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EMPLOYMENT NON-DISCRIMINATION ACT: ENSURING OPPORTUNITY FOR ALL AMERICANS

HEARING

OF THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

UNITED STATES SENATE

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

ON

EXAMINING S. 1584, TO PROHIBIT EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION OR GENDER IDENTITY

NOVEMBER 5, 2009

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EMPLOYMENT NON-DISCRIMINATION ACT: ENSURING OPPORTUNITY FOR ALL AMERICANS

THURSDAY, NOVEMBER 5, 2009

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The committee met, pursuant to notice, at 10:03 a.m., in Room SD–430, Dirksen Senate Office Building, Hon. Tom Harkin, chairman of the committee, presiding.

Present: Senators Harkin, Casey, Merkley, Franken, and Bennet.

OPENING STATEMENT OF SENATOR HARKIN

The CHAIRMAN. The Senate Committee on Health, Education, Labor, and Pensions will please come to order.

I welcome everyone here today. Our committee will hear testimony on an important piece of civil rights legislation, the Employment Nondiscrimination Act, also known as ENDA, and this is the first hearing we've had on this since 2002.

The issue here could not be more simple. We're talking about a fundamental American value: equal treatment for all, a principle that citizens who work hard and pay their taxes and contribute to their communities deserve fair treatment and should not be discriminated against.

Over the last 45 years, we've seen great strides toward eliminating discrimination in the workplace. The Civil Rights Act of 1964 prohibited discrimination on the basis of race, sex, national origin, and religion. The Age Discrimination in Employment Act in 1967 prohibited discrimination on the basis of age. One that I'm even more familiar with, the Americans With Disabilities Act in 1990 prohibited discrimination on the basis of disability.

So, it's time, I believe, at long last for us to prohibit discrimination on the basis of sexual orientation and gender identity, as well. Such discrimination is wrong and shouldn't be tolerated in our society.

The former chair of this committee, Senator Kennedy, worked his entire career to ensure opportunity for all Americans. He first introduced this legislation in 1994. So, today, by taking up this important bill, we'll continue Senator Kennedy's work, and we continue the proud commitment of this committee to uphold fair treatment for working Americans.

I'm proud that one of our newest members, Senator Merkley, led the effort in his own State of Oregon for full equality for all Ameri-

cans, and has established himself as a champion on these issues already here in the Senate. I thank him for his leadership. I look forward to working with him closely as this important legislation moves through Congress.

Full equality for lesbian, gay, bisexual, and transgender Americans is a vital issue, but it's by no means a new one. As we'll hear today, our States have already led the way toward ensuring full equality for our fellow Americans. Currently, the District of Columbia and 12 States—including Iowa, I am proud to say—have enacted statutes that prohibit discrimination on the basis of sexual orientation and gender identity. Another nine States bar job discrimination on the basis of sexual orientation alone. These States have found that full equality for all their citizens is not only the right thing to do, but it's beneficial to us all.

Likewise, leading companies across the country have found that equality in the workplace is not only the right thing to do, but makes good business sense. Eighty-seven percent of Fortune 500 companies have sexual orientation nondiscrimination policies and 41 percent have gender identity nondiscrimination policies. So, I look forward to hearing from our witnesses today about the positive experiences that businesses have had.

While these States and businesses provide important protections and should be commended, the harsh reality is that employers in most States in this country can still fire, refuse to hire, or otherwise discriminate against individuals because of their sexual orientation or gender identity; and, shockingly, they can do so within the law. As we'll hear today, too many hardworking Americans are being judged not by their talent and ability and qualifications, but by their sexual orientation or gender identity. Unfortunately, we can cite example after example of bigotry and blatant job discrimination.

Moreover, it's not just private employers that have been guilty of discrimination; unfortunately, State governments have also engaged in a widespread pattern of unconstitutional employment discrimination against lesbian, gay, bisexual, and transgender employees. I particularly refer my colleagues to the voluminous study by the Charles R. Williams Institute at UCLA Law School, which documented discrimination on the basis of sexual orientation and gender identity in State employment.

Equal opportunity is not just an abstract principle or a matter of statistics. Decent, hardworking Americans are being hurt by discrimination every day.

We're here today because of people like Mike Carney, one of our witnesses, a decorated police officer who was discriminated against because of his sexual orientation.

We're here because of people like Kimya Afi Ayodele, a social worker with more than two decades of experience. She suffered through a year of threatening messages, vandalism to her car, and slurs uttered in the workplace. Then in 2003, she was fired. Her supervisors told her, "This would not be happening if you were not a lesbian." Kimya sought legal help, but quickly learned that nothing in her State's law protected her from being fired because of her sexual orientation.

We're also here because of people like Diane Schroer, who is, I understand, here in the audience with us today. Diane is one of the many transgender Americans who we hope to protect through this bill. For 25 years, Diane served in the U.S. Army, rising through the ranks to become a Special Forces commander. After retiring from the military, she applied for a position as a terrorism specialist with the Congressional Research Service at the Library of Congress. So, it's not just States. After being offered the job, she explained to the Library that she was transitioning from living as David Schroer to living as Diane Schroer, consistent with her female gender identity. Although David had been the Library's top choice for the position, the Library notified her that Diane was, quote, "not a good fit," and rescinded the job offer.

Qualified workers should not be turned away or have to fear losing their livelihood for reasons that have nothing to do with their capabilities, skills, or performance. Such practices are un-American, and it's time for them to stop.

This bill is simple. It makes clear that private businesses, public employers, and labor unions cannot make employment decisions—hiring, firing, promotion, or compensation—because of a person's actual or perceived sexual orientation or gender identity. It contains the same exemptions as we have in title VII for small businesses and religious organizations, and current rules applicable to the Armed Forces are not affected.

As we will hear today, this legislation follows in the footsteps of our existing civil rights laws. Just as when we passed those earlier civil rights bills, we are hearing claims today that ENDA will lead to a flood of lawsuits or be an undue burden on religious organizations. These claims are just plain false.

Indeed, we are pleased to have broad bipartisan support and the endorsement of civil rights organizations, countless businesses, and religious leaders. It's long past time to eliminate bigotry in the workplace and ensure equal opportunity for all Americans. It's time to make clear that lesbian, gay, bisexual, and transgender Americans are first-class citizens. They are full and welcome members of our American family, and they deserve the same civil rights protections as all other Americans.

With that, I would be glad to recognize, again, one of our preeminent leaders in this whole field who led, as I said earlier, the effort in Oregon when he was in that State government, and now leading the effort here in the Federal Government.

Senator Merkley.

STATEMENT OF SENATOR MERKLEY

Senator MERKLEY. Thank you very much, Chairman. Thank you for convening this hearing, and thank you for your excellent remarks reviewing the challenges we face, the issues we face, and their importance.

I particularly want to welcome Virginia Nguyen today, who will be one of our witnesses and who's traveled here from my home State of Oregon to represent Nike, which has been a real champion on nondiscrimination policies.

Martin Luther King said that,

> "Human progress is neither automatic nor inevitable. Every step toward the goal of justice requires sacrifice, suffering, and struggle, tireless exertions, and passionate concern of dedicated individuals."

Well, we are on the path to one of those struggles for human progress, for a struggle to have full equality under the law, full equal opportunity. There can never be equal opportunity if we do not have equal opportunity in employment. Discrimination is simply wrong. This bill takes us a major step towards equality in America, and I look forward to hearing from our witnesses and hearing the comments of our colleagues as we work together.

I want to acknowledge, before our first panel, the debt we owe to Senator Kennedy. As the Chairman noted, he introduced the first ENDA more than 15 years ago. I know he would have liked to have been in this hearing room to continue to push and be a part of another victory in this battle for civil rights. But, it's certainly part of his legacy that we are here, and it will be a tremendous tribute to him when this bill is adopted and our Nation takes a great stride toward equality.

I also want to thank my co-sponsor, Susan Collins, who has stepped forward to show bipartisan leadership, reflecting the values of Maine, her values, and the values of the United States of America. I'm delighted to have her join me in this journey.

Thank you very much, Mr. Chair.

The CHAIRMAN. Thank you, Senator Merkley.

Senator Franken.

STATEMENT OF SENATOR FRANKEN

Senator FRANKEN. Mr. Chairman, thank you for holding today's hearing on this vital topic. I want to thank all the witnesses who are here today, for sharing your expertise.

In preparing for today's hearing, I reviewed all the witnesses' testimony and tried to familiarize myself with the ins and outs of the technical definitions and title VII, the exemptions and everything else. But, at some point, I paused to reflect that today, in 2009, in almost 30 States in this country, it's perfectly legal to fire somebody because they're gay or because they're suspected to be gay. You can be a hard worker, you can show up on time, get exemplary performance reviews, but if your boss discovers or suspects that you're gay or transgendered, they can fire you and there's nothing you can do about it.

Growing up, my kids read in history books about a time in our country when it was perfectly legal to fire somebody or refuse to hire somebody because they were black or a woman. For them it was a concept that they couldn't understand. I hope that my future grandkids will only read about when it was legal to fire someone because they're gay or transgender. I don't want them to actually see it; I want them to ask me, "What were people thinking?"

Now, most Minnesotans attend religious services every week. Minnesota is home to 19 Fortune 500 companies. Minnesotans enjoy a relatively, to the rest of the country, high standard of living. So, it might surprise some of you that the Minnesota Human Rights Act was passed in 1993. This law protects workers from dis-

crimination based on sexual orientation and gender identity, just like this bill does. This law has been protecting workers from discrimination for 15 years, and Minnesota's sky has not fallen.

Minnesota's basically the same as it was before this law was passed, with only one small exception. About 20 or so people per year exercise their rights under the law after they are discriminated against based on their sexual orientation or gender identity. That's it. That's the difference.

Today we have a chance to extend the same commonsense protections to every American and to every American worker by passing ENDA.

So, thank you again, Mr. Chairman, for calling this crucial hearing.

The CHAIRMAN. Thank you both. Thanks, Senator Franken, Senator Merkley, for being here.

Thank you all. This is, as has been said, I think, one of the most important things we can be about today.

Our first panel will be the Honorable Thomas Perez, Assistant Attorney General for the Civil Rights Division of the U.S. Department of Justice. During the first Bush and Clinton administrations, he was a Federal prosecutor at the Department of Justice, where he prosecuted and supervised some of the Department's high- profile civil rights cases. Later he served as deputy assistant attorney general for civil rights under Attorney General Reno and director of the Office for Civil Rights at the Department of Health and Human Services. In addition, Assistant Attorney General Perez served as special counsel to the former chairman of this committee, Senator Kennedy. Prior to his confirmation as Assistant Attorney General for the Civil Rights Division, he served as the secretary of Maryland's Department of Labor, Licensing, and Regulation.

Assistant Attorney General Perez, thank you very much for being here. Thank you for your long history of support for civil rights. Your statement will be made a part of the record, and I invite you to please proceed as you so desire. But, if you could keep it to 5 or 7, 8 minutes, something like that, I'd appreciate that so we can engage in a conversation.

STATEMENT OF THOMAS E. PEREZ, ASSISTANT ATTORNEY GENERAL, CIVIL RIGHTS DIVISION, U.S. DEPARTMENT OF JUSTICE, WASHINGTON, DC

Mr. PEREZ. Thank you so much, Mr. Chairman. It's an honor to be here and thank you for all of your kind words on behalf of Senator Kennedy.

It's impossible to sit in this room without thinking of Senator Kennedy, and I had the privilege of working on this bill back in 1995—year 3 or so of the Marathon Relay—had the privilege of working on hate crimes. Lucky number 13; 13 years after its introduction, the bill was passed. The Civil Rights Act of 1964 was first introduced in 1948. So, civil rights, if nothing else, is about persistence. Your persistence and leadership on these areas, and Senator Merkley and Senator Franken, your leadership in this, has been remarkable. I appreciate your taking the baton and moving the ball forward. Thank you very much for all of your work.

It really is a privilege to testify here today and to voice the Obama administration's strong support for fully inclusive legislation that prohibits discrimination on the basis of sexual orientation and gender identity.

The Civil Rights Division serves as the conscience of the Federal Government. We seek to advance this Nation's long struggle to embrace the principle so eloquently captured by Dr. King, that persons should be judged by the content of their character and not on the race, color, sex, national origin, religion, or any other irrelevant factor.

Just last month, Congress passed the first Federal law that provides civil rights protections to lesbian, gay, bisexual, and transgendered individuals. I was so proud to be at the signing ceremony last week, and I applaud all of you for your efforts in securing the passage of the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act.

Today we are here because passage of ENDA would provide us with the tool we need to fill another hole in our authority. We have come too far in the struggle for equal justice under law to remain silent when our LGBT brothers and sisters are still being mistreated and ostracized for reasons that have absolutely nothing to do with their skills or ability, and everything to do with myths, stereotypes, and prejudice. For this reason, the passage of ENDA is a top legislative priority for the Obama administration.

The Civil Rights Division regularly hears from individuals describing the same kind of hostility, bigotry, and hatred based on sexual orientation or gender identity that other groups faced for much of our history. There's nothing more frustrating for a law enforcement officer than to hear a horrific tale and to tell that person, "You have been wronged, and there's nothing I can do for you." That is a horrible feeling, whether it's hate crimes or whether it is discrimination in the workplace. This bill is going to enable us to correct that.

Throughout the decades that followed the passage of the Civil Rights Act of 1964, we as a nation have recognized a need to attend to the unfinished business in the fight for fair employment practices in the workplace, and that is what this bill is about: fair employment practices in the workplace.

Accordingly, under your leadership, Mr. Chairman, and so many others, we've seen the passage of the ADEA, we've seen passage of the Pregnancy Discrimination Act, and, under your leadership—and I have a vivid memory of the 10-year anniversary in which you spoke so eloquently, all in sign, at the FDR Memorial, Mr. Chairman. I didn't understand sign, but I understood what you were saying, and it was so powerful. The Obama administration strongly believes that ENDA must be the next step in the unfinished business of America, which is civil rights, and that this act will be a worthy addition to its venerable predecessors.

Underscoring the need for a Federal statute is the fact that 29 States, as you have correctly pointed out, still provide no protections for lesbian, gay, and bisexual and transgendered individuals in the workplace, and 38 States provide no protection for transgendered workers. LGBT employees in those States have no way to redress workplace discrimination.

We see so many stories, as indicated in the Williams Institute Report. For instance, an openly lesbian probation officer in Carroll County, IN, was allegedly denied promotion to chief probation officer because of her sexual orientation. The judge who refused to promote her reportedly told her it was because she was a lesbian, and said she was embarrassing the court by dating a woman, and asked other court employees about her sexual orientation and personal life. A man with no prior probation experience got the job. That is not in the best interests of public safety, I would respectfully submit.

An openly gay employee of the State-run Virginia Museum of Natural History was allegedly forced to resign shortly after receiving a positive evaluation that otherwise would have resulted in a raise. The executive director expressed concerns that the employee's sexual orientation would jeopardize donations to the museum. A Virginia appellate court dismissed his sexual orientation discrimination complaint, concluding that the Governor's executive order prohibiting such discrimination did not create a private right of action.

Under ENDA, we would have the authority to investigate these two cases, because the Justice Department enforces ENDA against State and local governments. These examples are but a sampling of the disturbing number of workplace discrimination incidents against LGBT Americans in recent years.

Prohibiting employment discrimination on the basis of sexual orientation and gender identity is not only about basic fairness, it is also about enlightened self-interest. It is not only a fair employment practice; I would respectfully submit, and our witness from Nike will affirm, that it is a sound business practice and critical to competing in the global economy.

As we work to revitalize and strengthen our economy, we cannot afford to waste talent or allow workplace bias and hostility to impede productivity, especially when many businesses operate in multiple cities and States. There is no reason why, for example, LGBT employees working for a company in Wisconsin or Oregon or Minnesota, which have these protections, should have their right to a living jeopardized if they moved to Michigan or another State that did not have such protection.

And finally, I'd like to dispel, Mr. Chairman—and you did so in your opening remarks, and others have done so, as well—some of the misconceptions about the scope and impact of the bill.

First, ENDA covers only cases of intentional discrimination; it does not cover disparate impact cases.

Second, it exempts businesses with fewer than 15 employees, tax-exempt private membership clubs, or religious organizations.

Third, ENDA contains a religious exemption for religious organizations and will not infringe upon an individual's right to practice his or her faith or exercise first amendment rights of free speech on these or other issues.

Finally, there is nothing to suggest that ENDA will burden employers, unleash a flood of complaints that would overwhelm the EEOC or the Department of Justice, or clog the Federal courts. Attorney General Madigan will talk about the experience of Illinois, which has not seen the floodgates that were predicted by some.

The experience of State and local governments with similar statutes for decades demonstrates that complaints under these statutes make up a relatively small portion of total employment discrimination complaints.

It really is an honor to be here today. Senator Kennedy said many times, and my friend and mentor Michael Myers heard it many more times than I have, that civil rights, indeed, remains the unfinished business of America. We finished some of the business a week ago, when the President signed the Hate Crimes bill, and I can think of no better tribute, again, to the late Senator than to pass this bill and send it to President Obama for his signature. Last week was lucky 13; 13 years, Hate Crimes. Hopefully, this year will be lucky 15 and that will be the passage of ENDA.

Thank you, Mr. Chairman, for your time, and I appreciate our courtesy.

[The prepared statement of Mr. Perez follows:]

PREPARED STATEMENT OF THOMAS E. PEREZ

Mr. Chairman, Ranking Member Enzi and members of the HELP Committee, thank you for the opportunity to appear before you today. It is a privilege to represent the Obama administration and the Department of Justice at this hearing to consider the Employment Non-Discrimination Act (ENDA), and to voice the Administration's strong support for fully inclusive legislation that prohibits discrimination on the basis of sexual orientation and gender identity.

The Civil Rights Division, which I have the great honor to lead, serves as the conscience of the Federal Government. Our mission is clear: to uphold and protect the civil and constitutional rights of all Americans, particularly some of the most vulnerable among us. We seek to advance this Nation's long struggle to embrace the principle so eloquently captured by Dr. Martin Luther King, Jr., that persons should be judged based on "content of their character," and not on their race, color, sex, national origin, religion or any other irrelevant factors. Our civil rights laws—laws enforced by the Civil Rights Division—reflect and uphold this noble principle.

Just last month Congress passed and the President made history when he signed the first Federal law that provides civil rights protections to lesbian, gay, bisexual and transgender (LGBT) individuals. I applaud you for recognizing the critical need for the Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, and I assure you the Department of Justice is prepared to fulfill its new duties under that law. Its enactment filled a critical gap in our enforcement abilities. Today, I come before you because passage of ENDA would provide us with the tool we need to fill another hole in our enforcement authority.

On an issue of basic equality and fundamental fairness for all Americans, we cannot in good conscience stand by and watch unjustifiable discrimination against lesbian, gay, bisexual and transgender individuals occur in the workplace without redress. We have come too far in our struggle for "equal justice under the law" to remain silent or stoic when our LGBT brothers and sisters are still being mistreated and ostracized for reasons that have absolutely nothing to do with their skills or abilities and everything to do with myths, stereotypes, fear of the unknown, and prejudice. No American should be denied a job or the opportunity to earn promotions, pay raises and other benefits of employment because of his or her sexual orientation or gender identity, which have no bearing on work performance. No one should be fired because he or she is gay, lesbian, bisexual or transgender. Period. ENDA would provide much-needed and long overdue Federal protections for LGBT individuals, who still face widespread discrimination in workplaces across the Nation. For this reason, the passage of ENDA is a top legislative priority for the Obama administration.

Broadly stated, ENDA would prohibit intentional employment discrimination on the basis of actual or perceived sexual orientation or gender identity, by employers, employment agencies, and labor organizations. Its coverage of intentional discrimination parallels that available for individuals under title VII, and the principles that underlie this coverage have been well-established for decades. Under ENDA, we would share responsibility for its enforcement with the Equal Employment Opportunity Commission (EEOC). Our role would be to challenge prohibited discrimination by State and local government employers.

The Civil Rights Division and other Federal civil rights agencies regularly receive letters and inquiries from individuals all over the country complaining of sexual orientation and gender identity discrimination in employment. This ongoing discrimination and abuse takes many forms, ranging from cruel instances of harassment and exclusion to explicit denials of employment or career-enhancing assignments because of the individual's sexual orientation or gender identity. It is painfully disappointing to have to tell these working men and women that, in the United States of America in 2009, they may well be without redress because our Federal employment anti-discrimination laws either exclude them or fail clearly to protect them.

Many letters sadly describe the same kind of hostility, bigotry and even hatred that other groups faced for much of our history, and which Congress responded to by passing the landmark Civil Rights Act of 1964. That act prohibited employment discrimination on the basis of race, color, religion, sex, or national origin. At the time the bill was debated, many of the same arguments that we hear today about ENDA—that it would open the floodgates to litigation, it would overburden employers and afford special rights to certain groups—were vociferously offered by the bill's opponents. No one would seriously contend that the parade of horribles predicted at the time ever became reality, and the 1964 Act, which, like ENDA, was introduced over multiple Congresses before it finally passed, has become a rock-solid foundation for our laws ensuring equality of opportunity in the workplace.

Throughout the decades that followed passage of the 1964 Act, we as a nation have recognized a need to attend to unfinished business in the fight for justice in the workplace. Accordingly, Congress has expanded the scope of employment protections on several occasions, passing the Age Discrimination in Employment Act of 1967, the Pregnancy Discrimination Act of 1978, and the Americans With Disabilities Act of 1990. The Obama administration believes that ENDA must be the next step, and that this act will be a worthy addition to its venerable predecessors.

It is estimated that there are more than 1 million LGBT individuals working in State and local governments and just under 7 million LGBT individuals employed in the private sector. A large body of evidence demonstrates that employment discrimination against LGBT individuals remains a significant problem. The Williams Institute, a national research center on sexual orientation and gender identity law and public policy at the UCLA School of Law, conducted a year-long study of employment discrimination against LGBT individuals. The study reviewed the numerous ways in which discrimination has been documented—in judicial opinions; in surveys of LGBT employees, State and local government officials; and in extensive evidence presented to Congress over the past 15 years during which ENDA has been considered. The study concluded that discrimination based on sexual orientation and gender identity is widespread and persistent in terms of quantity, geography and occupations. The study focused primarily on discrimination against LGBT employees of State and local governments, but also reviewed broader surveys that indicate that the problem is equally widespread in the private sector.

To combat the widespread employment discrimination against LGBT individuals, some States have passed laws banning discrimination based on sexual orientation and gender identity. However, 29 States still provide no protections for lesbian, gay and bisexual individuals and 38 States provide no protection for transgender workers. State laws therefore leave large numbers of LGBT individuals without recourse for workplace discrimination on the basis of the sexual orientation or gender identity.

Title VII of the Civil Rights Act of 1964, the Americans with Disabilities Act and other bedrock civil rights laws recognize that protecting valued members of our workforce from discrimination should not be left to a patchwork of State and local laws that leaves large gaps in coverage. Discrimination in my home State of Maryland is just as wrong as discrimination in Montana. As with those laws, Federal legislation prohibiting discrimination based on sexual orientation and gender identity will help eradicate workplace discrimination that should be neither tolerated nor condoned.

To underscore the need for a Federal statute, I would like to review the current scope of the law. 21 States—including Connecticut, Nevada, New Hampshire, and Maryland—prohibit employment discrimination based on sexual orientation. Another 12 States—including Iowa, New Mexico, Oregon, Colorado, Minnesota, Washington, Rhode Island, and Vermont—as well as the District of Columbia, prohibit discrimination based on sexual orientation and gender identity. A number of local jurisdictions contain similar protections in their local laws. For example, in my home State of Maryland, Baltimore City and Montgomery County have expanded the protections available under State law by banning employment discrimination against transgendered individuals.

In States where no remedies exist, LGBT employees have no opportunity to combat egregious workplace discrimination and harassment. The recent report of the Williams Institute documents a distressing number of such allegations. For example:

• A police officer at the Pineville City Police Department in West Virginia reported regular harassment by his coworkers because of his sexual orientation, who deliberately sent him on calls without back-up. After learning of the officer's sexual orientation, one coworker allegedly hit him across the face with a night stick, breaking the officer's glasses and cutting his eye. The officer believes that his eventual discharge was based on his sexual orientation and not his job performance.

• An openly lesbian probation officer in Carroll County, IN, was allegedly denied promotion to chief probation officer because of her sexual orientation. A superior court judge allegedly told her that he would not promote her because she was a lesbian, that she was embarrassing the court by dating a woman, and that he had asked other court employees about her sexual orientation and personal life. A man with no prior probation experience was promoted to the position.

• An employee of the Virginia Museum of Natural History, a State agency, was allegedly forced to resign because of his sexual orientation shortly after receiving a positive evaluation that otherwise would have resulted in a raise. The Executive Director of the Museum reportedly expressed concerns that the employee's sexual orientation would jeopardize donations to the museum. A Virginia appellate court dismissed his sexual-orientation employment discrimination claim, holding that the governor's executive order prohibiting such discrimination did not create a private right of action.

These examples—which would fall within the Civil Rights Division's enforcement authority under ENDA—are but a sampling of a disturbing number of reports of workplace discrimination against LGBT Americans in recent years. Unfortunately, the above LGBT employees have no opportunity to prove their claims, because they live in States that do not afford them redress.

The Williams Institute estimates that there are more than 200,000 LGBT employees in the Federal workforce, yet, as in the case of State and local governments, we also lack strong statutory protection from sexual orientation and gender identity discrimination in this arena. The Civil Service Reform Act, which prohibits discrimination on the basis of conduct not affecting job performance, has been interpreted by the Office of Personnel Management to prohibit discrimination on the basis of sexual orientation. In addition, Executive Order No. 13087 prohibits employment discrimination on the basis of sexual orientation in much of the executive branch. But the administrative remedies available under both of these provisions are far more limited than those available to Federal employees who experience other forms of discrimination, such as race, sex, or disability discrimination.

Moreover, although some courts have held that title VII's prohibition against sex discrimination can protect LGBT persons from certain types of discrimination under certain circumstances, the extent of such protection varies significantly from court to court. Enactment of legislation prohibiting discrimination against LGBT individuals in employment is needed to meaningfully and unambiguously prohibit employment discrimination on the basis of sexual orientation and gender identity and to give victims of such discrimination adequate remedies.

Preventing employment discrimination on the basis of sexual orientation and gender identity and providing the victims of such discrimination with a means to protect their rights not only is a matter of basic fairness, it is also a matter of enlightened economic self-interest. As the global marketplace becomes increasingly competitive, and as we work to revitalize and strengthen our economy, America cannot afford to waste talent or allow workplace bias and hostility to impede productivity, especially when many businesses operate in multiple cities and States. There is no reason why, for example, LGBT employees working for a company in Wisconsin, which was the first State to prohibit discrimination against LGBT individuals, should have their right to earn a living jeopardized or taken away if they are transferred across the lake to Michigan, which has not yet passed such a law.

Many of America's top businesses already recognize that discrimination of any kind, anywhere, is bad for business and costs money. Indeed, hundreds of companies now bar employment discrimination on the basis of sexual orientation and/or gender identity. According to the Human Rights Campaign's recently published Corporate Equality Index 2010, as of September 2009, 434 (87 percent) of the Fortune 500 companies had implemented non-discrimination policies that include sexual orientation, and 207 (41 percent) had policies that include gender identity. This, of course, is just the tip of the iceberg. Although most of the Nation's largest businesses have started addressing workplace fairness for LGBT employees, significant numbers of

individuals still face discrimination on the basis of sexual orientation or gender identity and desperately need the nationwide protections and remedies that ENDA would provide.

I have explained why legislation like ENDA is sorely needed in the private and public sectors and why it makes good business sense. We look forward to working with you on legislation as it advances in the Congress and are currently reviewing the proposed legislation. We may offer some technical comments on the bill. Now let me take a few moments to briefly dispel some misconceptions about the scope and impact of the legislation.

As you know, ENDA covers cases of intentional discrimination and explicitly precludes disparate-impact claims, does not permit the use of quotas or other forms of preferential treatment. Moreover, ENDA does not apply to small businesses with fewer than 15 employees, tax-exempt private membership clubs, or religious organizations. Indeed, ENDA contains a broad exemption for religious organizations and states that it does not apply to any corporation, association, educational institution, or society that is exempt from the religious discrimination provisions of title VII. In addition, nothing in ENDA infringes on an individual's ability to practice his or her faith, to hold and adhere to religious beliefs, or to exercise first amendment rights of free speech on these or other issues. In addition, ENDA does not apply to the relationship between the Federal Government and members of the Armed Forces, and does not affect Federal, State, or local rules providing veterans' preferences in employment decisions.

Last, there is nothing to suggest that ENDA will burden employers, unleash a flood of complaints that would threaten to overwhelm the EEOC or the Department of Justice, or clog the Federal courts. On the contrary, the experience of States and local governments with sexual orientation and gender identity discrimination statutes for decades demonstrates that complaints under these statutes make up a relatively small portion of total employment discrimination complaints. Moreover, the jurisdictions that prohibit discrimination on the basis of sexual orientation and gender identity have been able to implement and enforce these laws in an entirely workable manner. We fully expect that the same would hold true at the Federal level.

I will conclude by noting what a great honor it is for me to testify about a legislative initiative of the late Senator Ted Kennedy, who championed ENDA for more than a decade and who constantly reminded us that civil rights are the great unfinished business of our Nation. I can think of no better way to honor his life and work than to pass ENDA and provide sorely needed protections from arbitrary and unjustified discrimination to LGBT individuals in the workplace throughout our Nation.

Thank you once again for the opportunity to testify. I welcome your questions.

The CHAIRMAN. Thank you, Assistant Attorney General Perez. Thank you very much for that statement, but also for your lifetime of involvement in, and promotion of, civil rights for all our people. You've just always been in the forefront of that battle, and I appreciate that.

If you don't mind, I'd just say, at the outset, lucky 15, could you give me 16?

[Laughter.]

Mr. PEREZ. I think we can do that. That's a——

The CHAIRMAN. Next year?

Mr. PEREZ [continuing]. That's a friendly amendment.

The CHAIRMAN. How about next year? OK.

Mr. PEREZ. Yes, very well.

The CHAIRMAN. All right. Because I just want everyone to know, it is my intention to move this legislation. Obviously, we've got healthcare, we've got a couple of other things we've got to do before the end of the year. But, I'd just say to you that we're going to move this bill next year. So, it will be 16, OK?

Mr. PEREZ. We will be here to provide whatever support and assistance we can.

The CHAIRMAN. Thank you very much.

Let me just ask a couple of questions. You know, we'll hear later about States and businesses that have taken the lead—and we've already talked about it here—in ensuring equality for lesbians, gays, bisexual, and transgender workers. Some argue, therefore, no Federal legislation is needed; States are taking care of it, and businesses are taking care of it. What's your response to that?

Mr. PEREZ. Well, some States and some businesses are taking care of it, but it shouldn't be a function of where you live whether you have these rights. That is the challenge we have right now. As Senator Franken correctly pointed out, almost 30 States provide no such protections. So, we strongly believe that we should have this Federal protection so that everyone in America can be judged by the content of their character in the workplace.

The CHAIRMAN. Fortunately, there have been, recently, several successful suits under title VII. So, what do you say to those who say that title VII is enough to address the problem and that ENDA really isn't necessary.

Mr. PEREZ. Well, there may be some circumstances in which discrimination can be covered under title VII, but the circumstances are quite limited, and the courts have reached different conclusions in that. That is why ENDA will eliminate that uncertainty and ensure that anybody who is discriminated on account of sexual orientation or gender identity will have those protections. It will eliminate that ambiguity and the really limited protection, at best, that title VII might potentially provide.

The CHAIRMAN. Thank you very much, Attorney General Perez. And now I'll yield to Senator Casey.

STATEMENT OF SENATOR CASEY

Senator CASEY. Mr. Chairman, thank you very much.

I first want to say, at the outset—I apologize for being late—I want to thank you for having this hearing. It's so important that we have a hearing on this issue and on this bill. I've been proud to have been a co-sponsor in both the two Congresses I've been in—110th and 111th—and we're grateful to Chairman Harkin for convening this hearing.

I don't have a lot of questions, but I do want to say, at the outset, that it's appropriate that we have a hearing about this, and we're at a point in our history where we're moving in the direction of—not there yet, but moving in the direction of, not just tolerance, which use to be an important word on so many of these issues that involve Americans who happen to be gay or lesbian, bisexual or transgender, but we're evolving further, beyond tolerance, into an area of acceptance. Passing this bill would be further evidence of that, that it's long overdue.

I think the point that was made by a number of people about why this is good for business is also an important point to make here. We've seen that, I believe, in our history when we've passed civil rights legislation, even in the midst of tremendous opposition and conflict about it. We know what civil rights legislation has done to economically empower the South. Hard to imagine what the country would be like if we didn't pass that legislation. So, there's a strong economic argument.

But, the fundamental argument is still, I believe, about justice, basic justice, as we've come to understand it, in America. So, I think it's long overdue that we pass legislation that fundamentally requires employers in the private sector to respect the rights and dignities of their employees, and to provide employees with remedies in Federal courts.

I know that, in Pennsylvania, for example—a State that we often lead on things, and sometimes we fall behind—State law today, unfortunately, does not explicitly—in Pennsylvania—prohibit discrimination based upon sexual orientation or gender identity, although executive orders do protect State employees. So, what's good enough for a State employee—I used to be one of them—should be good enough for the rest of us.

But, I do believe that we're at a point now where the American people understand how important this is to—in the sense of justice, but also in the sense of what's good for our economy.

I just wanted to ask Mr. Perez, What do you think would be—in terms of an impediment to passage—what do you think our biggest challenge is and I'm not just talking about the nature of how things work in Washington—but what do you think is our biggest challenge to overcome, in terms of substance or message or how we convey the urgency of getting this passed?

Mr. PEREZ. Senator, thank you for your question.

I think the bill is going to pass, and I think it's going to become law next year. I think one of the challenges—and that's why this hearing is so important—is to educate people why this is not only a good civil rights law, but this is good for the Nation.

This is good public safety law. If you look, for instance, at the District of Columbia Police Department, because they have inclusive hiring policies, they have actually been able to do a better job of policing. They have an award-winning Gay and Lesbian Liaison Unit that has, again, won a host of awards. One of the early years, before it was established, there were two hate crimes reported in the District of Columbia based on sexual orientation. Chronic underreporting because people were afraid to come to the police to report that. As a result of the creation of this unit, people felt more comfortable. People felt more comfortable reporting these crimes. This bill is about effective public safety.

Similarly, the flip side is true. When you have discrimination in a workplace, in a law enforcement workplace, you undermine or jeopardize public safety. There was a case we had in West Virginia involving a gay officer, and they refused to send backup in—to assist him in responding to calls. That is an absolutely horrible law enforcement practice.

So, it strikes me that part of the challenge that lies ahead is for us to educate the public that this is not simply the right thing to do, it is absolutely in the enlightened self-interests of large and small companies to attract the best and the brightest, and it's in the public safety interests of government to ensure that we have a workforce that can meet the demands of our entire community. That's the education challenge that lies ahead, and I think we can meet it.

Senator CASEY. Thank you.

Senator CASEY. We're proud to be a co-sponsor. Thank you very much.

Mr. PEREZ. Thank you, Senator.

The CHAIRMAN. Thanks, Senator Casey.

Senator Merkley.

Senator MERKLEY. Thank you very much, Mr. Chair.

Thank you for your testimony, Mr. Perez. And congratulations on your nomination, confirmation.

Mr. PEREZ. Thank you.

Senator MERKLEY. I think your testimony here today shows how important it was to get you on the job.

I want to note that, as you were sharing those stories, I was thinking of the stories of some individuals who shared their journey at a press conference earlier today. One of them, Mike Carney, is going to share his story in the next panel. But, I also wanted to thank Colonel Diane Schroer, a 25-year Special Forces veteran, for sharing her story this morning, and Erlene Budd, who has been a tremendous advocate for transgender rights, for sharing her story, as well.

This got me thinking about some of the folks I know in Oregon, and their stories. One is Laura Calvo. Laura, a transgender person who hid her transgender identity in order to keep her job, served as a police officer for the Josephine County Sheriff's Department for more than 16 years. She earned numerous commendations, including being deputy of the year in 1994. But, when a burglary of her personal items led to the recognition of her transgender identity by her team, and her superiors, they fired her and broke a very successful career. And these stories go on and on.

Some say that having equal opportunity constitutes special rights. Can you comment on that?

Mr. PEREZ. I call it "fair employment practices." This is not special rights, this is about a level playing field so that somebody has an opportunity to demonstrate that they are qualified to do the job. I would respectfully assert that Officer Carney is exceedingly qualified to do the job, and as he said in his written testimony, being gay does not affect job performance, and it shouldn't affect employability, plain and simple. This is about equal opportunity.

Senator MERKLEY. Thank you.

Then others say that pursuing this track might result in a quota system. Can you address that issue?

Mr. PEREZ. The bill explicitly states that quotas are forbidden. That is a quintessential red herring. We hear that frequently in the context of these debates, and it's just dead wrong. We can look at the experience of the States, as well, in enforcing this. I, again, underscore the fact that this prohibits only intentional discrimination. It doesn't prohibit disparate impact.

Senator MERKLEY. You mentioned the term "disparate impact." Can you expand a little bit on that legal term? I think it will come up in our conversations ahead.

Mr. PEREZ. Sure. There are two ways to establish discrimination. One way is to demonstrate that an individual or a company intentionally discriminated. The other is to demonstrate that they had a facially neutral policy or practice that had a disproportionate ad-

verse impact on the basis of race, color, or some other protected category.

In title VII cases that we bring, we have both theories at our disposal. In Fair Housing cases that we bring, we have both theories at our disposal. In voting cases that we bring, we have both theories in our disposal. But, in this particular case, we actually have one less theory at our disposal, because it is only getting at intentional discrimination. So, this bill is actually more limited than other civil rights laws that are on the books.

Senator MERKLEY. And finally, 21 States have banned sexual identity discrimination in employment. Twelve States have fully inclusive nondiscrimination employment laws. In terms of how these acts have been implemented and what we've seen, have there been any, "The sky is falling" horror stories, as my colleague referred to?

Mr. PEREZ. That hasn't been our experiences, and I look forward to hearing from Attorney General Madigan. I confess, Senator, when I was preparing for this, I was reading some of the record from the debate on the 1964 Civil Rights Act. One Senator noted that,

> "This bill would discourage those who are considering starting a new business, frustrate the expansion of existing industry, and encourage many to give up their businesses entirely. If the Federal Government is to inject itself to this extent into the operations of the Nation's industry, it may well find itself in complete charge under a socialist State."

Another Senator noted,

> "Who is to determine whether a Negro cook is hired instead of the white, or the white instead of the Negro. What becomes of business management during the incessant harassment of investigations, reports, hearings, lawsuits? These observations barely touch upon the practical problems of administration that will fly from this Pandora's Box."

Those are statements from U.S. Senators in the connection with the Civil Rights Act of 1964. Forty-five years later, Pandora's Box is in pretty good shape, and we haven't seen—the sky is blue in Minnesota, and the sky is blue in Iowa, and the sky is blue in Pennsylvania and Oregon. We hope to make the sky blue on all 50 States by having a level playing field for people in the workplace.

Senator MERKLEY. Thank you.

The CHAIRMAN. Senator Franken.

Senator FRANKEN. Thank you, Mr. Chairman.

Mr. Perez, you just very eloquently put this in some historical context with the 1964 Civil Rights Act. I'm struck by the parallels of the civil rights movement of the 1960s and the debate taking place today.

I remember, until 1967, it was illegal in a number of States in this country for interracial couples to get married. Now we have a President of the United States who is the product of an interracial marriage. There just seems to be sort of a inexorable movement in history toward civil rights.

I've also seen a real change in attitudes about gay and LBGT people. I'd say my kids' generation—I have kids in their 20s—thinks whether someone is gay or not is about as interesting as if

they're left-handed. I think it's more interesting than being left-handed, but——

[Laughter.]

Mr. PEREZ. I'm ambidextrous.

Senator FRANKEN. Yes.

[Laughter.]

I'm not going to touch that.

[Laughter.]

But, I've seen a change in attitude—for example, in our military. I've done USO tours for years. I remember, in 1999, being in Kosovo and doing jokes about "Don't ask, don't tell," and I sensed a little tension from some people. Then, in 2006, I was in Afghanistan and there was open acknowledgment that there are gay men and women serving there, at Camp Phoenix. They are very open about it. I remember the commander, when he gave me this beautiful flag that I have in my office, that's in a triangular frame built by Afghan craftsmen. He said, "Keep telling those 'Don't ask, don't tell' jokes." A group of lesbian soldiers who were sitting in one section said, "Yeah, yeah." I know that these soldiers, who had been serving in Afghanistan for a year or so, or 15 months, or were on their third tour and had served in Iraq—at this time it was 2006 and recruiting was hard, and they were recruiting people, giving them moral passes, like people who'd been arrested or people who didn't do as well on cognitive tests as before. I talked to the soldiers, and they would rather have that gay man or woman who's been on their right and their left for the last year than have someone who got a moral waiver.

It's changed. People's attitudes change. So, I'm just trying to put this in an historical context. In 30 years, this isn't going to be an issue. People will look back and go, "Why was this an issue?" But, in the meantime, we've got 30 years. So, we've got 29 States in which you can be fired for, not just being gay or transgender, but for them suspecting that you are. And it's legal.

Let's say you're in one State, you're in Minnesota, where, again, the sky hasn't fallen, and you have a job with a corporation, and they want to send you to Michigan—promote you, because you've been doing such an excellent job—and you're gay—and Michigan doesn't have this protection. Can you end up in Michigan and just get fired?

Mr. PEREZ. Yes, sir.

Senator FRANKEN. Thank you.

Thank you, Mr. Chairman.

The CHAIRMAN. Interesting point on it. Thank you very much, Senator Franken.

Senator Bennet.

STATEMENT OF SENATOR BENNET

Senator BENNET. Thank you, Mr. Chairman. Thank you for holding this important hearing.

I'd like to thank our Assistant Attorney General for being here today. And congratulations on your confirmation.

Also, Mr. Chairman, I want to thank you for inviting Professor Helen Norton, from the Colorado School of Law, who's on the sec-

ond panel and is an expert in civil rights and employment law, and we're very proud of her and proud that she's here.

I think Senator Franken said it very well, that what this comes down to for me is that there is no member of this committee today, Mr. Chairman, who would take issue with our basic civil rights protections from racial, religious, or gender discrimination. I think one day in the near future, I believe the members of this committee and everybody that's here today will understand the case of the LGBT community in exactly the same way. This is a country that is built on fundamental fairness, and where discrimination is something that simply can't be tolerated.

One of the important things about civil rights laws is that they're not just about punishing bad actors, they're about fostering a movement toward better, fairer workplaces in the long run. So, the question that I have comes around training of private employers—their management teams, employees—about the types of behavior that actually constitute discrimination. Not everything does. Laws that are not known, won't do any good. So, the question I have for you is just this, How can we get the word out to employees that ENDA affords them new workplace protection so people actually understand that the protections are there? Does the Civil Rights Division plan to ensure that employers and employees are aware of their rights and responsibilities?

Mr. PEREZ. The short answer is "absolutely," Senator. We have a very elaborate rollout plan already underway for the Hate Crimes bill that passed, a week ago. Literally, the day after passage—or, the day after—the day the President signed the bill, we sent a missive to all the U.S. attorneys offices from the attorney general. I have since followed up. We have an implementation team in place.

Similarly, in ENDA, we would be working side by side with the EEOC, because the EEOC enforces ENDA, or would enforce ENDA as it relates to private employers. We would enforce ENDA at the Justice Department as it relates to State and local governments. We would—and are already. I met with the acting chair of the EEOC, literally 2 days ago, and we discussed this, among other issues, making sure we have that implementation team in place. Because we'd like to prevent problems from occurring. I'd love to be the Maytag repairman, waiting, sitting by the phone, waiting for it to ring, and having my feet up. Where, the other way, the phone rings off the hook, right now and we'd like to prevent that.

Senator BENNET. Right. We should all be so lucky.

I would just point out that there are a number of States, mine is one, where we've got similar legislation on the books already and there have been real efforts to make sure that people understand their rights. That these rights are communicated. I think there's an opportunity for you and for the Department to be able to learn from some of that acquired wisdom.

Mr. PEREZ. Absolutely.

Senator BENNET. That would probably be a good thing, as well.

Mr. PEREZ. I couldn't agree more.

Senator BENNET. Thank you for being here. Thanks for your leadership.

Mr. Chairman, thank you very much.

[The prepared statement of Senator Bennet follows:]

PREPARED STATEMENT OF SENATOR BENNET

I would like to thank Assistant Attorney General Perez for joining us this morning and congratulate him on his recent confirmation as head of the Civil Rights Division. It's clear to me that the Civil Rights Division could use some new leadership and new ideas. Our committee should seek to partner with the new Administration on civil rights issues such as the one we have before us today.

I would particularly like to welcome Professor Helen Norton from the Colorado School of Law, who will be participating in the second panel this morning. Professor Norton is an expert in civil rights and employment law, who was twice awarded Excellence in Teaching Awards at the law school. Thank you Professor Norton for joining us this morning. To the rest of the panel, I look forward to your testimony as we work to address issues related to the Employment Non-Discrimination Act and hopefully move forward with the bill during this Congress.

America is about being judged at work based on your merit. We have recognized in our Federal civil rights laws that discrimination and bias have no business creeping into the workplace. Employment decisions should be based on a person's qualifications and work ethic.

No member of this committee today would take issue with our basic civil rights protections from racial, religious or gender discrimination. One day in the near future, I believe that the members of this committee will understand the plight of the LGBT community in the same way. It's time to close the wide civil rights loophole that excludes them. It is critical that we update our laws to ensure that gay, lesbian and transgendered persons are provided the same opportunity to work hard and get ahead without discrimination or bias.

In Colorado, we are leading on ensuring equal rights in the workplace. Our State law and several of our city laws also protect against discrimination based on sexual orientation or transgendered status.

It is not only in government where we are ensuring equal rights, but also in the private sector. Several companies that operate in the State have non-discrimination policies that are inclusive of gays and transgendered persons. These companies include Coors Brewing Co., which is headquartered in the State, as well as Agilent, Anheuser-Busch, Avaya, Costco, Hewlett Packard, Kaiser Permanente, Kodak, Lockheed, Progressive Insurance, Safeway, Target and Wells Fargo. Nationally, 87 percent of Fortune 500 companies include sexual orientation in their equal employment policies and 41 percent also include gender identity.

Thank you Chairman Harkin for holding this hearing. As the newest member of the committee and a cosponsor of ENDA, I see this legislation as a civil rights imperative and look forward to the testimony.

The CHAIRMAN. Thank you.

Well, General Perez, thank you very much, again, for all your great leadership on this, and thanks for being here today, and your testimony. Well, I hope to see you before that, but we'll see you at the signing, next year.

Mr. PEREZ. Absolutely.

[Laughter.]

Thank you for your time.

The CHAIRMAN. Thanks very much.

Next, we'll call our next panel, and that'll be the Honorable Lisa Madigan, the attorney general of the State of Illinois. After working as a litigator, she served as a State senator, and then, in 2002, was elected as the attorney general and re-elected in 2006.

Mike Carney. Mike Carney is currently serving as a detective in the Vice Control Unit for the Springfield, MA, police department, which oversees narcotics, prostitution, organized crime, and liquor license offenses. He's a founding member of the Gay Officer's Action League of New England, and has served as president of that group, and has served on the Governor's Task Force on Hate Crimes.

We have Professor Helen Norton, an associate professor at the University of Colorado School of Law. Prior to that, she served as Deputy Assistant Attorney General for civil rights at the U.S. Department of Justice, where she managed the Civil Rights Division's Employment Litigation, Educational Opportunities, and Coordination and Review sections.

Ms. Virginia Nguyen. Ms. Nguyen joined Nike in November 2004 and is currently a member of Nike's Diversity and Inclusion Team.

Craig Parshall. Mr. Parshall is senior vice president and general counsel of the National Religious Broadcasters Association. He has practiced first amendment law and employment law, representing clients in, among other courts, the U.S. Supreme Court.

And Ms. Camille Olson. Ms. Olson is a partner at Seyfarth Shaw, LLP, and a member of its National Labor and Employment Law Steering Committee and the immediate past national chairperson of the Labor and Employment Practice Department.

We thank you all for being here this morning. I read over all your testimonies last evening. They're excellent. They will be made a part of the record in their entirety.

So, if I could ask people to just sort of—maybe 5 minutes, 7 minutes, to sum it up so we, again, could have an interchange with all of you, I would appreciate that.

I guess I'll just start from left to right. Professor Norton, I thank you very much for being here from Colorado, and please—again, 5, 7—I got—the clocks say 5 minutes. I don't get nervous at 5, I get nervous at 6 or 7.

[Laughter.]

The CHAIRMAN. Welcome. Please proceed.

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

Ms. NORTON. Good morning. Thank you. Thank you for the opportunity to join you today.

My testimony here draws not only from my work as a law professor, teaching and writing in the areas of employment discrimination and constitutional law, but also my experience as a Deputy Assistant Attorney General for civil rights at the Department of Jus-

tice, where my duties included supervising the division's title VII enforcement efforts.

Current Federal law prohibits job discrimination on the basis of race, sex, religion, color, national origin, age, disability, and, very shortly, genetic information. While these statutes provide many valuable safeguards for American workers, Federal law, however, currently fails to protect gay, lesbian, bisexual, and transgendered employees from discrimination on the basis of sexual orientation or gender identity. In fact, the case law is replete with cases in which Federal judges have characterized egregious acts of discrimination targeted at gay, lesbian, bisexual, and transgender workers as morally reprehensible, yet entirely beyond the law's reach.

In the interest of time, I'll offer just a few examples, but I'll refer you to my written statement for more.

Mr. Sydney Taylor alleged that his co-workers repeatedly subjected him to a wide range of abusive behaviors that included groping his genitals, simulating sexual acts, assaulting and otherwise touching him inappropriately. Another co-worker testified that Mr. Taylor was verbally harassed on a weekly basis and was subjected to a work environment that the co-worker characterized as "abusive and intolerable." In fact, the employer's own internal investigation confirmed Mr. Taylor's reports.

Although the Federal District Court found, "The actions of Taylor's co-workers to be deplorable and unacceptable in today's workforce," it ruled against him last year, on the grounds that current Federal law does not prohibit harassment based on sexual orientation or perceived sexual orientation. "Unfortunately, Congress has not yet seen fit to provide protection against such harassment."

Similarly, David Martin, a gay man employed by the New York State Department of Corrections, reported that co-workers subjected him for years to a constant stream of offensive and degrading sexual comments, lewd conduct, the posting of profane graffiti and pictures, and other forms of harassment. The Federal District Court dismissed his claims, because, "The torment endured by Martin, as reprehensible as it is, relates to his sexual orientation," and is thus unremedied by Federal law.

For decades, similarly, courts have dismissed the discrimination claims of transgender workers who were horribly harassed or denied jobs for which they were exceptionally well-qualified, simply because of myths, fears, and stereotypes about their transgender status. In the words of the Seventh Circuit, as just one example, "While we do not condone discrimination in any form, we are constrained to hold that title VII does not protect transsexuals."

To be sure, some States have enacted important antidiscrimination protections, but employers in the majority of States remain free to fire, refuse to hire, harass, or otherwise discriminate on the basis of sexual orientation or gender identity. As a result, current law, both Federal and State, leaves unremedied a wide range of injuries and injustices. S. 1584, ENDA, would fill these gaps by clearly articulating for the first time the national commitment to equal employment opportunity regardless of sexual orientation and gender identity. It does so while accommodating concerns that it would interfere with religious institutions' ability to make employment decisions consistent with their religious beliefs by exempting from

its coverage those religious institutions already exempt from title VII's prohibitions on discrimination based on religion.

Indeed, at the time of its enactment in 1964, 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. Congress addressed that issue by protecting the ability of religious corporations, associations, educational institutions, and societies to make employment decisions on the basis of religion.

Also exempt from title VII's prohibition on religious discrimination are educational institutions that are in whole or in substantial part owned, supported, controlled, or managed by a particular religion or religious institution or those whose curriculum is directed toward the propagation of a particular religion.

S. 1584 tracks these 45-year-old title VII provisions that protect religious institutions' ability to make their own employment decisions on the basis of religion. S. 1584 specifically provides that its prohibition on sexual orientation and gender identity discrimination does not apply to those religious institutions.

S. 1584 addresses other concerns, as well, but in the interest of time, Mr. Chairmen, I'll reserve my discussion of them for questions that you or your colleagues may have.

Again, I thank you for the opportunity to join you here today.

[The prepared statement of Ms. Norton follows:]

PREPARED STATEMENT OF HELEN NORTON

Thank you for the opportunity to join you today. 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 cases in which Federal judges have characterized egregious acts of discrimination targeted at GLBT workers as morally reprehensible—yet entirely beyond the law's reach. Consider just a few examples:

• Sidney Taylor alleged that his co-workers repeatedly subjected him to a wide range of abusive behaviors that included groping his genitals, simulating sexual acts, assaulting him, and otherwise touching him inappropriately.[2] Another co-worker further testified that Mr. Taylor was verbally harassed on a weekly basis and subjected to a work environment that was "abusive" and "intolerable,"[3] and the employer's own internal investigations confirmed Mr. Taylor's reports.[4] Although the Federal district court found "the actions of Taylor's co-workers to be deplorable and unacceptable in today's workforce," it ruled against him last year on the grounds that current law does not prohibit harassment based on perceived homosexuality:

[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). The Genetic Information Nondiscrimination Act, which becomes effective on November 21, 2009, prohibits job discrimination on the basis of genetic information. Pub. L. No. 110–233, 122 Stat. 881.

[2] *Taylor* v. *H.B. Fuller Co.*, 2008 WL 4647690 *1–3 (S.D. Ohio 2008). The many acts of abuse alleged by Mr. Taylor also included being "shown inappropriate or pornographic images by his co-workers" and witnessing co-workers "repeatedly watching the male-on-male rape scene from *Deliverance*," being approached by a co-worker "holding a diaper filled with what appeared to be blood [who] asked Taylor if it was his or it if belonged to 'some chick,'" and having a bloody tampon placed on his desk. *Id.* at 2.

[3] *Id.* at *2.

[4] *Id.* at *1–2.

"Unfortunately, 'Congress has not yet seen fit . . . to provide protection against such harassment.'".[5]

• David Martin, a gay male employed by the New York State Department of Corrections, reported that co-workers subjected him for years to a constant stream of offensive and degrading sexual comments, lewd conduct, the posting of profane graffiti and pictures, and other forms of harassment.[6] The Federal district court dismissed his claims because "the torment endured by Martin, as reprehensible as it is, relates to his sexual orientation" and is thus unremedied by current law.[7]

• 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.[8] 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.[9] The Sixth Circuit Court of Appeals dismissed his claim in 2006, 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."[10]

• Postal worker Dwayne Simonton 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.[11] The alleged harassment was so severe that Mr. Simonton ultimately suffered a heart attack.[12] 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."[13]

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."[14]

• Robert Higgins brought a title VII challenge to a workplace environment that the First Circuit Court of Appeals characterized as "wretchedly hostile."[15] 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 directed 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:[16] 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.[17]

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[5] *Id.* at *6–7 (quoting *Bibby* v. *Philadelphia Coca-Cola Bottling Co.*, 260 F.3d 257, 265 (3rd Cir. 2001)).

[6] *Martin* v. *N.Y. Dep't of Correctional Servs.*, 224 F. Supp. 2d 434, 441 (N.D.N.Y. 2002).

[7] *Id.* at 447. For an extensive discussion of widespread, persistent, and irrational discrimination by State Government employers based on sexual orientation and gender identity, *see* The Williams Institute, Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment (2009).

[8] *Vickers* v. *Fairfield Medical Center*, 4 53 F.3d 757, 759 (6th Cir. 2006), *cert. denied*, 127 S.Ct. 2910 (2007).

[9] *Id.* at 759–60.

[10] *Id.* at 764–65.

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

[12] *Id.* at 34.

[13] *Id.* at 35.

[14] *Id.*

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

[16] *Id.* at 257.

[17] *Id.* at 259. For a sampling of additional cases in this vein, *see King* v. *Super Service, Inc.*, 68 Fed. Appx. 659, 664 (6th Cir. 2003) (observing that "[t]he individuals who harassed King were cruel and vile, and their conduct would not be tolerated by any respectable employer," but concluding that the reported physical and verbal harassment was based on actual or perceived sexual orientation and thus not actionable under title VII); *Bibby* v. *Philadelphia Coca-Cola Bot-*

To be sure, some courts have interpreted title VII's prohibitions on sex discrimination to bar certain misconduct targeted at GLBT workers, such as employment decisions that punish workers who are perceived as failing to conform to certain gender stereotypes.[18] 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.[19]

To fill these significant gaps, some States have enacted important antidiscrimination protections for GLBT workers: indeed, 12 States and the District of Columbia have enacted statutes that bar job discrimination on the basis of sexual orientation as well as gender identity,[20] while another 9 States prohibit job discrimination on the basis of sexual orientation alone.[21] But employers in the majority of States remain free to fire, refuse to hire, harass, or otherwise discriminate against individuals because of their sexual orientation and/or gender identity. (Moreover, even in the most egregious cases, State tort remedies such as assault and battery are of little, if any, practical value to victims: not only do courts generally decline to find employers vicariously liable for such torts as beyond the scope of employment, the individual assailants themselves are often judgment-proof. Indeed, none of the decisions discussed above included any disposition of a tort claim in the plaintiff's favor.)

As a result, current law—both Federal and State—leaves unremedied a wide range of injuries and injustices suffered by GLBT workers. S. 1584 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. More specifically, it forbids such discrimination in decisions about hiring, firing, compensation, and other terms and conditions of employment.[22] S. 1584 also incorporates the remedies and enforcement mechanisms available under title VII.[23]

S. 1584 thus accomplishes antidiscrimination law's twin purposes of compensating victims of discrimination for their injuries and deterring future acts of bias. It does so while accommodating concerns that it would interfere with religious institutions' ability to make employment decisions consistent with their religious beliefs. More specifically, S. 1584 completely exempts from its coverage those religious institutions already exempt from title VII's prohibition on discrimination based on religion.[24]

At the time of its debate in 1964, 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. Congress addressed this issue by protecting the ability of "a religious corporation, association, educational institution,

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tling 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); *Silva* v. *Sliffard*, 215 F.3d 1312 (1st Cir. 2000) ("Although we do not condone harassment on the basis of perceived sexual orientation, it is not, without more, actionable under title VII."); *Ulane* v. *Eastern Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984); *cert. denied*, 471 U.S. 1017 (1985) ("While we do not condone discrimination in any form, we are constrained to hold that title VII does not protect transsexuals."); *see also Medina* v. *Income Support Div., New Mexico*, 413 F.3d 1131, 1135 (10th Cir. 2005) ("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.").

[18] *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"); *Schroer* v. *Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (concluding that Library of Congress's withdrawal of job offer to plaintiff once it learned of her transgender status constituted sex stereotyping and sex discrimination in violation of title VII).

[19] *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.'") (quoting *Simonton* v. *Runyon*, 232 F.3d 33, 38 (2nd Cir. 2000); *Schroer* v. *Billington*, 525 F. Supp. 2d 58, 63 (D.D.C. 2007) (stating that a title VII sex stereotyping claim "could not be supported by facts showing that [an adverse employment action] resulted *solely* from [the plaintiff's] disclosure of her gender dysphoria").

[20] Along with the District of Columbia, those States are: California, Colorado, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.

[21] Those States are Connecticut, Delaware, Hawaii, Maryland, Massachusetts, Nevada, New Hampshire, New York, and Wisconsin.

[22] S. 1584 at § 4.

[23] *Id.* at § 10.

[24] *Id.* at § 6 ("This Act shall not apply to a corporation, association, educational institution or institution of learning, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Act of 1964 pursuant to section 702(a) or 703(e)(2) of such Act (42 U.S.C. 2000e–1(a); 2000e– 2(e)(2)).").

or society" to make employment decisions on the basis of religion.[25] Over the last 45 years, courts have interpreted this provision to exempt not only houses of worship, parochial schools, and religious missions, but also other organizations found to be primarily religious in purpose and character.[26]

As originally enacted in 1964, this provision exempted only employment decisions concerning jobs related to such organizations' "religious" activities.[27] In 1972, however, Congress broadened the exemption to its current scope by exempting such organizations from title VII's ban on religious discrimination with respect to employment decisions about jobs related to *any* of their activities, non-religious as well as religious.[28] Also exempt from title VII's prohibition on religious discrimination are schools, colleges, universities, or other educational institutions or institutions of learning that are "in whole or in substantial part, owned, supported, controlled, or managed, by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion."[29]

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[25] 42 U.S.C. § 2000e–1(a).

[26] *See, e.g.*, Corp. of the *Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327 (1987) (applying exemption to nonprofit gymnasium operated by the LDS Church); *Leboon* v. *Lancaster Jewish Community Center Ass'n*, 503 F.3d 217, 226 (3rd Cir. 2007), *cert. denied* 128 S.Ct. 2053 (2008) (holding that a Jewish Community Center was exempt from title VII's religious discrimination provisions because its purpose and character were primarily religious); *Hall* v. *Baptist Memorial Health Care Corp.*, 215 F.3d 618 (6th Cir. 2000) (applying exemption to college of health sciences directly related to the Baptist church); *Killinger* v. *Samford University*, 113 F.3d 196 (11th Cir. 1997) (applying exemption to university because of its close relationship with the State Baptist Convention); *Little* v. *Wuerl*, 929 F.2d 944 (3rd Cir. 1991) (applying exemption to Catholic parish school); *Spencer* v. *World Vision, Inc.*, 570 F. Supp. 2d 1279 (W.D. Wash. 2008) (holding a nonprofit Christian humanitarian aid organization to be an exempt religious institution); *Saeemodarae* v. *Mercy Health Services*, 456 F. Supp. 2d 1021 (N.D. Iowa 2006) (applying exemption to hospital affiliated with Catholic church); *Lown* v. *Salvation Army*, 393 F. Supp. 2d 223 (S.D.N.Y. 2005) (applying exemption to Salvation Army); *Wirth* v. *College of the Ozarks*, 26 F. Supp. 2d 1185 (W.D. Mo. 1998) (applying exemption to college affiliated with Presbyterian church); *Feldstein* v. *Christian Science Monitor*, 555 F. Supp. 974 (D. Mass. 1983) (applying exemption to Christian Science Monitor). On the other hand, courts have held that the exemption does not apply to organizations that are primarily secular in purpose and character. *See, e.g., EEOC* v. *Townley Engineering & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989) (holding that a for-profit manufacturer of mining equipment owned by religious individuals who operated the company pursuant to their religious principles was not an exempt religious institution because its nature was primarily secular).

[27] Civil Rights Act of 1964, Pub. L. No. 88–352, title VII, Section 702, 78 Stat. 241, 255.

[28] Equal Employment Opportunity Act of 1972, Pub. L. No. 92–261, Section 702, 86 Stat. 103, 104 (now codified at 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.* In recognition of the significant constitutional and other interests at stake, however, courts have long interpreted the first amendment to preclude the application of title VII and other employment laws to religious institutions' decisions about their spiritual leaders. *See, e.g., Alicea-Hernandez* v. *Catholic Bishop of Chicago*, 320 F.3d 698 (7th Cir. 2003) (declining to consider plaintiff's title VII race and national origin claims by holding that title VII does not apply to religious institutions' employment decisions about ministers and other 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 decisions involving teachers of religious canon law from title VII); *Scharon* v. *St. Luke's Episcopal Presbyterian Hospital*, 929 F.2d 360 (8th Cir. 1991) (precluding chaplain's discrimination claims under the ministerial exception); *Rayburn* v. *General Conference of Seventh-Day Adventists*, 772 F.2d 1164 (4th Cir. 1985) (holding that ministerial exception exempts employment decisions about pastoral advisors from title VII scrutiny); *McClure* v. *Salvation Army*, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972) (rejecting 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).

[29] 42 U.S.C. § 2000e–2(e)(2). This provision was added in 1964 through an amendment offered by Representative Purcell, who expressed concern that some church-affiliated educational institutions would not be exempt under 42 U.S.C. § 2000e–1(a): "Almost without exception, the term 'religious corporation' would not include church-affiliated schools unless this definition should receive the most liberal possible interpretation by the courts. Actually most church-related schools are chartered under the general corporation statutes as nonprofit institutions for the purpose of education." 110 Cong. Rec. 2585–2593 (1964). Nevertheless, there remains a significant amount of overlap between these two exemptions. *See, e.g., Hall* v. *Baptist Memorial Health Care Corp.*, 215 F.3d 618 (6th Cir. 2000) (concluding that college of health sciences was exempt from title VII's prohibition on religious discrimination under both 42 U.S.C. § 2000e–1(a) and 42 U.S.C. § 2000e–2(e)(2) because of its direct relationship to the Baptist church); *Killinger* v. *Samford University*, 113 F.3d 196 (11th Cir. 1997) (concluding that Samford University satisfied both of title VII's religious exemptions because of its close relationship with the State Baptist

S. 1584 incorporates the longstanding statutory definitions of religious institutions exempt from title VII's ban on religious discrimination and specifically exempts those same institutions from its prohibition on sexual orientation and gender identity discrimination:

> "This Act shall not apply to a corporation, association, educational institution or institution of learning, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Act of 1964 pursuant to section 702(a) or 703(e)(2) of such Act (42 U.S.C. 2000e–1(a); 2000e–2(e)(2))." [30]

S. 1584 addresses other concerns as well. For example, it provides no disparate impact cause of action,[31] and it prohibits employers from granting preferential treatment to an individual because of the individual's actual or perceived sexual orientation or gender identity.[32] It does not prohibit an employer from enforcing rules or policies that do not intentionally circumvent the act's purposes,[33] nor does it require the collection of statistics on actual or perceived sexual orientation or gender identity.[34] S.1584 does not apply to the armed services.[35] Finally, it does not require an employer to treat an unmarried couple in the same manner as a married couple for employee benefits purposes,[36] with the definition of the term "married" drawn from that in the Defense of Marriage Act.[37]

In sum, S. 1584 proposes to fill significant gaps in existing law by clearly articulating, for the first time, a national commitment to equal employment opportunity regardless of sexual orientation and gender identity while addressing concerns raised by religious institutions and other employers. Again, thank you for the opportunity to testify here today, and I look forward to your questions.

The CHAIRMAN. Again, we're honored by the presence of the attorney general of Illinois, Attorney General Madigan.

STATEMENT OF HON. LISA MADIGAN, ATTORNEY GENERAL, STATE OF ILLINOIS, CHICAGO, IL

Ms. MADIGAN. Thank you, Mr. Chairman and members of the committee, for inviting me to testify today in support of this important Federal civil rights legislation to prohibit discrimination on the basis of sexual orientation and gender identity.

As the chief legal officer for the State of Illinois, I am pleased to share Illinois' experience in expanding the protections of our Human Rights Act to cover members of the lesbian, gay, bisexual, and transgender community.

Illinois is one of 21 States in the country with an antidiscrimination statute that includes sexual orientation as a protected class, and we are one of the 12 States that includes gender identity. Since the implementation of these protections in January 2006, we have seen a positive reaction in both the public and private sectors, with a move toward tolerance, acceptance, and inclusion of all individuals. At the same time, as I will testify, Illinois has not seen a flood of complaints. On the contrary, we have seen a reasonable number of charges being filed.

The Illinois Human Rights Act originally passed in 1980. It protects individuals from discrimination not only in employment, but also in real estate transactions, access to financial credit, and access to public accommodations. The law protects individuals from

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Convention); *Little* v. *Wuerl*, 929 F.2d 944 (3rd Cir. 1991) (concluding that Catholic parish school satisfied both exemptions).

[30] S. 1584 at § 6.
[31] S. 1584 at § 4(g).
[32] *Id.* at § 4(f)(1).
[33] *Id.* at § 8(a)(1)
[34] *Id.* at § 9.
[35] *Id.* at § 7.
[36] *Id.* at § 8(b)
[37] *Id.* at § 8(c).

discrimination on several bases, including age, disability, race, sex, and religion.

In 2005, the Illinois legislature amended the Human Rights Act to include sexual orientation. Illinois' definition of sexual orientation includes both actual and perceived sexual orientation, as well as gender-related identity. These definitions are similar to the definitions under the proposed Employment Non-Discrimination Act.

The amendments to our Human Rights Act have been in effect for 3½ years. Some had predicted that the addition of sexual orientation and gender identity to the Human Rights Act would lead to an avalanche of discrimination complaints and a significant increase in litigation. But, that has not been the experience in Illinois.

The Illinois Department of Human Rights is our State administrative agency with the primary responsibility for investigating and initiating discrimination charges. Since the Human Rights Act was amended, only between 2.06 percent and 3.79 percent of all charges filed annually with the Department have involved allegations of sexual orientation discrimination. Specifically, of the 13,723 employment discrimination charges filed since 2006, only 399, or 2.9 percent, were based on sexual orientation. As these numbers clearly demonstrate, we have not seen a flood of discrimination charges.

Perhaps the reason for that is because the law was passed with considerable support from our business community. There were 115 major Illinois employers, as well as the Chicagoland Chamber of Commerce, that publicly supported these amendments. And in part, I presume that is—not only was it an enlightened business decision, but prior to the passage of our State law, there were already 16 different municipalities and local governments throughout Illinois that had enacted antidiscrimination ordinances that included sexual orientation. Prior to the passage of the State law, there was a patchwork of protections throughout the State, and with the changes to our Human Rights Act, we now have a statewide standard. Illinois employers now work under the same rules.

Employers have also reacted positively to the new law, in that 208 of the employers that are headquartered in Illinois now have sexual orientation included in their internal nondiscrimination policies and programs; 67 of those, we are aware of, have also included gender identity. These policies lead to more productive, more inclusive, more tolerant, and more safe workplaces for all employees. Studies have shown—and I presume we will hear about Nike's experience—that employers that institute inclusive antidiscrimination policies and programs are less likely to experience discrimination lawsuits, and therefore, spend less money on legal fees.

But, the most important impact of prohibiting discrimination against LGBT persons is the impact on individual lives. Statistics are helpful, but ultimately we must focus on the protections that we provide to real people. We obviously all know that discrimination on the basis of sexual orientation and gender identity occurs. We have already heard numerous stories this morning. I want to address one more thing.

Lesbian, gay, bisexual, and transgender employees are not seeking special rights or privileges. Instead, they want to be able to

come to work and to be judged on the quality of their work, not on who they are or on who they are perceived to be.

Through the enactment of a statewide statute prohibiting discrimination based on sexual orientation and gender identity, Illinois has promoted tolerance, fundamental equality, and the common humanity of all individuals in our State. The benefits of such a message to the citizens of our State cannot be underestimated.

I believe that the experience in Illinois speaks strongly in favor of Federal action to protect citizens across our country from unfair workplace discrimination based on sexual orientation and gender identity.

Thank you for the opportunity to testify today. I'd be happy to answer the committee's questions.

[The prepared statement of Ms. Madigan follows:]

PREPARED STATEMENT OF LISA MADIGAN

I. INTRODUCTION

Senator Harkin and members of the committee, thank you for inviting me to testify at today's hearing on the proposed Employment Non-Discrimination Act. As the chief legal officer for a State that has been a leader in protecting the civil rights of all of its citizens, I am pleased to share Illinois' experience in expanding the protections of the Illinois Human Rights Act to cover sexual orientation and gender identity.

Illinois is one of 21 States in the country with an anti-discrimination statute that includes sexual orientation as a protected class, and 1 of 13 States that includes gender identity. Since the implementation of these protections in January 2006, Illinois has seen a reasonable number of charges being filed, with a recent increase in the last year. At the same time, we have seen a positive reaction in the public and private sector with a move toward tolerance, acceptance and inclusion of all individuals.

My testimony today is divided into two parts. First, I will review the Illinois Human Rights Act, with specific emphasis on the definition of sexual orientation and gender identity. In the second part, I will discuss Illinois' experience since the implementation of the amendments to the Human Rights Act in January 2006, including a discussion of the number and types of complaints filed regarding sexual orientation and gender identity.

II. THE ILLINOIS HUMAN RIGHTS ACT

The Illinois Human Rights Act, 775 ILCS 5/1–101 et seq. ("IHRA"), was originally passed and implemented in 1980. IHRA protects an individual from discrimination based upon race, color, citizenship status, national origin, ancestry, age, handicap, marital status, gender, religion, military service, or unfavorable military discharge status, as well as sexual harassment and retaliation, in connection with four areas: employment, real estate transactions, access to financial credit, and the availability of public accommodations. 775 ILCS 5/1–102(A). In 2005, IHRA was amended to include sexual orientation as a protected class. 775 ILCS 5/1–102(A). These amendments became effective January 1, 2006 ("the 2006 Amendments").

IHRA defines "sexual orientation" as: actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth. 775 ILCS 5/1–102(0–1).

IHRA covers not only cases where a complainant is discriminated against because of his or her actual sexual orientation, but also those cases where a complainant is discriminated against because someone *assumes* his or her sexual orientation based upon the complainant's behavior, dress, or associations. The definitions of "sexual orientation" and "gender identity" in the proposed Employment Non-Discrimination Act are similar to the definitions under IHRA. *See*, S. 1584, Section 3(a)(6, 9).

IHRA applies to employers with 15 or more employees within Illinois. 775 ILCS 5/2–101(B)(1)(a). The State, as well as any political subdivision, municipal corporation or other governmental unit or agency, without regard to the number of employees, are also covered. 775 ILCS 5/2–101(B)(1)(c).

Relief available to a complainant under IHRA is similar to relief available under Title VII of the Federal Civil Rights Act of 1964: actual damages; back pay; front

pay; lost benefits; emotional damages; injunctive relief including reinstatement; and attorneys' fees and costs. 775 ILCS 5/8A–104(A–J). However, unlike title VII, punitive damages are not available under IHRA.

When a complainant believes he or she has been discriminated against because of his or her sexual orientation, the complainant may file charges with the Illinois Department of Human Rights ("IDHR"). 775 ILCS 5/7A–102(A). IDHR forwards a copy of the charge to the respondent and the parties may enter into a voluntary mediation. 775 ILCS 5/7A–102(B, B–1). If the mediation does not resolve the matter, or the parties choose not to mediate at that time, the respondent must answer the charges and IDHR begins an investigation. 775 ILCS 5/7A–102(C). Once IDHR completes the investigation, the Department issues an investigation report. 775 ILCS 5/7A–102(D). If after a review of the investigation report, the Director of IDHR determines that there is substantial evidence of discrimination, the complainant may request that IDHR file a complaint with the Illinois Human Rights Commission ("Commission") on his or her behalf, or he or she may file a civil action in the State circuit court. 775 ILCS 5/7A–102(D)(4). If the Director determines that there is no substantial evidence of discrimination, the charges are dismissed and the complainant may appeal the finding by filing a Request for Review with the Commission, or filing an action in the State circuit court. 775 ILCS 5/7A–102(D)(3).

III. ILLINOIS' EXPERIENCE UNDER THE 2006 AMENDMENTS TO THE ILLINOIS HUMAN RIGHTS ACT

A. Charges Filed With the Illinois Department of Human Rights

Prior to the enactment of the 2006 Amendments to IHRA, which added sexual orientation and gender identity, IDHR anticipated that after the 2006 Amendments went into effect, roughly 10 percent of all charges filed with the Department would involve sexual orientation discrimination. After 3½ years under the 2006 Amendments, the percentage of sexual orientation cases has been less than originally anticipated: since fiscal year 2006, between 2.06 and 3.79 percent of all charges filed with IDHR have alleged sexual orientation discrimination.[1]

With regard to employment discrimination charges, while charges based upon sexual orientation have increased over time, they still make up a relatively small percentage of the total charges. For example, in fiscal year 2006, only 34 employment discrimination charges based on sexual orientation were filed with IDHR, which was only 2 percent of all employment discrimination charges filed that fiscal year.[2] In fiscal year 2009, 147 employment discrimination charges based on sexual orientation were filed with IDHR, totaling only 4 percent of all employment discrimination charges filed that fiscal year. IDHR attributes the increase in sexual orientation employment discrimination charges to the downturn in the economy, as well as to educational outreach by IDHR regarding the law to the lesbian and gay community, other agencies, and employers throughout the State.

Discrimination charges based on sexual orientation have a similar settlement rate as discrimination charges based on other protective classes. Approximately one-third of all discrimination charges based on sexual orientation filed with IDHR are settled, which is comparable to the settlement rate for other charges.

Since 2006, there have been 140 charges filed against public entities based upon sexual orientation discrimination under IHRA. Those 140 charges include not only employment discrimination claims, but claims based upon real estate transactions, access to financial credit, and the availability of public accommodations. During that same time period, 273 charges were filed against private entities, six charges were filed against unions, and 35 were filed against other entities.

B. Results of the 2006 Amendments to the Illinois Human Rights Act

While there has not been an overwhelming number of discrimination charges based upon sexual orientation filed since IHRA was amended in 2006, that does not mean that the amendments were not necessary or that the law has not been effective. There have been several benefits to the citizens of Illinois because of this improvement to the law, while at the same time businesses have become more inclusive and the rights of religious institutions have been protected.

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[1] See Exhibit A, Analysis of Sexual Orientation (including Gender Identity) Charges filed with the Illinois Department of Human Rights, fiscal year 2006–10.

[2] The data for fiscal year 2006 reflect only the last 6 months of the fiscal year, since the amendments to IHRA did not go into effect until January 1, 2006. The fiscal year in Illinois is July 1—June 30.

1. Effect Upon the Business Sector in Illinois

The 2006 Amendments to IHRA created a statewide standard for employers and businesses throughout Illinois. Prior to the 2006 Amendments, 16 different municipalities and local governments, ranging from large urban centers and suburban areas to down-state communities, had local ordinances that prohibited discrimination based upon sexual orientation.[3] This created a patchwork of protections throughout the State, which led to inconsistent policies for employers who conducted business in multiple parts of the State. With a statewide act, all employers are now working under the same rules and standards.

Since the implementation of the 2006 Amendments, there has not been evidence of a backlash by employers. In fact, the business community showed significant support for the passage of the 2006 Amendments. Over 115 major employers in Illinois publicly supported the 2006 amendments, and business associations, such as the Chicagoland Chamber of Commerce, supported the amendments, as well.

The 2006 Amendments also have not led to frivolous lawsuits. Of the 13,723 employment discrimination charges filed with IDHR since 2006, only 399, or 2.9 percent, were based upon sexual orientation. Studies have also shown that companies that have instituted inclusive anti-discrimination policies and programs are less likely to experience discrimination lawsuits and have spent less on legal fees since the implementation of those policies.[4]

Publicity on the 2006 Amendments has led employers and businesses to revise their non-discrimination policies as well as their internal trainings. This publicity has led to increased awareness as well as prevention. Since the implementation of the 2006 Amendments to IHRA, 208 employers who are headquartered in Illinois have added sexual orientation to their internal anti-discrimination policies, and 67 of these companies have added gender identity to those internal policies, as well.[5] These changes in policies reflect changes in employee attitudes toward lesbian and gay co-workers and colleagues. A national survey by Harris Interactive, Inc. in 2008 shows that 79 percent of heterosexual employees agree that how an employee does his or her job should be the standard for judging an employee, not his or her sexual orientation.[6]

2. Effect Upon Religious Institutions in Illinois

The 2006 Amendments to IHRA do not supersede a religious institution's First Amendment right to hire and fire according to the tenets of its religion. Federal courts have held that religious institutions are exempt from all liability under title VII, regardless of the basis of the alleged discrimination, if the job position involved in the employment discrimination claim was a ministerial position. See, e.g., *Alicea-Hernandez* v. *The Catholic Bishop of Chicago*, 320 F.3d 698 (7t Cir. 2003) (Employee could not bring a claim of discrimination based on gender and national origin because her position of communications manager was ministerial in nature); and *E.E.O.C.* v. *The Roman Catholic Diocese of Raleigh, NC*, 213 F.3d 795 (4th Cir. 2000) (Employee could not bring a claim of discrimination based on gender and retaliation because her position of music director was ministerial in nature). The Illinois Human Rights Commission has made similar holdings under IHRA. See, e.g., *Hopkins and Urbana Assembly of God*, 39 Ill.HRC Rep. 394 (March 30, 1988); *McBride and Trinity Lutheran Church*, Charge No. 1992SF0074 (1997 WL 683117)(September 17, 1997). The 2006 Amendments to IHRA have not superseded this precedent.

Charges filed with IDHR also show that religious institutions have not been impacted by the 2006 Amendments to IHRA. Since the effective date of the 2006 Amendments, only a handful of charges based on sexual orientation have been filed against religious institutions. In fiscal year 2009 and so far in fiscal year 2010, not a single charge based upon sexual orientation was filed against a religious institution.

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[3] The Illinois municipalities with anti-discrimination ordinances that include sexual orientation as a protected class are Bloomington, Carbondale, Chicago, Champaign, Decatur, DeKalb, Evanston, LaGrange, Moline, Naperville, Normal, Oak Park, Peoria, Springfield and Urbana. The County of Cook, where Chicago is located, also as an anti-discrimination ordinance that includes sexual orientation as a protected class.

[4] Wentlin, R.M., Palm-Rivas, N., "Current status and future trends in diversity initiatives in the workplace: Diversity experts' perspective," Diversity in the Workplace Series, Report No. 2; MDS–1082, Berkeley: National Center for Research in Vocational Education, University of California (1997).

[5] Human Rights Campaign Foundation, *www.hrg.org/employersearch*.

[6] "Out & Equal Workplace Culture Report, Survey of Workplace Attitudes, 2002–2008," Harris Interactive, Inc. on behalf of Out & Equal Workplace Advocates (2008).

Most importantly, a significant number of religious institutions were in support of the 2006 Amendments to IHDA. At the time of the passage of the 2006 Amendments, approximately 87 religious institutions, organizations and leaders pledged their public support for the amendments.[7]

3. Success Stories Under the 2006 Amendments to the Illinois Human Rights Act

While the Illinois experience has been that the number of charges of employment discrimination based upon sexual orientation has been relatively small, the 2006 Amendments to IHRA have had a positive effect on individual lives. The statistics are helpful, but it is the stories of real people who have been helped by the 2006 Amendments that demonstrate the importance of these protections.

The first example I would like to share with you is the case of a woman I will call Ellen. Ellen is an African-American lesbian who was employed as a maintenance worker at a large retailer. One of Ellen's co-workers learned that Ellen was a lesbian and had a girlfriend. He began to call Ellen derogatory names on an almost daily basis, sometimes spitting the words in her face. Then the harassment began to spread. Managers and coworkers asked her graphic sexual questions and flashed at her pornographic pictures almost every other day on the job. On several occasions when Ellen was cleaning the men's restroom, male co-workers purposely entered the restroom, exposed their genitals to her, and made threatening sexual comments to her. When Ellen reported this harassment to her supervisor, management, and eventually the corporate office, it was ignored. Ellen filed charges against her employer through IDHR. Ellen's goal is to return to her job free of harassment and continue as a productive employee.

The second example is the case of a woman I will call Sherry. Sherry was the Chief Naturalist of a suburban nature center in Illinois. Sherry worked for the nature center for over 16 years, creating programs for children and families, running volunteer programs, and she thoroughly loved her profession. Sherry had never had a negative job performance review. But then a co-worker saw Sherry at a restaurant where Sherry was attending a support group for transgendered individuals. When the new Executive Director of the nature center learned that Sherry was going to transition from a man to a woman, the Executive Director demoted Sherry, and eventually terminated her employment. Sherry filed a charge against the Executive Director and the nature center through IDHR. While Sherry did not gain her position back, the case was resolved and Sherry was able to continue with her life. Without the 2006 Amendments to IHRA, Sherry would have had no recourse at all.

The real-life cases of Ellen and Sherry demonstrate why the inclusion of sexual orientation and gender identity in employment anti-discrimination laws is so important. Neither Ellen nor Sherry wants special rights or privileges. Instead, they want to be able to come to work, have the opportunity to work free of harassment, and be judged on the quality of their performance, not on their sexual orientation, gender identity or the perception of their sexual orientation or gender identity.

IV. CONCLUSION

Since the enactment of the 2006 Amendments to the Illinois Human Rights Act, which added sexual orientation, including gender identity, as a protected class, the State has provided individuals who face unfair workplace discrimination with a useful and necessary tool. The State has not been overwhelmed with the number of charges based upon sexual orientation filed with the Illinois Department of Human Rights. We have also not seen a backlash from the business community, nor harm to the religious institutions in the State. Instead, Illinois has seen an increase in the number of employers with inclusive anti-discrimination policies. But just as important, the existence of a statewide statute prohibiting discrimination based upon sexual orientation promotes tolerance, fundamental equality and common humanity of all individuals in our State. The benefits of such a message to the citizens of our State cannot be underestimated.

I would like to recognize that here with me today is the Director of the Illinois Department of Human Rights, Rocco Claps. Mr. Claps and the Department were extremely helpful in providing the data cited in my testimony today.

Thank you for the opportunity to testify before the committee today.

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[7] See Exhibit B, Religious organizations, institutions and leaders who publicly supported the 2006 Amendments to IHRA.

EXHIBIT A.—STATE OF ILLINOIS, DEPARTMENT OF HUMAN RIGHTS

Analysis of Sexual Orientation (Including Gender Identity) Charges

	2006*	2007	2008	2009	2010**
Type of Sexual Orientation Discrimination:					
Employment	34	103	81	147	34
Housing	2	5	5	5	2
Public Accommodations	6	2	4	18	6
Financial Credit	0	0	0	0	0
Sexual Harassment In Higher Education	0	0	0	0	0
Total Sexual Orientation Charges	42	110	90	170	42
Total Charges Filed:					
Total Employment Charges Filed	1,788	3,287	3,522	4,007	1,119
Total Housing Charges Filed	216	397	309	355	124
Total Public Accommodations Charges Filed	49	90	116	127	32
Total Financial Credit Charges Filed	0	5	2	0	0
Total Sexual Harassment in Higher Education	2	3	0	2	4
Total	2,055	3,782	3,949	4,491	1,279
Percent to Total Charges Filed by Type:					
Employment	2%	3%	2%	4%	3%
Housing	1%	1%	2%	1%	2%
Public Accommodations	12%	2%	3%	14%	19%
Financial Credit	0%	0%	0%	0%	0%
Sexual Harassment in Higher Education	0%	0%	0%	0%	0%
Percentage of Sexual Orientation Charges to Total	2.04%	2.91%	2.28%	3.79%	NA[3]
Resolution of Sexual Orientation Charges:					
Settled	10	38	34	34	2
Withdrawal	0	10	5	10	0
Substantial Evidence	10	10	10	4	0
Lack of Substantial Evidence	12	26	26	7	0
Lack of Jurisdiction	1	1	3	2	0
Failed to Participate	2	8	8	6	0
Other	7	17	4	107	40
Charges Docketed by Sexual Orientation Category:					
Bisexual	2	3	3	3	2
Gender Identity	0	3	3	15	1
Homosexual (Gay, Lesbian)	27	58	48	132	29
Heterosexual	0	10	10	8	3
Transgender	7	26	16	4	2
Perceived Sexual Orientation	6	10	10	8	5
Sexual Orientation Charges (Including Gender Identity) by Type of Respondent:					
Public Entity	8	22	80	20	6
State Government	1	2	1	0	0
Private Entity	31	77	5	132	28
Unions	0	1	4	1	0
Other	2	8	0	17	8

[1] Public Act 93–1078 became effective 1/1/06.
[2] Charges docketed through 10/27/09.
[3] Comparison NA due to partial year statistics.

EXHIBIT B.—RELIGIOUS ORGANIZATIONS, INITIATIVE AND LEADERS WHO PUBLICLY SUPPORTED THE 2006 AMENDMENTS TO THE ILLINOIS HUMAN RIGHTS ACT

Adorers of the Blood of Christ, Ruma, IL; Advocate Health Care; Alexian Brothers, Provincial Council, Elk Grove Village; American Jewish Congress; Congregational Church, United Church of Christ, Jacksonville, IL; Daughters of Charity, East Central Province; Daughters of Charity, Chicago; Divine Word Missionaries, Provincial Council, Techny, IL; Eighth Day Center for Justice; Epiphany United Church of Christ, Chicago; Franciscan Friars, Sacred Heart Province; Franciscan Sisters of Wheaton, Provincial Council; Good Shepherd Parish, Chicago; Little Company of Mary Sisters, Evergreen Park, IL; National Assembly of Religious Brothers; National Coalition of American Nuns; Pilgrim Congregational Church, Oak Park,

IL; Presentation Sisters; Project IRENE; Protestants For the Common Good; Resurrection Metropolitan Community Church; School Sisters of Notre Dame; Sisters of Charity of the Blessed Virgin Mary, Great Lakes Region; Sisters of Christian Charity, Wilmette; Sisters of the Living Word, Living Word Center; Sisters of Loretto; Sisters of Mercy of the Americans, Chicago Region, Leadership Team; Sisters of Notre Dame de Namur; Sisters of Providence, Maternity BVM Convent; Sisters of St. Dominic of St. Catherine; Sisters of St. Francis of Assisi, Peace and Justice Committee; Sisters of St. Joseph of LaGrange, Peace & Justice Committee; University Church, Chicago.

Bishop Sheldon Duecker, United Methodist Church; Reverend Dr. Jane Eisler Hoffman, Conference Minister, United Church of Christ, Westchester, IL; Bishop Sherman Hicks, Former Bishop, Metropolitan Synod, Evangelical Lutheran Church of American; Bishop Edward MacBurney, Retired Episcopal Bishop of Quincy; Bishop William D. Parsell, Episcopal Diocese of Chicago; Bishop Joseph Sprague, United Methodist Church; Bishop James Wilkowski, Evangelical Catholic Church.

St. Katherine Bales, Dominican Sisters, Rantoul, IL; Fr. Robert Bossie, Sacred Heart Fathers, Chicago; Rev. Wayne T. Bradley, Pastor, Good Shepherd Parish MCC, Chicago; Rev. Cheryl Burke, Association Minister, Fox Valley Association, United Church of Christ, Elgin, IL; Rev. John D. Bultrick, Association Minister, Illinois Conference, United Church of Christ; Gary Cozette, Chicago Religious Leadership on Latin America; Marguerite Cleary, Barat College, Lake Forest; Fr. Ted Cirone, Claretian Missionaries; Rev. Ann Marie Coleman, Co-Senior Pastor, University Church; Rev. Donald Coleman, Co-Senior Pastor, University Church; Sr. Marion Dahlke, SSSF, Ministry Director, School Sisters of St. Francis; Sr. Kathleen Desautels, SP, Sisters of Providence, Justice Coordinator; Rev. Shane Desautels, Pastor, Resurrection MCC, Chicago; Sr. Karen Donahue, Justice Coordinator, Sisters of Mercy of the Americas, Aurora; Fr. Charles Faso, OFM, Franciscan Friars; Sr. Pat Francis, Dominican Sisters, Chicago; Rev. Edward E. Goode, Association Co-Minister, Chicago Metropolitan Association, Illinois Conference United Church of Christ; Br. Gerald Meeghan, SDB; Sr. Rebecca Ann Gemma, Dominican Sisters, Springfield; Rev. Edward E. Goode, Association Co-Minister, Chicago Metropolitan Association, Illinois Conference, United Church of Christ; Sr. Mary Ellen Green, OP, Prioress, Sinsinawa Dominican Sisters, Eastern Province; Rev. Carla Grosch, Seniors Minister, Pilgrim Congregational Church, United Church of Christ, Oak Park, IL; Fr. Kurt Hartrich, Franciscan Friaras, Sacred Heart Province; Sr. Therese Marie Havlik, Norridge, IL; Rev. Thomas Henry, Senior Pastor, St. Pauls Church, Chicago; Fr. John Huels, OSM, Prior Provincial Servite Friars; Rev. Jerry Wagenstedt, Senior Vice President, Advocate Health Care; Sr. Mary Lou Larkin, Sisters of Charity, BVM; Rev. Joseph Liang, United Church of Christ; Sr. Gervase, Lisner, School Sisters of St. Francis; Sr. Maureen McCormack, SL President, Sisters of Loretto; Sr. Barbara Maas, Sisters of the Living Word; Sr. Stephanie Mertens, ASC, Adorers of the Blood of Christ, Ruma, IL; Sr. Rose Mary Meyer, BVM, Director, Project IRENE; Rev. Calvin S. Morris, PH.D., Chicago; Rev. Rich Pleva, Prairie Association Minister, Illinois Conference; United Church of Christ, DeKalb, IL; Sr. Donna Quinn, OP, National Coalition of American Nuns, Evergreen Park, IL; Patricia Reiss, Barat College, Lake Forest, IL; Sr. Joellen Sbrissa, CSJ, Sisters of St. Joseph of LaGrange, Peace & Justice Committee, LaGrange, IL; Sr. Rose Miriam Schulte, OP, Dominican Sisters of Springfield; Rev. Betty Sue Sherrod, Pastor, Congregational Church, Jacksonville, IL; Rev. Lynne M. Simcox, Association Co-Minister, Chicago Metropolitan Association Illinois Conference of the United Church of Christ; Fr. Michael Joseph Stengel, Chicago, IL; Sr. Anita Swansen, OSM, Servants of Mary; Rev. Jerry Wagenknecht, Senior Vice President, Advocate Health Care; Sr. Elizabeth Wirth, Sisters of Charity, BVM; Sr. Marguerite Yezek, Sisters of Charity, BVM.

The CHAIRMAN. Thank you very much, Attorney General Madigan. And, as I said, all your statements will be made a part of the record; but, also, the addendums that you had, which listed all of the religious organizations that supported this, is quite exhaustive—

Ms. MADIGAN. Yes.

The CHAIRMAN [continuing]. In terms of the number. Thank you very much for that.

Now we turn to Virginia Nguyen with Nike. Again, we welcome you, and please proceed, Ms. Nguyen.

STATEMENT OF VIRGINIA NGUYEN, DIVERSITY AND INCLUSION TEAM MEMBER, NIKE, INC., BEAVERTON, OR

Ms. NGUYEN. Thank you, Chairman Harkin and honorable members of the committee. Again, my name is Virginia Nguyen and I am part of Nike, Inc.'s, Diversity and Inclusion Team based in Beaverton, OR, and it is truly an honor and pleasure to speak on Nike's behalf today. Thank you for this opportunity to address this important and vital hearing.

Thank you, especially, Senator Merkley, for this invitation and for your continued commitment to workplace protections. It was a proud moment in Nike's home State of Oregon, when, in 2007, Governor Ted Kulongoski signed into law the Oregon Equality Act, a bill strongly championed by you. This law prohibits discrimination based on sexual orientation in employment, housing, public accommodations, and other areas. The law passed with strong bipartisan support, and Nike led the effort to build support within the Oregon business community to pass the bill. Once again we are proud to testify our support behind the long overdue Employment Non-Discrimination Act, and we are very encouraged that, with your and the committee's leadership, we are moving a step closer toward passage of this essential piece of legislation.

Diversity and inclusion at Nike is about respecting our differences, mining the skills and talent that exist, leveraging our strengths, and maximizing opportunity for all. These values are our competitive advantage and make Nike a better company, passionately supportive of our employees, respectful of our consumers, and more competitive in our industry. Our ability to continually innovate and positively influence as a global corporate citizen hinges on our ability to welcome diverse perspectives and ideas and to make an investment in all of our employees.

Nike's support of this bill is a reflection of our own employment policies, practices, and training programs. These are designed to reinforce a culture of inclusion and respect, where each employee can reach their full potential, and this can only happen in an environment that is free from discrimination of all types.

To that end, Nike's policy, which we call the Matter of Respect Policy, prohibits discrimination and harassment and provides employees with an effective complaint process. This policy applies to all of Nike's employees worldwide, which total over 30,000 in over 160 countries, and is consistently enforced.

From our perspective, ENDA is good for business, for our employees, and for our community, and here's why:

Nike firmly believes that diversity drives innovation, which is the cornerstone of our business. We understand that high-performing teams grow and thrive in an open and welcoming work environment, where individuals are bringing their full selves to work. An inclusive work environment and community enables us to attract and retain the best and the brightest people around the world.

We support the active involvement of our Nike teammates in a variety of employee networks, including the Lesbian, Gay, Bisexual, Transgender Employee and Friends Network. Employee networks influence Nike on a variety of issues impacting the lives of our employees and communities where we live and work.

In 2009, for the 7th year in a row, Nike received a perfect score on the Human Rights Campaign Foundation's Corporate Equality Index. The Index rates corporations' nondiscrimination policies, partner benefits, affinity group support, and engagement of the LGBT community. In 2002, Nike was 1 of only 13 to be given a perfect score, and 7 years later, Nike and its employees are proud to share the recognition with 259 other companies.

So, clearly Nike isn't the only company that is having this conversation and ensuring workplace equality through policy and practice. Currently, over 85 percent of Fortune 500 companies include sexual orientation in their equal employment policies, and more than one-third include gender identity. While this celebrates the strides made in workplace fairness, it is also a clear indicator that Federal legislation is lagging, and that we need a Federal standard that protects everyone's right to earn a living. That is why Nike is part of the Business Coalition for Workplace Fairness, a group of over 80 leading companies that support passage of the Employment Non-Discrimination Act.

Unfortunately, not all Americans experience this basic protection. As we've heard, in 29 States it is still legal to fire or refuse to hire or promote someone because of their sexual orientation, and in 38 States it is still legal to do so based on gender identity and expression.

In supporting ENDA, you support the conviction that every American deserves the chance to compete and prosper on a level playing field. That fairness is fundamental to our country's core.

To conclude, one of Nike's corporate maxims is "Do The Right Thing." This maxim challenges our employees to embrace the truth, offer transparency, and help shape Nike's evolution as a global citizen. I am very proud and am very fortunate to work for a company that consistently strives to uphold this core value.

On behalf of Nike, we urge you to support this legislation and do the right thing. Both government and the private sector have a basic obligation to uphold the principles of equality and fairness. Act swiftly and pass the Employment Non-Discrimination Act into law.

Thank you so very much for this opportunity to share our testimony.

[The prepared statement of Ms. Nguyen follows:]

PREPARED STATEMENT OF VIRGINIA NGUYEN

Chairperson Tom Harkin, and Honorable Members of the committee: My name is Virginia Nguyen, I am part of Nike Inc's Diversity & Inclusion team in Beaverton, Oregon, and it is an honor and pleasure to speak on Nike's behalf today. Thank you for the opportunity to address this important and vital hearing. Thank you, especially, Senator Merkley, for this invitation and for your continued commitment to workplace protections. It was a proud moment in Nike's home State, Oregon, when in 2007, Governor Ted Kulongoski signed into law Senate bill 2—the Oregon Equality Act—a bill strongly championed by you, Senator Merkley. This law prohibits discrimination based on sexual orientation in employment, housing, public accommodations and other areas. This law passed with strong bi-partisan support and Nike led the effort to build support within the Oregon business community to pass the bill. Once again, we are proud to testify our support behind the long-overdue Employment Non-Discrimination Act and are very encouraged that with your and the committee's leadership, we are moving a step closer toward passage of this essential piece of legislation.

NIKE'S APPROACH

Nike brand's mission is to bring inspiration & innovation to every athlete in the world. And if you have a body, you are an athlete. For us, that is the ultimate statement of inclusion and it speaks to what we at Nike prioritize as our work, and that is to unleash human potential. Not only for our athletes, but also for ourselves. Diversity and Inclusion at Nike is about respecting our differences, mining the skills and talents that exist, leveraging our strengths and maximizing opportunity for all. These values are our competitive advantage and make Nike a better company, passionately supportive of our employees, respectful of our consumers and more competitive in our industry. Our ability to continually innovate and positively influence as a global corporate citizen hinges on our ability to welcome diverse perspectives and ideas and to make an investment in all of our employees.

Nike's support of this bill is a reflection of our employment policies, practices, and training programs, which have been in place for decades. These are designed to reinforce a culture of inclusion and respect where each employee can reach their full potential. This can only happen in an environment that is free from discrimination **of all types**. To that end, Nike's policy prohibits discrimination and harassment, and provides employees with an effective complaint process. This policy applies to all of Nike's employees worldwide, which total over 30,000 across six continents, and is consistently enforced.

From our perspective, ENDA is good for business, for our employees and our community. Here's why:

- Nike firmly believes that diversity drives innovation, which is a cornerstone of our business.
- High performing teams grow and thrive in an open and welcoming work environment, where individuals are bringing their full selves to work.
- An inclusive work environment and community enables us to attract and retain the best and the brightest people around the world.

DOING THE RIGHT THING

We support the active involvement of our Nike teammates in a variety of employee networks, including the Lesbian, Gay, Bisexual, Transgender and Friends Network (LGBT&F). Employee networks influence Nike on a variety of issues impacting the lives of our employees and communities where we live and work.

In **2009**, for the **seventh** year in a row, Nike received a perfect score on the Human Rights Campaign Foundation's Corporate Equality Index. The Index rates corporations' treatment of gay, lesbian, bisexual and transgender employees through their non-discrimination policies, partner benefits, affinity group support, and engagement of the LGBT community. In 2002, Nike was one of only 13 companies to be given a perfect score. **Seven** years later, Nike and its employees are proud to share the recognition with **259** other companies—a **twenty**-fold increase.

THE BUSINESS COMMUNITY

Clearly, Nike isn't the only company that is having this conversation and ensuring workplace equality through policy and practice. Currently, 85 percent of Fortune 500 companies include sexual orientation in their equal employment policies, and more than one-third also include gender identity. While this celebrates the strides made in workplace fairness, it is also a clear indicator that Federal legislation is lagging and that we need a Federal standard that protects everyone's right to earn a living. That's why Nike is part of the Business Coalition for Workplace Fairness, a group of over 80 leading companies that support passage of the Employment Non-Discrimination Act.

In supporting ENDA, you support the conviction that every American deserves a chance to compete and prosper on a level playing field; that fairness is fundamental to our country's core.

Unfortunately, not all Americans experience this basic protection. In **29** States, it is still legal to fire or refuse to hire or promote someone because of their sexual orientation. In **38** States, it is still legal to do so based on gender identify or expression. The Federal Government and the private sector have an obligation to act upon and to uphold the principles of equality and fairness that are the foundation of the Constitution.

CONCLUSION

One of Nike's corporate Maxims is Do the Right Thing. This maxim strives to challenge our employees to embrace the truth, offer transparency and help shape

Nike's evolution as a global citizen. I am very proud and fortunate to work for a company that consistently strives to uphold this core value.

On behalf of Nike, we urge you to support this legislation and do the right thing. Both government and the private sector have a basic obligation to uphold the principles of equality and fairness. Act swiftly and pass the Employment Non-Discrimination Act into law. Thank you for the opportunity to share our testimony.

The CHAIRMAN. Ms. Nguyen, thank you very much for an excellent presentation and for being here today on behalf of Nike.

Now we'll turn to Mr. Mike Carney, whom I introduced earlier, from Springfield, MA. Right?

Mr. CARNEY. I am sir.

The CHAIRMAN. Alright, thank you, Mr. Carney—

Mr. CARNEY. Thank you. Good morning.

The CHAIRMAN. Please proceed.

STATEMENT OF MICHAEL P. CARNEY, POLICE OFFICER, CITY OF SPRINGFIELD POLICE DEPARTMENT, SPRINGFIELD, MA

Mr. CARNEY. I'd like to thank you and the Senate Committee on Health, Education, Labor, and Pensions for the opportunity to speak on your work on this very important bill.

The Employment Non-Discrimination Act is vitally important to the gay and lesbian, bisexual, and transgendered community, but it's even more important to America.

As a first-generation Irish American, I grew up hearing stories 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 these days were behind us, that we could be anything we wanted to be, in America. I found out the hard way that that wasn't true.

Today, there remains an invincible but insidious obstacle to equal employment that cuts across all racial and religious and ethnic lines in America.

I realized, soon after graduating from the police academy, that because I was gay, my safety as a police officer and my future as a public servant was seriously jeopardized. I felt that I had no choice but to keep my personal life a secret from my co-workers and my supervisors.

Not being able to share my personal life with those who I spent time with was extremely painful. Can you imagine going to work everyday fearing to talk about last night's date, your spouse, your weekend, or your family? Not being able to share any part of your personal life to fear of reappraisal or being ostracized? I did this in a career that prides itself on integrity, honesty, and professionalism, and where a close bond with one's colleagues and partner is critical to surviving dangerous and potential deadly situations.

At my police graduation, a colleague's sexual orientation became the topic of conversation because he brought a man to the graduation party. Although he told everybody he was just a friend, by the end of the evening this new recruit was assaulted by another officer. That evening I got an early lesson in 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.

After a few years, another classmate and his partner were gunned down in the streets, murdered, and it forever changed the way that I viewed my job as a gay cop. Every time my partner and

I would roll down on a domestic or a gun call, all I could think of was, Who would notify my life partner? Who'd be the first—would he be the first to learn about my shooting on the 11 o'clock news? Who—how many of my colleagues would show at the funeral? Would they support him?

The more I thought of these things, the more isolated and insecure I felt, the more singled out, second-class I really, truly felt I was. I was beginning to feel how my grandfather's generation felt, that I wasn't good enough; I was a second-class citizen.

That's when 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 on fundamental principle that all men are created equal, endowed by their creator with certain inalienable rights, that amongst these are life, liberty, and a pursuit of happiness?

Every day I felt the disconnect, the pain, and the gut-wrenching fear for my safety as a cop. In 1989, after years of torment, I hit bottom and I resigned as a police officer. Three years later, after finding the support that I needed, I decided to reapply for the job that I loved. After a series of layoffs, our department was interviewing officers for rehiring, so four of my colleagues and I applied. During my interview, I told the police commission I was gay. Of the five applicants, only one was not rehired. The mayor intervened and asked that I be granted another interview. At that interview, the police chief told the police commission I did a commendable job as a police officer.

In 1994, sighting the police commission's rationale for my rejection as pretext, the Mass Commission Against Discrimination ruled probable cause that discrimination did appear.

I'm a good cop, but I lost 2½ years of my employment fighting to get my job back because I'm gay. I never would have been able to do that if I didn't live in Massachusetts or 1 of the 13 other States or the District of Columbia that protects gay employees from discrimination. In fact, if I were a Federal employee living in Massachusetts, I wouldn't be protected at all. Do you think that impacts Federal recruitment efforts? I bet it does.

Workplace discrimination impacts the lives of everyone. It deprives people of jobs and safe working conditions. It robs the Federal Government of an exceptional pool of specialists, and it robs our citizens of the services that they would have received from talented, dedicated gay and lesbian, bisexual, transgender workers.

We are much more tolerant of individual differences today than 10 years ago. I see it in our streets. I see it in the younger generation and I see it in the older generation. I believe America is ready to tear down the last walls of discrimination in our workplace. Encouraged by this wind at our backs, I hope that Congress will legislate the right of employees to be judged solely on their work performance. This is not a Democratic or Republican value; this is an American value.

I am personally grateful to Chairman Harkin and the Assistant Attorney General Tom Perez for their kind comments, and I'm especially grateful to Senator Kennedy—the late Senator Kennedy and his staff, and to Congressman Barney Frank, as well as Diego

Sanchez, who is Congressman Frank's and Capitol Hill's first transgendered staff person.

Thank you.

[The prepared statement of Mr. Carney follows:]

PREPARED STATEMENT OF MICHAEL P. CARNEY

My name is Michael Carney and I am a police officer in the Springfield, MA Police Department.

The Employment Non-Discrimination Act is vitally important to the Gay, Lesbian, Bisexual and Transgender community. But it is even more important to America.

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

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

I found out the hard way it's not true. Today, sexual orientation and gender identity remains an invisible but insidious obstacle to equal employment that cuts across all racial, religious and ethnic lines in America.

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

It doesn't affect my job performance, but it continues to affect my employability in America. The following is how I learned it.

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 1982, after I graduated from the 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 fearing to talk about last night's date, your spouse, your weekend, your family—not being able to share 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 close bond with one's colleagues and partner is critical to surviving dangerous and potentially deadly situations.

At my police graduation, a colleague's sexual orientation became 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 new recruit was assaulted by a fellow officer.

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 my colleagues at my funeral treat him?

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 how 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; 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 with myself openly.

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 four of my colleagues and 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 "commendable 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, "other candidates were more enthusiastic and more forthright."

The Massachusetts Commission Against Discrimination's investigation took 2½ years of my life—2½ 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 Governors Hate Crimes Task Force for 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 1 of the 13 other States and the District of Columbia that protect GLBT people from discrimination.

In fact, if I were a Federal employee living in Massachusetts I would not be protected at all. Do you think that impacts Federal recruitment efforts? You bet it does.

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.

Workplace discrimination impacts the lives of *everyone*. It deprives people of jobs and safe working conditions; it robs the Federal Government of an exceptional pool

of specialists; and it robs our citizens of services they would have received from talented and dedicated GLBT workers.

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 keep their jobs, solely because of their sexual orientation or gender identity.

I'm proud to be an Irish-American. I'm proud to be gay. And I'm proud to be a cop in Springfield, MA.

We are much more tolerant of individual differences today than 10 years ago. I see it on the streets. I see it in our younger generations. I see it in our older generations. I believe America is ready to tear down the last walls of discrimination in the workplace.

Encouraged by this wind at our backs, I hope that Congress will legislate the right of employees to be judged solely on their performance. This is not a Democratic or Republican value. **It is an American value.**

I am personally grateful to Chairman Harkin and everyone on this committee for your extraordinary efforts.

I am especially grateful to the late Senator Kennedy and his staff, and to Congressman Barney Frank and his staff—including Diego Sanchez, Capitol Hill's first transgender staff.

Thank you.

The CHAIRMAN. Mr. Carney, thank you very much for your courage, both as a police officer, but also your courage in just being out in front on this for so long and taking those courageous first steps. I think you stand as a shining example to so many others. Thanks for being here.

Mr. CARNEY. Thank you. I'm honored to be here, sir. Thank you.

The CHAIRMAN. Now we turn to Mr. Craig Parshall, senior vice president and general counsel of the National Religious Broadcasters Association.

Mr. Parshall, thank you very much for being here.

STATEMENT OF CRAIG L. PARSHALL, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, NATIONAL RELIGIOUS BROADCASTERS ASSOCIATION, MANASSAS, VA

Mr. PARSHALL. Thank you. Thank you, Chairman Harkin. I'd also like to thank Ranking Member Enzi and the other members of the committee.

I'm Craig Parshall, senior vice president and general counsel for National Religious Broadcasters. We do oppose ENDA, the Employment Non-Discrimination Act of 2009, and I hope to set forth some of the considerations that have brought us to that position.

My organization, NRB, is a nonprofit association representing the interests, first of all, of broadcasters—Christian radio, Christian television, and Internet broadcasters—but, we also represent a wide variety of other Christian ministries, as well: Christian-oriented public relation agencies, publishing companies, churches with media outreach, programmers, teaching and preaching ministries, faith-based humanitarian organizations that operate worldwide, and more than a dozen Christian colleges and bible schools.

It's my opinion that ENDA, in its present form, would impose a substantial and unconstitutional burden on religious organizations, and would interfere with their effectiveness, in terms of pursuing their mission. Now, I say that for four reasons:

No. 1, I believe ENDA, in its current State, would violate the free exercise of religion. I've examined the exemption, in Section 6 of ENDA, which merely cross-references the existing religious exemption under title VII. However, the Federal courts have construed

title VII to mean that a religious employer can only be exempt regarding its faith-based decisions that relate to the religious beliefs of the employee.

Now, this is a very important distinction to make, because secular courts will most likely rule, let's say, if ENDA is passed and we have a Christian bookstore, as an example, that decides they do not want to hire a homosexual—the courts will most likely decide that the decision was really not based on the job applicant's religion, but on his sex—or her—sexual orientation or gender identity. As a result, no exemption will prove to be effective.

Now, this scenario is substantiated by a host of court cases that have noticed that concept of discrimination based on gender or sex is very close to, very analogous to, discrimination based on homosexuality or gender identity. The courts have already expressed difficulty in drawing the lines of distinction between those various forms of discrimination.

However, the cases are pretty uniform in one respect: religious groups gets no exemption when the discrimination is deemed to be on the basis of gender or sex. As a practical matter, then many religious employers are simply not going to be protected under title VII's language that's been imported into Section 6 of ENDA. That, of course, is going to have a chilling effect, not only on those that are prohibited, but those who must guess whether or not they're covered, because of the language of section 6. This is simply unconstitutional. A failure to sufficiently provide for the religious autonomy of private religious employers violates the First Amendment.

No. 2, I believe ENDA would violate the Establishment Clause: it's a basic principle that courts are prohibited from conducting searching investigations into the religious doctrine or dogma of religious groups, because that would constitute excessive entanglement. But, that's exactly the kind of invasive inquiry that courts are going to have to make under title VI as they try to grapple with, let's say, as an example, a Christian book publisher who decides they don't want to hire a transgender person in their editorial department. The court's going to ask, "Well, does this really have to do with the religion of the applicant or the applicants sexual orientation or gender identity?" Depending on how they decide that, there may be absolutely no exemption available to a Christian publisher.

No. 3, It would violate, I believe, freedom of association. In two recent U.S. Supreme Court cases, civic groups have been held to have a first amendment Freedom of Association right to deny participation by openly gay persons. ENDA collides with those decisions, simply because title VII's religious exemption scheme is much narrower than the Freedom of Association rights that have been outlined by the U.S. Supreme Court in those two cases.

No. 4, Section 6 is going to create massive uncertainty for religious groups simply because of the history of religious exemption under title VII. The factors, as an example, used by the courts in deciding whether a religious group does or does not qualify varies from circuit to circuit. The Ninth Circuit, as an example, has a six-factor test. The Third Circuit has used a nine-factor test. The Third Circuit gives a somewhat fluid interpretation of title VII Religious Exemptions, but title IX has construed it narrowly.

There is, frankly, a confusing and crazy-quilt landscape of cases that give similar organizations different treatment from circuit to circuit.

But, there's another complication that I see that impacts our broadcasters. The FCC has specifically developed its own EEO guidelines exempting from employment discrimination with regard to faith-based decisions broadcasters that are defined as, "religious broadcasters." But, the test the FCC uses is much different than the test that the courts have used under title VII. What effect ENDA will have on the FCC and hundreds and thousands of broadcasters around the country, we simply do not know.

In conclusion, I would urge this committee not to jettison the rights, or forget the rights, of people of faith or to treat them as lesser privileges or to reduce the Freedom of Religion rights of religious organizations to a miniature of what our founding fathers envisioned. If that happens here, it means that we've set ourselves on a very dangerous path, I believe—a radical departure from basic liberties for which our founders risked their lives, their fortunes, and their sacred honor.

Thank you.

[The prepared statement of Mr. Parshall follows:]

PREPARED STATEMENT OF CRAIG L. PARSHALL

I am Craig Parshall, Senior Vice-President and General Counsel for National Religious Broadcasters (NRB). I am appearing today to voice NRB's opposition to S. 1584, the Employment Non-Discrimination Act of 2009 (ENDA). It is my legal opinion that S. 1584, if passed into law, would impose a substantial, unconstitutional burden on religious organizations and would interfere with their ability to effectively pursue their missions, both of which are non-profit groups, as well as faith-based institutions and enterprises which operate commercially.

NRB is the pre-eminent association representing the interests of Christian television, radio and Internet broadcasters. Our organization also includes in its membership Christian groups not directly engaged in broadcasting activities but which are involved in activities which provide support services specifically to religious broadcasters or are involved in communications-related activities, such as public relations agencies, law firms with an emphasis on media law, Christian publishing companies, churches with a media outreach, Christian programmers, preaching and teaching ministries and faith-based charity and humanitarian organizations. NRB also has among its membership more than a dozen Christian colleges and Bible schools. Thus, the wide variety of Christian organizations comprising our membership provides National Religious Broadcasters with a unique view of the potential collision between S. 1584 and the religious liberties of faith-based organizations.

S. 1584 THREATENS THE CONSTITUTIONAL RIGHTS OF RELIGIOUS EMPLOYERS

S. 1584 is a sweeping new piece of employment discrimination legislation which protects persons from adverse employment actions that are based on the "actual or perceived sexual orientation or gender identity" of that person. While the bill references Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. 2000e, et seq., it structurally stands alone as a separate form of substantive employment law.

The bill provides a purported "exemption" for "religious organizations" in section 6, and then defines the organizational status that would qualify an employer for exemption by directly referencing the exemption scheme under title VII.[1] Section 6 will be discussed at more length below. However it is my opinion that section 6 is fatally insufficient to protect religious employers. As such, it is infirm because it violates several protections under the first amendment.

[1] Title VII exempts religious organizations regarding the employment of persons "*of a particular religion* to perform work connected with the carrying on" of the organization's "activities" (emphasis added).

Free Exercise of Religion

When a government law sweeps into its regulatory purview religious groups whose operations are thereby substantially and selectively burdened, and it fails to provide ample exemptions for those religious organizations, it violates the Free Exercise provisions of the first amendment. *Church of the Lakumi Babalu Aye* v. *Hialeah*, 508 U.S. 520, 531–532 (1997).

In the realm of private religious employers, broad and adequate exemptions for religious organizations are constitutionally imperative. *Corporation of the Presiding Bishop* v. *Amos*, 483 U.S. 327, 336 (1987) (holding that title VII religious exemptions do not collide with the Establishment Clause but are fully consistent with it, the court in *Amos* going on to state: "Nonetheless, it 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 principal expressed in *Amos* is clear: where attempted "exemptions" in discrimination laws are so unclear, confusing, or overly broad so as to cause religious organizations to guess or speculate as to whether they are sufficiently "religious" either in structure of activities to qualify for the exemption, then the religious liberty provisions of the first amendment are violated. Moreover, where a law is passed in the area of employment discrimination and it fails, as S. 1584 does here, to provide a sufficiently adequate exemption for religious institutions regarding faith-based employment decisions it also violates the Free Exercise Clause of the first amendment. *Montrose Christian School Corp.* v. *Carver*, *Montrose Christian School Corp.* v. *Walsh*, 770 A.2d 111 (Md. Ct. App. 2001) (county employment discrimination code violated the Free Exercise rights of a private religious school by failing to provide a satisfactory, substantive exemption for it, the Court noting that "[a] uniform line of cases apply[] this principle, namely that the free exercise guarantee limits governmental interference with the internal management of religious organizations . . ."). The Free Exercise guarantee of the first amendment reflects "a spirit of freedom for religious organizations, and independence from secular control or manipulation . . ." *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church*, 344 U.S. 94, 116 (1952).

Establishment Clause

The Establishment Clause prohibits excessive entanglement between government and religion. *N.L.R.B.* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979) (exemption of religious schools from Federal National Labor Relations Board oversight). *Walz* v. *Tax Commission*, 397 U.S. 664 (tax exemption for religious groups wisely facilitates a "desired separation [of government from religion] insulating each from the other"). Confusion has been created in the section 6 religious exemption of S. 1584, as it attempts to exempt only those religious groups that would be exempt under title VII. But by doing that, section 6 will invite courts to engage in searching inquiries into the beliefs and doctrines of religious employers regarding homosexuality, lesbianism, bisexuality, transgenderism and similar issues in an attempt to parse-out the scope of the religious exemption in section 6; i.e. to determine whether, under the provisions of S. 1584 (which *does* expressly include sexual orientation and gender identity as categories for protection) a religious employer would, under the language of section 6, be "exempt from the *religious discrimination provisions* of title VII" (which *does* not expressly provide protections for sexual orientation or gender identity). This kind of apples-and-oranges incorporation of title VII into section 6 of S. 1584 creates another world of uncertainty for religious organizations. As will be discussed in more detail below, if sexual orientation and gender discrimination are construed by courts to be more like traditional "sex" discrimination under title VII, then religious groups will be given no practical exemption or a very limited one, but if those categories of discrimination are deemed to be more like "religious discrimination" then some religious groups (i.e. those recognized organizationally under the title VII religious exemption) might be entitled to exemption.

One added concern is that section 6 of S. 1584, through its adoption wholesale by cross-reference to the title VII religious exemption scheme, has also incorporated title VII's separate exemption provision for religious schools. That exemption applies where the school's curriculum is determined to have been "directed toward the propagation of a religion." However, this is an intensely intrusive and unconstitutional inquiry for any secular court to undertake. A school seeking this exemption paradoxically would have to forfeit its private religious autonomy, in effect, in order to try to save it. When the government exercises an "official and continuing surveillance" over the internal operations of a religious institution, religious freedom under the first amendment is jeopardized. *Walz* v. *Tax Commission of the City of New York*, 397 U.S. 664, 675 (1970). A secular court may not review a religious body's decisions on points of faith, discipline, or doctrine, *Watson* v. *Jones*, 80 U.S. 679 (1872), nor

may it govern the affairs of religious organizations. *Serbian E. Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976).

Freedom of Association

The first amendment's free association guarantee has been interpreted to mean that a discrimination law could not be used to force the Boy Scouts of America to employ a professed homosexual as an assistant scout leader. *Boy Scouts of America* v. *Dale*, 530 U.S. 640 (2000). And while *Dale* did involve a *non-profit association* as a party, and it addressed the groups "moral" (as opposed to religious) objections to homosexuality, the Supreme Court nowhere conditioned its reasoning on that fact that the Boy Scouts were a non-profit organization. Further, "moral" beliefs are not explicitly protected under the first amendment as a stand-alone right; rather they were protected in *Dale* because they were anchored to the Free Speech aspects of the right of Association. By contrast, religion is given explicit protection in the first amendment in its own right and therefore ought to receive *even more protection* under the principals of the *Dale* case. This would mean that S. 1584 is of questionable constitutionality regarding its negative impact on those religious group that have faith-based objections to hiring persons who are self-identified as homosexuals or persons of non-heterosexual gender identity. Private religious employers, like private associations, must be given the *right to reject* members or staff who would conflict with the religious organization's declared mission and beliefs. A religious group has "the autonomy to choose the content of [it's] own message." *Hurley* v. *Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995)

S. 1584'S RELIGIOUS EXEMPTION PROVISION IS FATALLY FLAWED

S. 1584 prohibits employment discrimination regarding the "actual or perceived sexual orientation or gender identity" of any person. Sec. 6 purports to provide an exemption for "a corporation, association, educational institution, or society that is exempt from the religious discrimination provisions of Title VII of the Civil Rights Act . . ." (hereinafter title VII). Thus, sec. 6 shifts the inquiry back to the "religious discrimination provisions" of title VII. However, S. 1584 does not define what it means by the phrase "religious discrimination provisions" of title VII. One likely interpretation is that the phrase could be construed to mean "discrimination on the basis of religion." See: *E.E.O.C.* v. *Mississippi College*, 626 F.2d 477, 484 (5th Cir. 1980). But what does title VII's exemption mean when it says that it permits discrimination "on the basis of religion?" According to *Petruska* v. *Gannon University*, 462 F. 3d 294 (3rd Cir. 2006) it means this: "The statute exempts religious entities and educational organizations from its non-discrimination mandate to the extent that an employment decision *is based on an individual's [i.e. the plaintiff's] religious preferences*" (emphasis added). The current state of the law is that organizations can be exempted from the operation of title VII *only* regarding adverse employment decisions which are made "on the basis of [the] religion" of the plaintiff; however, generally speaking, title VII grants *no* exemption for religious organizations whose actions are held to implicate discrimination on the basis of the "race, color, sex or national origin" of the plaintiff, regardless of the alleged religious motivations of the religious organization. *Id.* See also: *Rayburn* v. *Gen'l Conf. of Seventh Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985).

This distinction is critical. It is foreseeable that future courts could construe the adverse decisions of faith-based groups regarding non-hiring of homosexuals, as an example, as being more akin to discrimination based on "race . . . [or] sex" than discrimination "on the basis of religion." An even stronger argument might be made that "gender identity" discrimination by a religious organization is tantamount to discrimination based on "sex" (a gender issue) and therefore, because the religious group would not qualify for exemption under title VII for sex discrimination, neither will it receive exemption for "gender identity" discrimination under S. 1584. This likely confusion by the courts is not just idle speculation. As the Court said in *Powel* v. *Wise Business Forms, Inc.*, __F.3d__ (3rd Circuit, August 28, 2009) appeal No. 07–3997, slip op. page 14: ". . . the line between sexual orientation discrimination and discrimination 'because of sex' can be difficult to draw." The end result of the uncertainty created by section 6 could well be that the supposed protections contained in its religious "exemption" in S. 1584 would prove in the end to have been only a mirage.

But even aside from these intractable problems of whether the wholesale adoption of title VII religious exemptions into a "sexual preference" and "gender identity" discrimination law actually provides any protection whatsoever from a religious liberty standpoint, there are other insurmountable difficulties in S. 1584.

SEC. 6 SIMPLY COMPOUNDS A CRAZY QUILT OF INCONSISTENT COURT DECISIONS

By bootstrapping title VII's religious exemption language into sec. 6, the ENDA bill, S. 1584, subjects religious organizations to a crazy-quilt of inconsistent decisions that have been rendered by the courts in construing the exemption language of title VII. This approach will stultify and confuse religious groups and lead to endless, expensive, and harassing litigation.

Title VII (42 U.S.C. §§ 2000e et seq.) provides in part:

> This title . . . 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.

Unfortunately, Congress "did not define what constitutes a religious organization,—'a religious corporation, association, educational institution, or society'" under title VII. *Spencer* v. *World Vision, Inc.*, 570 F. Supp. 2d 1279, 1283 (W.D. Wash. 2008). As a result, "courts conduct a factual inquiry and weigh '[a]ll significant religious and secular characteristics . . .'" *Id.* (citations omitted).

What has resulted is a sad pattern of inconsistent and complex decisions which render very scant religious freedom to faith groups but which have sent a chilling pall over their activities not to mention their budgets: *Leboon* v. *Lancaster Jewish Community Center Association*, 503 F. 3d 217 (3rd Cir. 2007) (Jewish Community Center qualified as a religious organization so that its firing of a Christian was nonactionable under title VII); *but compare*: *EEOC* v. *Townley Eng'g & Mfg. Co.*, 859 F. 2d 610 (9th Cir. 1988) (no exemption for small, closely held manufacturing shop whose owner had a clearly Christian world view and wanted it to permeate the work place). A Christian humanitarian organization dedicated to ministering to the needs of poverty-stricken children and families around the world was entitled to take adverse employment actions against an employee because of that person's religion because it qualified for exemption under title VII (*Spencer* v. *World Vision, Inc., supra*); but a Methodist orphan's home dedicated to instilling in orphaned children Christian beliefs was held *not* to be qualified as a "religious corporation . . .", etc. where it had a temporary period of increased secular leadership followed by return to its original spiritual mission, *Fike* v. *United Methodist Children's Home of Virginia, Inc.*, 547 F. Supp. 286 (E.D. Va. 1982). Further compare: *Feldstein* v. *Christian Science Monitor*, 555 F. Supp. 974 (D. Mass. 1983) (newspaper covering secular news but with close relationship with the Christian Science Church allowed to discriminate on basis of religion).

The legal tests employed by the courts in deciding religious exemptions under title VII are complex and discordant. The 9th Circuit has employed a complicated six-factor test. *Spencer, supra* at 570 F. Supp. 2d 1284. Whereas the 6th Circuit has applied an even more complex nine-factor test. *Id.* at 1285–86. In addition, the 9th Circuit has construed the religious exemption narrowly, whereas the 3rd Circuit has not. *Id.*

The chances that the religious exemption in sec. 6 of S. 1584 would be given a very narrow, cramped interpretation are substantial. Where general discrimination laws collide with sincerely held religious beliefs, religion often loses. See: *Bob Jones University* v. *U.S.*, 461 U.S. 574 (1983) (private religious college loses its tax exempt status as a non-profit religious corporation because, while it admitted students from all races, its inter-racial dating rules were found to violate a national policy regarding discrimination). In *Bob Jones University* the Supreme Court could only muster a meager reference to the thoroughly religious school's Free Exercise rights, holding that the compelling interest of the government in stamping out discrimination outweighed "whatever burden" was caused to the organization's freedom of religion. *Id.* at 604. To the extent that "sexual preference" or "gender identity" discrimination are likened by the courts to racial discrimination, religious organizations will find little comfort under sec. 6 of S. 1584. See also *Swanner* v. *Anchorage Equal Rights Commission*, __U.S.__, 115 S.Ct. 460 (1994)(Thomas, J., dissenting) where the Supreme Court declined the chance to grant certiorari and to vindicate the rights of a landlord successfully sued for State housing discrimination where he refused on religious grounds to rent to unmarried couples.

Title VII grants a separate exemption specifically for religious schools. 42 U.S.C. §§ 2000e-2 (e)(2) provides exemption for such religious institutions provided that they are at least "in substantial part owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society . . ." or where the curriculum "is directed toward the propagation of a religion."

But here again the resulting court interpretations there have been just as dismal: *EEOC* v. *Kamehameha School/Bishop Estate*, 990 F.2d 458 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 439 (1993) (private Protestant religious school was denied title VII

religious exemption even though it had numerous religious characteristics and activities); *Pime* v. *Loyola University of Chicago*, 585 F. Supp. 435 (N.D. Ill. 1984)(Catholic college held not to be entitled to religious exemption relating to its preference for Jesuit professors over a Jewish professor), reversed on other grounds at 803 F.2d 351 (7th Cir. 1986)(where Judge Posner noted in his concurrence that, regarding the religious exemption issue, "the statute itself does not answer it," and "the legislative history . . . is inconclusive," *Id.* at 357). Contrast with: *Hall* v. *Baptist Memorial Care Corp.*, 215 F. 3d 618 (6th Cir. 2000) (Baptist entity training students for health care had sufficiently religious overtones to qualify for exemption regarding its firing of a lesbian staffer who was a minister at a pro-homosexual church).

N.R.B.'s membership includes some 200 Christian radio stations that are commercial in their organizational structure. Considering the chilly reception such commercial religious entities receive by the courts when they are other than non-profit corporations, they can expect to be shut out of any exemption under S. 1584 in litigation. We can add to that list other of our for-profit members whose mission is Christian in nature but who will be denied exemption: Christian publishers, religious media consulting groups and agencies. Also, food vendors who work exclusively with Christian schools may be denied exemption; Christian-oriented bookstores, adoption agencies, counseling centers and drug rehab facilities will also suffer the same fate.

CONFUSION REGARDING THE FCC'S EEO JURISDICTION

Currently, the Federal Communications Commission has promulgated EEO rules regarding broadcast licensees. An exemption is provided for a "religious broadcaster" regarding all employment decisions impacting religious belief, but they still must abide by a non-discrimination standard respecting "race . . . or gender." *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 17 FCC Rcd. 24018 (2002) ("EEO Order"), ¶¶50, 128.

Would S. 1584 supersede the regulations of the FCC regarding the employment activities of broadcasters? We simply do not know. The only help we have in answering that comes from a sparse comment in *The King's Garden, Inc.* v. *FCC*, 498 F. 2d 51, 53 (D.C. Cir. 1974)(FCC is justified in pursuing its own EEO regulations against religious broadcasters where "Congress has given absolutely no indication that it wished to impose the [title VII] exemption upon the FCC"). Nothing in the language of S. 1584 gives us any congressional intent to regulate broadcasters. On the other hand, would this new legislation be held to regulate those broadcasters that do not qualify for the FCC's definition of a "religious broadcaster?" The FCC has generated a "totality of the circumstances" test for what is, or is not, a "religious broadcaster" that differs from the title VII language. S. 1584 exponentially increases the uncertainty regarding which law applies. Furthermore, would "gender identity" protections under S. 1584 be viewed as the same, or different from the requirement imposed by the FCC that even religious broadcasters not discriminate on the basis of "gender?" Again, such uncertainties only ratchet-up the probability that the religious liberties of Christian broadcasters and communicators will be chilled as they try to speculate what the law actually provides and what their rights really are.

SEXUAL ORIENTATION AND GENDER IDENTITY ARE ALREADY PROTECTED

S. 1584 declares that the "purposes of his Act" are in part "to provide . . . meaningful and effective remedies" for "employment discrimination on the basis of sexual orientation or gender identity." Section 2, Purposes, paragraph (1). Yet that stated purpose behind S. 1584 ignores the fact that remedies already exist in Federal employment law. Title VII has been construed to already provide "gender stereotyping" discrimination protection for homosexuals or persons of non-heterosexual gender identity under existing "sex discrimination" provisions. *Powel* v. *Wise Business Forms, Inc.*, *F.3d* (3rd Circuit, August 28, 2009) appeal No. 07–3997. See also: *Vickers* v. *Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006); *Nichols* v. *Azteca Rest. Enters., Inc.*, 256 F 3d 864 (9th Cir. 2001); *Higgins* v. *New Balance Athletic Shoe, Inc.*, 194 F. 3d 252 (1st Cir. 1999).

CONCLUSION

S. 1584, and its companion ENDA bill in the House of Representatives, H.R. 3017, are the result of a public debate over sexual orientation and gender identity legal protections. But when we consider the entire course of American history, that debate is of very recent vintage.

Compare, by contrast, the long-standing recognition in our Nation that religious liberty is a foundational right and that government should have few occasions to invade it. In fact, that concept of religious freedom pre-dates the Constitution.

America's first Supreme Court Chief Justice, John Jay, a decade before the constitutional convention, described the notion of free exercise of religion this way: ". . . Adequate security is also given to the rights of conscience and private judgment. They are by nature subject to no control but that of the Deity, and in that free situation they are now left. Every man is permitted to consider, to adore, and to worship his Creator in the manner most agreeable to his conscience."[2]

John Witherspoon, a member of the Continental Congress and signer of the Declaration of Independence was an evangelical minister who also served as President of the College of New Jersey (later renamed Princeton). His students at that school included future signers of the Declaration as well as delegates to the constitutional convention. James Madison was one of them. Witherspoon recognized the inherent relationship between civil liberty and religious freedom and when assaults came against either, both rallied in support of the other. He stated the matter well when he said in the paradigm of a prayer: "God grant that in America true religion and civil liberty may be inseparable and that unjust attempts to destroy the one, may in the issue tend to the support and establishment of both."[3]

S. 1584 and its companion in the House represent an assault on these historical notions of religious freedom. Time and the deliberative decisions of this Senate will determine whether the idea behind John Witherspoon's prayer will be honored. We urge this committee not to jettison the rights of people of faith, turn them into lesser privileges, or reduce them to a mere miniature of the concept that our Founder's held. If that happens here, it means that we have set ourselves on a very dangerous path, a radical departure from those basic liberties for which our Founders risked their lives, their fortunes and their sacred honor. Thank you.

The CHAIRMAN. Thank you very much, Mr. Parshall.

Now we turn to Ms. Camille Olson, a partner of Seyfarth Shaw, LLP.

Ms. Olson, welcome back. You've been here before.

Ms. OLSON. Thank you.

The CHAIRMAN. Thank you.

Ms. OLSON. It's good to be here again.

STATEMENT OF CAMILLE A. OLSON, PARTNER, SEYFARTH SHAW, LLP, CHICAGO, IL

Ms. OLSON. Good morning. Thank you, Chairman Harkin and other members of the committee.

My name is Camille Olson. I'm a partner with Seyfarth Shaw, a national law firm, where I'm the chair of its National Complex Discrimination Litigation Practice Group. I also regularly teach equal employment opportunity law at Loyola University School of Law in Chicago, IL, which is my hometown.

My practice is focused on representing employers to ensure that their policies and their practices comply with equal employment opportunity laws and nonharassment laws in the workplace. That work entails developing practices, policies, and compliance strategies, training managers and supervisors on their legal obligations in the workplace, as well as defending companies regarding challenges to those employment policies and practices.

I strongly support equal employment opportunities in employment, and in particular ensuring that employment decisions are based upon an individual's qualifications for a job and other legitimate nondiscriminatory factors. I believe that the fair and consistent application of workplace policies and practices is instru-

[2] John Jay's "Charge to the Grand Jury of Ulster County," April 20, 1777 cited in Henry P. Johnston, ed., *The Correspondence and Public Papers of John Jay 1745–1826*, (New York: Da Capo Press, 1971), Volt. I, page 163.

[3] "The Dominion of Providence Over the Passions of Men," delivered at Princeton on May 17, 1776, from *The Selected Writings of John Witherspoon*, edited by Thomas Miller (Carbondale, Ill.: Southern Illinois University Press 1990), page 147.

mental to an employer's success as an employer of choice in the community.

With respect to my comments today, my testimony is provided as a summary of some of my legal analysis on certain provisions of Senate bill 1584 as it applies to private employers. My testimony is provided in the hopes that it will result in clarification of certain of the provisions for the benefit of both employees and employers alike.

ENDA already demonstrates the significant examination and debate that has taken place over the years concerning the extension of protections in employment to individuals on the basis of sexual orientation and/or gender identity. Indeed, certain changes from the current version, as compared to early bills, reflect an understanding of the need to provide clarity in the workplace to ensure compliance with the legislation by carefully describing the obligations of employers and employees.

My written testimony highlights six points of uncertainty which I believe would benefit from further clarification, and I'd like to summarize those for you now.

There are three general points of clarification.

The first one is that I believe ENDA should be clarified to eliminate the possibility of double coverage and/or a double recovery for claims filed under both title VII and ENDA based on a common set of facts. This is because, as set forth in my written testimony, some courts have recognized that conduct based on sex stereotyping may be actionable under title VII, issues that would also be actionable under ENDA. Given the complicated issues inherent in gender discrimination, ENDA has been drafted as a stand-alone bill—stand-alone, as opposed to an amendment to title VII—to address these specific issues specific to gender identity claims. A number of the reasons for that have been articulated already in the testimony of other witnesses today.

Second, I believe ENDA should also be clarified to include a definition of "disparate impact." "Disparate impact" is stated in ENDA. but it doesn't reference a definition. If it is intended to pick up a definition from title VII, as other definitions in ENDA are intended to be picked up from title VII, those title VII provisions are specifically identified in ENDA. I would ask that the committee consider incorporating the definition that's contained in section 2000(e)(2)(k) of title VII as the "disparate impact" definition of ENDA, to make it clear what, in fact, is being talked about in connection with that particular phrase.

Third, with respect to another general clarification, ENDA should be clarified to make sure that it's clear that it is intended to include the same remedies that are contained within title VII. That's particularly true with respect to the remedies provisions. ENDA states that the procedures and remedies available under title VII are those that should be applicable under ENDA, and yet that isn't what the language of ENDA says after that particular statement. Instead, it says that it provides for attorney's fees with respect to administrative proceedings, for example.

ENDA should clearly State that it is not intended to allow the EEOC to award attorney's fees to private-sector participants in administrative hearings before it. Any other result would provide

more remedies for sexual orientation or gender identity discrimination that are currently available for discrimination under title VII or available under the Age Discrimination and Employment Act.

Let me also mention there are three specific provisions that require clarification with respect to an employer's obligations to accommodate employees with respect to gender identity issues in the workplace.

There are two provisions in ENDA that require employers to accommodate employees with respect to employment practices. Those obligations are triggered, upon notification by the employee that the employee has undergone, or is undergoing, gender transition. A few issues come immediately to mind.

First, I think it would be very helpful to employers and employees if everyone knew what triggered an employer's affirmative obligation with regard to shared facilities and application of the employer's dress and grooming standard. What notice is required? Is it written or verbal? Is it permissible for an employer to request documentation from a third-party professional, much like an employer does with respect to an ADA issue or an FMLA issue? Currently, ENDA doesn't really address that issue.

Second, what does it mean to have undergone, or to be undergoing, gender transition? The terms are undefined in ENDA, as it currently exists, and the process may include a variety of steps. I think it would be helpful to have that defined.

Third, and this is an important issue, in connection with ENDA, ENDA describes a fact that certain shared facilities, with respect to shared facilities where it may be inevitable that a person might be unclothed, would have certain accommodation obligations. As defined in ENDA, though, the certain shared facilities are shared showers or dressing facilities, and it doesn't—and it provides very good guidance to employers on those issues and describes a number—two different ways in which employers and employees can comply with a modification of a policy. The question that I raise is, Is that analysis also to apply to restrooms? I'm not suggesting that Section 8(a)(3) of ENDA be revised to include all restrooms, but that the committee consider whether it should be revised to include certain restrooms where being clothed would be unavoidable.

Finally, the last issue is, I believe ENDA should be clarified to specifically state whether employers are required to modify existing facilities with respect to section 8(a)(3). The language says that an employer is not required to construct new facilities. It doesn't really address the issue of modification. Is an employer required to modify? I believe that the committee could provide guidance through specific language in ENDA. And, if so, if a modification is required, on what timetable and to what extent? There would be less ambiguity, less confusion, and there would be more likelihood that individuals would understand how to comply with ENDA.

In conclusion, I believe the issues raised here should be considered and addressed as the committee continues to consider ENDA. I'd like to thank the committee, including, in particular, Chairman Harkin and other members of the committee, for the opportunity for me to share my thoughts with respect to ENDA.

Thank you very much.

[The prepared statement of Ms. Olson follows:]

PREPARED STATEMENT OF CAMILLE A. OLSON

Good afternoon, Mr. Chairman and members of the committee. My name is Camille A. Olson, and I am pleased to present this testimony addressing S. 1584, the Employment Non-Discrimination Act of 2009 ("S. 1584" or "ENDA"). I am a Partner with the law firm of Seyfarth Shaw LLP. Seyfarth Shaw is a national firm with 10 offices nationwide, and one of the largest labor and employment practices in the United States. Nationwide, over 350 Seyfarth Shaw attorneys provide advice, counsel, and litigation defense representation in connection with equal employment opportunities, as well as other labor and employment matters affecting employees in their workplaces.[1]

I. INTRODUCTION

I am the Chairperson of Seyfarth Shaw's Labor and Employment Department's Complex Discrimination Litigation Practice Group. I have practiced in the areas of employment discrimination counseling and litigation defense for over 20 years in Chicago, IL. I am a member of both the California and Illinois bars. Members of our firm, along with our training subsidiary, Seyfarth Shaw at Work, have written a number of treatises on employment laws; advised thousands of employers on compliance issues; and trained tens of thousands of managers and employees with respect to compliance with their employer's policies relating to equal employment opportunities and non-harassment in the workplace, as well as the requirements of State and Federal employment laws. We have also actively conducted workplace audits and developed best practices for implementation of new policies addressing employer obligations on a companywide, statewide, and/or nationwide basis (depending on the particular employment practice at issue).

My personal legal practice specializes in equal employment opportunity compliance—counseling employers as to their legal obligations under Federal and State law, developing best practices in the workplace, training managers and supervisors on the legal obligations they have in the workplace, and litigating employment discrimination cases. I also teach equal employment opportunity law at Loyola University School of Law in Chicago, IL. I am a frequent lecturer and have published numerous articles and chapters on various employment and equal employment opportunity issues. For example, in 2009 I co-edited a book now in its Sixth Edition entitled *Guide to Employment Law Compliance* for Thompson Publishing Group; and, in late 2008 and 2009, I, along with other Seyfarth Shaw partners, have conducted numerous webinars, teleconferences, and full-day seminars across the country for employers and the Society for Human Resource Management on an employer's new obligations under the recently passed amendments to the Americans with Disabilities Act, 42 U.S.C. §§ 12101–12213 (1994) ("ADA").[2] I am also a member of the U.S. Chamber of Commerce's Policy Subcommittee on Equal Employment Opportunity, and I am a member of the Board of Directors of a number of business and charitable institutions.

II. SUMMARY OF TESTIMONY

Today, I have been invited to discuss with you the impact of the Employment Non-Discrimination Act of 2009 in the employment context, separate and apart from my relationship with the above-noted institutions, clients, and associations. I strongly support equal opportunities in employment, and, in particular, ensuring that employment decisions are based upon an individual's qualifications for a job (including education, experience, and other relevant competencies), as well as other legitimate nondiscriminatory factors. Similarly, I believe that fair and consistent application of workplace practices and policies is instrumental to an employer's success as an employer of choice in the community.[3]

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[1] I would like to acknowledge Seyfarth Shaw attorneys Annette Tyman and Sam Schwartz-Fenwick for their invaluable assistance in the preparation of this testimony.

[2] The amendments to the ADA are contained in the Americans with Disabilities Act Amendments Act, 42 U.S.C. § 12101, et seq. and 29 U.S.C. § 705 (2008) that became effective January 1, 2009.

[3] Seyfarth Shaw is a nationwide employer of over 1,650 persons providing services throughout the United States. Seyfarth Shaw's non-discrimination policy, applicable to all employees, states as follows: "Seyfarth Shaw is committed to the principles of equal employment opportunity. Firm practices and employment decisions, including those regarding recruitment, hiring, assignment, promotion and compensation, shall not be based on any person's sex, race, color, religion, ancestry or national origin, age, disability, marital status, sexual orientation, gender identity or expression, veteran status, citizenship status, or other protected group status as defined by law. Sexual harassment or harassment based on other protected group status as defined by law is also prohibited."

My purpose in providing this testimony is not to comment positively or negatively on whether the U.S. Senate should enact S. 1584 into law as sound public policy. Rather, my testimony is provided as a summary distillation of my legal analysis of certain provisions of S. 1584 as they apply to private sector employers only.[4] This analysis is provided within the context of other Federal non-discrimination in employment legislation, such as Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. It is also provided to highlight certain practical uncertainties sure to be faced by employers attempting to comply with its provisions, and by employees attempting to understand their rights and obligations under ENDA. As such, this testimony is provided in the hopes that this information will result in the clarification of certain of S. 1584 provisions for the benefit of employees and employers alike. If S. 1584 passes; such clarifications would minimize confusion and litigation over the meaning of certain provisions, and enable employers to conform with congressional intent as expressed through S. 1584's plain language. This would also better track the protections afforded to other protected groups under title VII, as amended, and related Federal employment discrimination statutes.

As drafted, S. 1584 clearly provides the following:

- S. 1584 prohibits employers from discriminating against an individual based on that person's actual or perceived sexual orientation or gender identity with respect to employment decisions and other terms, conditions, and privileges of employment.[5]
- S. 1584 prohibits employers from discriminating against employees or applicants by limiting, segregating, or classifying them on the basis of their actual or perceived sexual orientation or gender identity in a way that adversely affects them.[6]
- S. 1584 prohibits employers from discriminating against an individual based on the perceived or actual sexual orientation or gender identity of a person with whom that person associates.[7]
- S. 1584 prohibits employers from retaliating against an individual based on the individual's opposition to an unlawful employment practice, or for participating in a charge, investigation, or hearing.[8]
- S. 1584 does not prohibit an employer from enforcing rules and policies that do not intentionally circumvent its purposes.[9]
- S. 1584 does not require an employer to treat an unmarried couple in the same manner as a married couple for employee benefits purposes.[10] The term "married" as used in S. 1584 is defined in the Defense of Marriage Act, 1 U.S.C. § 7 et seq.
- S. 1584 requires that an employee notify their employer if the employee is undergoing gender transition and requests the use of shower or dressing areas that do not conflict with the gender to which the employee is transitioning or has transitioned. An employer may satisfy the employee's request in one of two ways, through either providing access to the general shower or dressing areas of the gender the employee is transitioning to or has transitioned to; or by providing reasonable access to adequate facilities that are not inconsistent with that gender.[11]
- S. 1584 does not require employers to build new or additional facilities.[12]
- S. 1584 does not require or permit employers to grant preferential treatment to an individual because of the individual's actual or perceived sexual orientation or gender identity.[13]
- S. 1584 does not require or permit an employer to adopt or implement a quota on the basis of actual or perceived sexual orientation or gender identity.[14]
- S. 1584 allows employers to continue to require an employee to adhere to reasonable dress and grooming standards compliant with other applicable laws consistent with the employee's sex at birth, so long as an employee who has notified their employer that they have undergone or are undergoing gender transition is allowed the opportunity to follow the same dress or grooming standards for the gender to which the employee has transitioned or is transitioning.[15]

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[4] My testimony is limited to S. 1584's application to private sector employers. It does not specifically address S. 1584's provisions unique to religious organizations (Section 6), the Armed Forces (Section 7), or to local, State, or Federal Governments (Section 3(a)(4)((b–d)).

[5] S. 1584, Section 4 (a)(1).

[6] S. 1584, Section 4(a)(2).

[7] S. 1584, Section 4(e).

[8] S. 1584, Section 5.

[9] S. 1584, Section 8(a)(1).

[10] S. 1584 Section 8(b).

[11] S. 1584, Section 8(a)(3).

[12] S. 1584, Section 8(a)(4).

[13] S. 1584, Section 4(f)(1).

[14] S. 1584, Section 4(f)(2).

[15] S. 1584, Section 8(a)(5).

• S. 1584 requires employers to post notices that describe its provisions.[16]
• S. 1584 would be effective 6 months following the date of its enactment, and it does not apply to conduct occurring prior to its effective date.[17]

However, as drafted, S. 1584 creates the following ambiguity and uncertainty:

• Whether title VII and ENDA will provide duplicate causes of action for sex stereotyping;
• How "disparate impact" claims will be defined under ENDA;
• Whether ENDA was intended to provide more robust remedies for attorney's fees than those available under title VII;
• Determining what triggers an employer's affirmative obligations with regard to shared facilities and application of its dressing and grooming standards;
• Whether "certain shared facilities" include restrooms; and
• Whether employers are required to modify existing facilities.

III. THE EMPLOYEE NON-DISCRIMINATION ACT OF 2009

A. Existing Protections Against Sex Discrimination in Employment

Existing Federal employment laws prohibit discrimination on the basis of an individual's sex. Under Federal law it is unlawful to:

• Discriminate against a person because she is a female;[18]
• Discriminate against a person because he is a male;
• Discriminate against a person because she is pregnant;[19]
• Discriminate against a person by sexually harassing a member of the opposite sex based on his or her sex;[20]
• Discriminate against a person by sexually harassing a member of the same sex based on his or her sex;[21] and
• Discriminate against a person due to gender stereotyping because of his or her sex.[22]

No Federal law, however, prohibits employers from discriminating against employees based on their sexual orientation or gender identity.[23] Courts have recognized the difficulty that they often face in determining under title VII whether certain conduct is "because of the individual's sex" as opposed to their sexual orientation or gender identity. For example, the Seventh Circuit Court of Appeals has described the various factual settings raised by these cases as obligating them to "navigate the tricky legal waters of male-on-male sex harassment."[24] As a result, some courts have reached inconsistent results as to whether similar factual situations are covered by title VII's prohibition against sex discrimination where there is evidence that the discrimination was "because of . . . sex." For instance, some courts have found that males who behave femininely or who dress in women's clothing are not protected by title VII, while others conclude that they are protected by title VII.[25]

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[16] S. 1584, Section 13.
[17] S. 1584, Section 17.
[18] *See* Title VII of the Civil Rights Acts of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"); *see also* The Equal Pay Act of 1963, 29 U.S.C. § 206(d) et seq. (the "EPA").
[19] *See* Pregnancy Discrimination Act of 1978, amending title VII § 2000e(k).
[20] *See Meritor Say. Bank* v. *Vinson*, 477 U.S. 57 (1986).
[21] *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (male employee alleging he was sexually harassed by his male supervisor and two male co-workers, none of whom were alleged to be gay, alleges same-sex sexual harassment which is a violation of title VII).
[22] *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989) (female employee alleging she was denied a promotion as a result of being described as being "macho," "overcompensating for being a woman," and being given advice to "take a course at charm school," and "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" in order to improve her chances for promotion, stated a cause of action under title VII for sex discrimination because she did not conform to the stereotypes associated with being a woman).
[23] *See, e.g., Hamner* v. *St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 704 (7th Cir. 2000) (the protections of title VII do not permit claims based on an individual's sexual orientation); *Etsitty* v. *Utah Transit Auth.*, 502 F.3d 1215 (10th Cir. 2007) (employer did not violate title VII when it terminated a transgendered employee finding that discrimination against a transsexual is not "discrimination because of sex").
[24] *See, e.g., Hamm* v. *Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1061 (7th Cir. 2003) (sexual orientation not covered by title VII).
[25] Compare *Etsitty*, 502 F.3d 1215 (10th Cir. 2007) (employer did not violate title VII when it terminated a transgendered employee, finding that discrimination against a transsexual is not "discrimination because of sex") with *Smith* v. *City of Salem*, 378 F.3d 566 (6th Cir. 2004) (concluding a transgender plaintiff could bring a sex discrimination claim under title VII) and *Schroer* v. *Billington*, 577 F. Supp. 2d 293 (D.C. Cir. 2008) (employer violated title VII when

A number of jurisdictions have enacted legislation prohibiting discrimination based on sexual orientation and/or gender identity. To date, 12 States and the District of Columbia prohibit discrimination based on gender identity and sexual orientation.[26] Twenty-one States and the District of Columbia prohibit discrimination based on sexual orientation.[27] The legal obligations imposed by such State laws differ from State to State.

B. Summary of Federal Legislative Efforts to Enact ENDA

Legislation to prohibit employment discrimination on the basis of sexual orientation was first introduced in 1994 before the 103rd Congress.[28] Since then, legislation has been introduced in almost every session of Congress to address this topic. For instance, in 2002, hearings on S. 1284, legislation introduced in the 107th Congress, were held before this committee. This committee favorably reported the bill and it was placed on the Senate calendar. In 2007, protections on the basis of gender identity were included for the first time in a bill introduced only in the House of Representatives.[29] Although hearings were held, the legislation proposed in 2007 did not garner enough support for passage in the House. Later that year, legislation that included only a prohibition against discrimination on the basis of sexual orientation was introduced and passed by the U.S. House of Representatives.[30] Similar legislation was not introduced in the Senate in 2007.

Many of S. 1584's provisions track the language of title VII, the principal equal employment opportunity statute that employers have used as their guidepost in developing appropriate policies and practices regarding non-discrimination in employment. For example, S. 1584 references existing provisions of title VII to define certain terms, such as employee, employer, and employment agencies; and to reference specific enforcement powers, procedures, and remedies.[31]

The language contained in S. 1584 demonstrates the significant examination and debate that has taken place over the years concerning the extension of protections in employment to individuals on the basis of sexual orientation and now, gender identity. Indeed, certain changes from the current version as compared to S. 1284 and/or the bill introduced in the House in 2007 ("ENDA 2007"), reflects an understanding of the need to provide clarity in the workplace to ensure compliance with the legislation, by carefully describing the obligations of employers and employees. Some examples of the clarifications urged in prior hearings and addressed in S. 1584 are set forth below:

- ENDA 2007, Section 5 prohibited retaliation against an individual for opposing any practice made unlawful by the Act, or against an individual who made a charge or who provided testimony under the Act.[32] Given that the concept of retaliation is a well understood principle in employment law, legal practitioners suggested that language track the language already available under existing laws to minimize confusion and litigation. S. 1584 includes revised retaliation language that parallels the well established language prohibiting retaliation contained in title VII.[33]
- ENDA 2007, Section 8(a)(1) provided:

IN GENERAL.—Nothing in this Act shall be construed to prohibit a covered entity from enforcing rules and policies that do not circumvent the purposes of this Act, if the rules or policies are designed for, and uniformly applied to, all individuals regardless of actual or perceived sexual orientation or gender identity.[34]

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it rescinded an employment offer upon learning the employee was transgendered). *See*, also, *Hamm*, 332 F.3d at 1066 (Judge Posner's concurring opinion describing case law in this area as having "gone off the tracks" under title VII) and *Nichols* v. *Azteca Rest. Enters., Inc.* and *The Legacy of Price Waterhouse* v. *Hopkins: Does Title VII Prohibit "Effeminacy" Discrimination?*, 54 Ala. L. Rev. 193, Fall 2002, and *Sex Stereotyping Per Se: Transgender Employees and Title VII*, 95 Cal. L. Rev. 561, Apr. 2007.

[26] These jurisdictions include California, Colorado, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington, as well as the District of Columbia.

[27] These jurisdictions include those set forth directly above, as well as Connecticut, Delaware, Hawaii, Maryland, Massachusetts, Nevada, New Hampshire, New York, and Wisconsin.

[28] Human Rights Campaign, Timeline: The Employment Non-Discrimination Act, *http://www.hrc.org/issues/workplace/5636.htm* (last visited Nov. 3, 2009).

[29] H.R. 2015.

[30] H.R. 3685.

[31] *See, e.g.*, S. 1584, Section 3 (Definitions—partial); Section 4 (Employment Discrimination Prohibited—partial); Section 5 (Retaliation Prohibited); Section 10 (Enforcement—partial); and Section 13 (Posting Notices).

[32] H.R. 2015.

[33] Compare H.R. 2015, Section (5) with S. 1584, Section 5.

[34] Compare H.R. 2015, section 8(a)(1) with S. 1584, section 8(a)(1).

Practitioners urged drafters to insert the word "intentionally" before the phrase, "circumvent the purposes of this Act" to ensure that section 8(a)(1) would not be used to unintentionally incorporate concepts of disparate impact claims into ENDA. S. 1584 has been revised to include the word "intentionally."

• ENDA 2007 section 17 and S. 1284 section 19 provided that ENDA would take effect 60 days after the date of enactment. S. 1584 provides for its effective date to be 6 months after the date of enactment. This 6-month lead time will be particularly helpful to employers to allow sufficient time to make necessary revisions to their policies, practices, and procedures. This will also provide adequate time for employers to train managers, human resource professionals, and employees to ensure compliance with a new Federal law.

C. S. 1584 Requires Clarification

As described in Section III.B. above, as drafted, S. 1584 has provided clarity concerning certain provisions in prior House and Senate bills regarding many of the new obligations ENDA would impose upon employers. Notwithstanding these clarifications, certain ambiguities remain that warrant further discussion and analysis. These ambiguities are described below in two sections. Section 1 addresses general ENDA points requiring clarification. Section 2 addresses specific points with regard to the application of specific provisions of ENDA regarding an employer's facilities and policies to an employee's gender identity protections, and specifically to individuals who have undergone or are undergoing gender transition.

1. General Points Requiring Clarification

a. Whether Title VII and ENDA Will Provide Duplicate Causes of Action for Sex Stereotyping

ENDA is the only Federal legislation, that, if enacted, would expressly prohibit discrimination or retaliation on the basis of sexual orientation[35] and gender identity.[36] While courts have made clear that no Federal cause of action exists for discrimination on the basis of an individual's sexual orientation or gender identity,[37] as noted on pages 6–7, *supra*, some Federal courts have inconsistently extended title VII protections to factual situations brought on the basis of sex-stereotyping that more accurately involve claims of sexual orientation and/or an individual's gender identity.

If enacted in its current form, these same factual scenarios would clearly be actionable under ENDA given its broad definition of gender identity. What is sex-stereotyping if it is not discrimination based upon an individual's "appearance, or mannerisms or other gender-related characteristics . . . with or without regard to the individual's designated sex at birth?"[38] These concepts are overlapping, thus, certain factual situations that some courts have found actionable under title VII would most assuredly also be actionable under ENDA.

Moreover, with regard to the relationship between ENDA and other laws, section 15 of ENDA specifically provides as follows:

> This Act shall not invalidate or limit the rights, remedies, or procedures available to an individual claiming discrimination prohibited under any other Federal law or regulation or any law or regulation of a State or political subdivision of a state.

Given this language, it is clear that ENDA, as currently drafted, serves only to add protections on the basis of sexual orientation and gender identity, and that it does not replace any claims that would otherwise be actionable under title VII.

Yet, such a reading of the two statutes would lead to the unintended consequence of a potential dual recovery by a successful plaintiff filing claims under both title VII and ENDA for the same alleged wrongful conduct. As such, it is critical that ENDA include language which makes clear that ENDA is the exclusive Federal remedy for any alleged conduct on the basis of sexual orientation or gender identity as those terms have been defined. Accordingly, I urge this committee to carefully

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[35] Sexual orientation is defined as "homosexuality, heterosexuality, or bisexuality." H.R. 3017, Section 3(9).

[36] Gender identity is defined 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." S. 1584, section 3(6).

[37] *Dawson* v. *Bumble & Bumble*, 398 F.3d 211 (2nd Cir. 2004); *Bibby* v. *Phila. Coca Cola Bottling Co.*, 260 F.3d 257 (3rd Cir. 2001); *Simonton* v. *Runyon*, 232 F.3d 33 (2nd Cir. 2000); *Spearman* v. *Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000); *Hamm, supra,* 332 F.3d 1058; *Centola* v. *Potter*, 183 F.Supp.2d 403 (D.Mass. 2002).

[38] S. 1584, Section 3(6); *see also Price Waterhouse*, 490 U.S. 228.

consider the interplay between ENDA and title VII to ensure that there is not an unintended duplication of remedies and that congressional intent be made abundantly clear in this regard.

b. Disparate Impact Claims Are Not Available Under S. 1584

Disparate treatment claims are actionable under S. 1584.[39] S. 1584 prohibits intentional discrimination only.[40]

In contrast, disparate impact claims are not available under S. 1584.[41] In other words, S. 1584 does not provide individuals with a remedy for alleged discrimination that is based on a rule or policy that does not intentionally circumvent ENDA, so long as the rules and policies are applied equally to all individuals regardless of their sexual orientation or gender identity.

The most familiar statutory definition of a disparate impact claim is in title VII.[42] Thus, to ensure that disparate impact claims are appropriately defined, *and properly excluded from ENDA*, a reference to title VII's statutory definition of a disparate impact claim should be included in ENDA. The current language leaves some ambiguity. For example, section 4(g) of ENDA provides as follows: Disparate Impact—Only disparate treatment claims may be brought under this Act.

Thus, while section 4(g) is entitled "Disparate Impact"—the text of the provision does not explicitly define disparate impact claims, or expressly state that they may not be brought under ENDA. Rather, the provision instead affirmatively states that only disparate treatment claims may be brought under ENDA. Accordingly, this committee should also consider adding a provision that explicitly defines disparate impact claims and excludes disparate impact claims for sexual orientation and gender identity from ENDA's prohibitions to ensure that congressional intent is clear as to the claims that are exempted from S. 1584.

c. The Remedies Available Under S. 1584. Should Parallel Those Available Under Title VII

S. 1584, Section 10(b)(1) specifically provides that the procedures and remedies applicable are those set forth in title VII (42 U.S.C. § 2000e et seq.). Despite this provision, Section 12 of ENDA expands the remedies with respect to attorney's fees for claims arising under ENDA beyond those currently available under title VII. Specifically, section 12 provides as follows with regard to attorney's fees:

> Notwithstanding any other provision of this Act, in an action or ***administrative proceeding*** for a violation of this Act, ***an entity described in section 10(a) (other than paragraph (4) of such section)***, in the discretion of the entity, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs. The Commission and the United States shall be liable for the costs to the same extent as a private person.[43]

In contrast, title VII provides as follows with regard to attorney's fees:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert fees) as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person."[44]

Specifically, S. 1584, Section 12, expands the remedies that would otherwise be available under title VII by permitting a prevailing party in an "administrative proceeding" to recover a "reasonable attorney's fee (including expert fees) as part of the costs." Although it is unclear who is a "prevailing party" under ENDA, employees who receive a finding of substantial evidence from the Equal Employment Opportunity Commission ("EEOC") or another administrative agency as described in section 10(a) may arguably be entitled to attorney's fees. This is a significant expansion of the remedies available under title VII.

This inconsistency between ENDA and title VII would mean that a plaintiff who alleges discrimination on the basis of sexual orientation or gender identity would be entitled to greater remedies than a plaintiff who alleges discrimination on the basis of race, color, religion, sex, or national origin. Moreover, other employment dis-

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[39] S. 1584, Section 4(g).
[40] S. 1584, Section 8(a)(1).
[41] *Id.*
[42] 42 U.S.C. § 2000e–2(k).
[43] S. 1584, Section 12. Attorney's Fees (emphasis added).
[44] Title VII § 2000e–5(k). Attorney's Fees; Liability of Commission and United States for Costs (emphasis added).

crimination statutes, including the ADA, adopt title VII's remedies. ENDA, in contrast, as discussed, would add new remedies.

Moreover, the very nature of the investigative proceeding at the administrative agency phase demonstrates why an award of attorney's fees would not be appropriate. First, EEOC decisions are not considered "final orders" subject to appeal, thus an employer would be deprived of its due process rights to contest any such award. In fact, the EEOC is not required to provide documented reasons for its decisions. Accordingly, an employer may not be provided a written basis for the EEOC's decision. Moreover, information submitted at the EEOC phase is produced to assist the EEOC in its investigation, and is not subject to the Federal Rules of Evidence.

The second significant departure contained in ENDA, as compared to title VII, relates to who is granted the authority and discretion to grant such awards. As noted above, under ENDA, courts and administrative agencies, such as the EEOC, are granted the authority to award attorney's fees. In contrast, title VII appropriately limits the authority to grant such remedies to the courts. Courts, and not administrative agencies, are best positioned to decide who is a "prevailing party" under the law. Such decisions should be made only after careful consideration and review of the admissible evidence as presented by both the plaintiff and the employer.

For these reasons, this committee should undertake a careful examination of Section 12 of ENDA to ensure that the remedies available to a plaintiff under ENDA are consistent with provisions under title VII, consistent with S. 1584's expressed congressional intent.

2. Specific Provisions Requiring Clarification Regarding Gender Identity

Among other protections, S. 1584 makes it a violation of Federal law for an employer to "discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's actual or perceived sexual orientation or gender identity."[45] S. 1584 further provides as follows:

> [Section 8(a)(3)] CERTAIN SHARED FACILITIES.—Nothing in this Act shall be construed to establish 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 seen unclothed 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.[46]
>
> [Section 8(a)(5)] DRESS AND GROOMING STANDARDS.—Nothing in this Act shall prohibit an employer from requiring an employee, during the employee's hours at work, to adhere to reasonable dress or grooming standards not prohibited by other provisions of Federal, State, or local law, *provided that the employer permits 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*.[47]

Thus, in addition to prohibiting discrimination in employment on the basis of gender identity, ENDA places affirmative obligations on employers. Specifically, employers are required to adjust their policies, practices, or procedures with regard to "certain shared facilities" and "dress and grooming standards" for a subset of individuals who have either "undergone" or who are "undergoing" transition to a gender other than their gender at birth."[48] These affirmative obligations present unique issues in the workplace that merit further consideration and reflection.

a. What Triggers an Employer's Affirmative Obligation?

The first issue that requires additional consideration relates to the use of the phrases, "upon notification" and "notified the employer." As an initial matter, it is unclear whether these similar, though different, phrases mean the same thing. For the sake of clarity, one phrase should be selected and used consistently throughout to avoid confusion.

Second, the terms "notification" and "notified" are vague terms that should be modified to clarify what the employee is required to do before an employer's obliga-

[45] S. 1584, Section 4(a)(1).
[46] S. 1584, Section 8(a)(3) (emphasis added).
[47] S. 1584, Section 8(a)(5) (emphasis added).
[48] *Id.* at Section 8(a)(3) and 8(a)(5).

tions are triggered. For instance, does the employee have to notify the employer in writing, or does a verbal conversation satisfy the employee's obligation to notify? Is the employee's own statement sufficient, or is it permissible for an employer to request confirmation from a third-party professional before it is required to amend its policies, procedures, or practices for the requesting individual? Are the employer's obligations to modify its existing policies triggered immediately upon notification? And if not, how soon is the employer required to act? Should the employee be required to provide sufficient lead time to allow the employer the opportunity to make adjustments as appropriate? And if so, how much time is necessary? These questions are not currently addressed in S. 1584.

b. Who Is Covered by Sections 8(a)(3) and 8(a)(5)?

Sections 8(a)(3) and 8(a)(5) are applicable to only a subset of employees that are otherwise covered under ENDA. Specifically, these sections are applicable to those individuals that have "undergone" or who are "undergoing gender transition." Absent from ENDA, however, is a definition of the phrases "undergone," "undergoing," or "gender transition." These undefined phrases are particularly problematic given that "gender transition" is a broad term used to describe a combination of social, medical, and legal steps that an individual may, or may not, choose to undergo in their decision to define their gender identity.[49]

For instance, social steps in the process might include asking to be referred to by a different name or pronouns (i.e., "she" instead of "he" or vice versa).[50] Such steps may also involve an employee using clothing or accessories traditionally worn by individuals of the sex and/or gender the employee identifies with, or taking on mannerisms associated with a particular gender.[51]

Certain employees may also choose to take medical steps to further conform to their core gender identity. Such medical interventions may include hormonal therapies and/or surgery to further modify their physical appearance or attributes.[52] Finally, transitioning individuals may utilize courts or other agencies to achieve legal recognition of their new name and/or gender.[53] Thus, the term "gender transition" implicates a wide range of steps that employees may be said to have "undergone" or be "undergoing."

As previously stated, one of the social steps in the gender transition process may include the use of clothing, make-up, or accessories commonly associated with an individual's true identity rather than with his or her gender at birth. As currently written, "undergoing" may be so broadly interpreted as to cover any employee who presents in a gender non-conforming manner on a single day.

Such distinctions on issues that most employers may not fully comprehend may be cause for significant concern and confusion in the employer community. Thus, defining more specifically those individuals who can make requests under sections 8(a)(3) and 8(a)(5) should be clearly defined in ENDA.

c. Do "Certain Shared Facilities" Include Restrooms?

Section 8(a)(3) implicates a common, yet controversial, issue related to transitioning employees. Specifically, which "certain shared facilities" should transitioning employees use, and when is it appropriate for these employees to begin using shared facilities designated for members of the "opposite sex." Though entitled "Certain Shared Facilities," Section 8(a)(3) provides only limited guidance on this issue. As written, it applies only to "shared shower or dressing facilities in which being seen unclothed is unavoidable."[54] In such shared facilities, an employer who has been notified that an employee has or is undergoing gender transition has the following two options: (1) to allow the transitioning employee access to the shared facilities designated for the gender to which the individual is transitioning; or (2) to provide the transitioning employee with "reasonable access to adequate facilities" that are not inconsistent with the gender to which they are transitioning.

Glaringly absent from ENDA, however, is guidance for employers with respect to bathrooms or restrooms. Indeed, far more prevalent in the workplace than "shared shower or dressing facilities in which being seen unclothed is unavoidable" are restrooms. The same privacy issues that give rise to the use of "shared showers or

[49] Transgender Visibility Guide: A Note on Transitioning, available at *http://www.hrc.org/issues/transgender/13105.htm*. (last viewed Sept. 21, 2009); *see also* The Transsexual Person in Your Life, Responses To Some Frequently Asked Questions/Frequently Held Concerns, available at *http://www.tsfaq.info/*. (last viewed Sept. 21, 2009).

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] S. 1584, section 8(a)(3).

dressing facilities" are applicable to some bathrooms where being seen unclothed is also unavoidable. Employers should be provided the same flexibility that H.R. 3016 provides employers with respect to shared shower or dressing facilities by expressly permitting employers to decide which restrooms transitioning employees will have access to so long as they are permitted "reasonable access to adequate" restrooms.

Moreover, because the definition of "gender identity" in S. 1584 is broader than the subgroup of individuals who have or who are undergoing gender transition, it should also be clarified to expressly state whether an employer has any obligation to allow anyone other than transgendered employees access to shared facilities that are designated for use by only members of one particular sex. Given that restroom accommodations may be perhaps one of the most controversial issues employers will be required to face if ENDA is enacted in its current form, congressional guidance on this point would be helpful to employers who will be required to implement policies, practices, and procedures consistent with ENDA.

d. Are Employers Required to Modify Existing Facilities Under ENDA?

Section 8(a)(4) of ENDA provides as follows:

> ADDITIONAL FACILITIES NOT REQUIRED.—Nothing in this Act shall be construed to require the construction of new or additional facilities.[55]

Given the language in the text, it is clear that ENDA does not require an employer to construct new or additional facilities. Left unanswered, however, is whether employers are nonetheless required to *modify* existing facilities. Clarification concerning this issue is critical so as to have certainty with respect to the scope of an employer's obligations under ENDA.[56]

IV. CONCLUSION

In conclusion, I believe that the issues raised herein should be considered and addressed as the committee considers the Employment Non-Discrimination Act of 2009. Chairman Harkin, Ranking Member Enzi, and members of the committee, I thank you for the opportunity to share my thoughts with you today. Please do not hesitate to contact me if I can be of further assistance in suggesting ways in which to improve ENDA's language to ensure that it meets congressional objectives.

The CHAIRMAN. Thank you, Ms. Olson.

Again, I thank all of you for being here today.

I'll just start my first 5-minute round, and then we can continue on.

I would like to get right to the issue basically raised by Mr. Parshall. I would direct this, again, to Professor Norton. ENDA has a very broad religious exemption based on that that already exists in title VII. Yet we've heard criticism that this bill is an attack on religious liberties, especially the ability of religious organizations to object to what they consider immoral behavior. So, I guess I'd liked to have any response that you might have, that—if you heard Mr. Parshall's testimony—(a) Do you think religious organizations are at risk under this bill? Do you believe that the Civil Rights Act and ENDA strike a balance where religious institutions should be able to make employment decisions consistent with their religious beliefs, but nonreligious employers are not exempt? Is it appropriate that private employers whose primary purpose and character is not religious should not be exempted?

So, again, I just—I throw those out, but I just want your response on the religious exemption and how ENDA might impact that.

Ms. NORTON. Certainly, Chairman Harkin.

In short, I do believe that ENDA, as currently drafted, strikes a clear and appropriate balance between the interests of religious in-

[55] H.R. 3917, Section 8(a)(4).

[56] If ENDA were clarified to require an employer to undertake such affirmative obligations with respect to modification of existing facilities, it is critical to also provide guidance on when those obligations are triggered and when they must be completed.

stitutions and the equal employment opportunity rights of all Americans. Let me make several points.

First, let me emphasize that the language of the bill is crystal clear. This is section 6, "This Act"—meaning ENDA—"This Act shall not apply"—this Act, which would prohibit sexual orientation discrimination and gender identity discrimination—"shall not apply"—period—to a, "a religious corporation or association, educational institution, or society that is exempt from title VII's religious discrimination provision."

So, in other words, if an institution qualifies for the title VII exemption—under current law, that means that an organization may discriminate on the basis of religion—it's also clear that, under this bill, that organization is also free from the prohibition on sexual orientation and gender identity discrimination that would be created by this act.

Second, the U.S. Supreme Court has held that a 1987 decision in Amos—that the title VII religious exemption does strike an appropriate constitutional balance between free exercise and establishment-clause violations as applied to the nonprofit activities of religious institution. That Court said that title VII, as drafted, does exempt religious institutions, in that, as applied to their nonprofit activities, religious or otherwise, that is constitutional. The Court declined to rule whether a broader exemption would pass constitutional scrutiny. In fact, several members of the Court concurred separately to emphasize their concern that a broader exemption—for example, an exemption that relieved religious institutions' for-profit activities from compliance with title VII—they concurred separately that to emphasize that a broader exemption of that nature may well run afoul of establishment-clause principles. So, the Court has, in fact, endorsed the balance struck by the title VII exemptions.

Third, we have a long history—a 45-year history—of courts interpreting the scope of the religious institution exemptions under title VII. The rule is—that is applied in that—in those cases is clear across all circuits. Courts determine whether or not the institution is primarily religious or primarily secular in function and purpose. In many cases, this is an easy call. If the institution is a church, a parochial school, a religious mission, a house of worship, clearly it's a religious institution that qualifies for the exemption under title VII and would qualify for the exemption under ENDA, as well.

Different facts will lead to different outcomes. Different facts that suggest a different religious or secular character will lead to different outcomes. That's a single rule applied to different facts that, understandably, would get you to different outcomes.

In the small universe of cases in which institutions have been denied the exemption, I would characterize them as falling into one or two categories. Again, this is a small universe of characters.

First, a for-profit employer producing a secular product will not be found to be a religious institution. It's not primarily religious in function and purpose.

Second, an institution that was founded with a religious mission—perhaps hundreds of years ago—but has changed in operation over time and is now, in fact, secular in operation may no

longer qualify for the religious institution exemption. Courts look at its operation at the time of the employment decision in question.

Mr. PARSHALL. Senator, may I respond just very quickly to the——

The CHAIRMAN. Mr. Parshall.

Mr. PARSHALL. I appreciate Professor Norton's comments. And she is right, I agree, absolutely, that the language of section 6 is crystal clear. Its meaning, however, is hopelessly complex and, I think, inscrutable. Here's the reason why. Section 6 simply says, "If you're covered under title VII, you are covered under ENDA as a religious organization."

I think it seems to be an effortless analysis. The problem is—let's look at title VII. Title VII language says that religious organizations are exempt regarding employment decisions of persons, "of a particular religion," to perform work connected with the carrying on of the organization's activities. "Of a particular religion." The courts have indicated, as I've cited in my testimony, that what that means is, if the employer's religious views conflict with the employee's religious views, they get a pass. Only as to that. Sex and gender discrimination, they don't get a pass.

There is an exception, called the "ministerial exception," but that only applies to a rabbi in a synagogue, a Imam in a house of worship under Islam, a Christian pastor in a church, as an example. But, 99 percent of the problems are not dealing with the head clergy person in an organization.

Now, if we have a person who is non-hired because of sexual orientation, the court will then ask, "Well, is this because of the religion of the employee?" The answer would have to be "no." As a result, title VII's being incorporated into section 6 is going to be a meaningless exercise and will provide no protection at all.

Second, Professor Norton mentioned the Amos case, and it was a significant case, and they did indicate that it was limited to nonprofit organizations. In that case, it was a religion decision made by the Mormons about the religious viewpoint of a certain person. But, my concern is that we have many, many broadcasters, as an example, who are for-profit. Now, most of our broadcasters are nonprofit, tax-exempt organizations, religious organizations, but many are religious Christians in their charter, their mission, their characterization, and yet, they are for-profit, in terms of taking advertising dollars. Those, it is my firm belief, will get absolutely no protection under ENDA, regardless of how you interpret section 6.

And the last point that Professor Norton made about the scope of past decisions being sort of fact-specific. That is true, courts look at them as a case-by-case basis. But, when I look at, for instance, the fact that a child welfare society in a U.S. District Court in Virginia, an orphanage, was—clearly Christian in its mission, Christian in its nature of its operations, and yet it had a head of the organization that, for a short period of time, started steering toward more secular goals, then they returned to their original Christian mission. They were denied an exemption. A thoroughly Christian small business that employed Christians at bible studies and wanted to integrate Christianity in all aspects of the workplace, that was denied exemption under title VII.

So, those are some of the complicated problems that I foresee in getting any meaningful protection for religious groups under title VII being incorporated into ENDA.

The CHAIRMAN. I've used up more than my 5-minutes.

I ask the indulgence of my fellow Senators, if I might get a response on that.

I'd like to, Ms. Norton—but, Attorney General Madigan, you've had experience in Illinois under this. You've heard the exchange. Do you think there's adequate protections for bona fide religious organizations and churches under ENDA?

Ms. MADIGAN. Let me tell you the experience of the State of Illinois, in terms of the amendments to our Human Rights Act, which, as you all know, includes sexual orientation and gender identity. We have seen no more than a handful of complaints against religious institutions. In fact, we haven't seen any for the last 2 fiscal years, so the last one would have been prior to July 1, 2008.

I will not be as eloquent, nor will I—I don't practice in this area; I'm mainly defending the State of Illinois—as Professor Norton was able to explain. So, I think that, you know, in all legal cases there are two sides to a story. The courts throughout this country, as has been noted, have had slightly less than 45 years—I think the current language in that section is from 1972; so, since 1972 they have been interpreting that language, and have done a good job of it, creating, again, as Professor Norton said, a standard that is applicable across the circuits. So, I do believe, No. 1, based on the experience in Illinois, this has not been an issue; and, No. 2, that the courts will definitely understand the implication of importing the title VII standard.

The CHAIRMAN. Ms. Norton, do we know—I probably should ask Senator Franken this—has there been any problems in the States that have had such a law on their books for a long time? Now, Iowa's only had it on its books for a couple of years, but some States go back to the 1990s. What's been the experience in these States, dealing with the religious exemption?

Ms. NORTON. Right. I think it—backing up Attorney General Madigan's experience, as well, I think there's been very, very little experience. There's very few complaints of any type being filed under the statute. In Colorado, for example, and in most States, you see only dozens of complaints filed at all under this statute in any given year. Larger States, like New York and California, maybe a few hundred. But, a very small fraction of the total human rights caseload in those States. Actually, I can't give you an example of a case involving a religious institution as a defendant; not to say that they don't exist, but just to say that the sample size is very small.

The CHAIRMAN. Thank you very much. I've used double my amount of time.

Senator Merkley.

Senator MERKLEY. Thank you very much, Mr. Chair.

Officer Carney, thank you for your terrific testimony. You note that our Constitution says that, "All men are created equal, endowed by their creator, with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness." Do you find,

from your experience, that equal opportunity at your job is integral to life, liberty, and the pursuit of happiness?

Mr. CARNEY. Well, the only thing I can do is tell you from experience that the first 30 years of my life were hell. I hid, and I tormented myself over my sexual orientation, my identity issue. Since then, since I filed my complaint and it became public knowledge that I was gay, everything in my life has gotten better. I truly feel that I am much healthier, I take care of myself, and I feel that—and hope that I'm a better employee as a result of that.

So, I really feel strongly that having somebody out in the workforce is tremendously an asset to—and hopefully our department, as well as others.

Senator MERKLEY. In your testimony, you described how you were denied re-application three times, spent 2½ years appealing that. The Commission Against Discrimination found that you had been discriminated against, and you were restored. And since then, you've been a police academy instructor, a detective in the Youth Assessment Center, detective in the Narcotics Division, and an aide to the chief of police. Would any of that have been possible if you lived in a State that did not have protections against discrimination?

Mr. CARNEY. No, sir.

Senator MERKLEY. Thank goodness you were in a State that did. It's too bad it took so long and interrupted your life.

This makes me want to turn to Professor Norton and some of your testimony. The court found that David Martin was subject to a constant stream of degrading sexual comments, lewd conduct, posting of profane graffiti, other forms of harassment, but his case was dismissed because, "The torment endured by Martin, as reprehensible as it is, relates to his sexual orientation, and is thus unremedied by the law." So, harassment of gay, lesbian, and transgender people are legal in States that do not have protection against discrimination.

Ms. NORTON. That's correct, Senator.

Senator MERKLEY. That is unbelievable to me.

To go on, Michael Vickers, who befriended a gay colleague, was then the subject of sexual slurs, derogatory remarks, irritant chemicals in his food and personal property, engaged in a long list of harassment. And the court found,

> "While the harassment alleged by Vickers reflects conduct that is socially unacceptable and repugnant to workplace standards of proper treatment and civility, his claim does not fit within the probations of the law."

In Kentucky, this intense harassment was legal because Vickers was gay.

Ms. NORTON. That's correct, sir.

Senator MERKLEY. And I could go on. The next example cited that the court found that, "No doubt the conduct engaged,"—this is regarding Dwayne Simonton—"engaged in Simonton's co-workers is morally reprehensible whenever and in whatever context it occurs, particularly in the modern workplace." But, the court went on to reject his claim, saying, "The law is well-suited, does not protect harassment or discrimination."

If we pass the Employment Non-Discrimination Act, will this "morally reprehensible"—as described by one court—"repugnant behavior," this direct harassment, making people extraordinarily miserable in the workplace, will it finally be illegal for the GLBT community to be subject to that kind of treatment?

Ms. NORTON. Yes, sir, it will make that treatment illegal.

Senator MERKLEY. Thank you. As you can tell, I think that it's about time that we protect all American citizens, giving them both the chance to have a job that they would like to apply for—without discrimination hiring—and certainly against this repugnant, unacceptable, harassment in the workplace.

Attorney General Madigan, we've had the experience in Oregon for a year and a half now; so, a shorter period of time. We've had a modest number of complaints. The press calls it—and the headline was, "Gay Discrimination Complaints, Few Under Oregon Law. An Oregon law protecting gays from discrimination, housing, work has produced a mere trickle of complaints." It goes on to analyze those complaints. And finds that basically, the law is doing what it should. Conduct has changed as a result of the law.

And I believe, in your testimony, you said you had more complaints about GLBT treatment in the workplace—I think it was 10 percent versus 2 to 4 percent now—and you've seen the impact. People recognize, "Oh, I can't harass people in the workplace like I did before," and there's actually fewer complaints now than previously.

Ms. MADIGAN. The complaint levels have—initially they were low, they went up in the second year, down in the third, they're up in the fourth. I think that happens for a number of reasons.

No. 1, initially people are not aware of the law. Our Department of Human Rights has been very proactive in educating people and employers about the laws. Employers, as I mentioned, have adopted this into their policies, are doing training programs on it. So, there's a greater awareness.

But, nonetheless, when you look at the total number of complaints, they're still relatively small. If I average it out, I would say no more than 100 a year, under sexual orientation and gender identity, that have been filed.

Senator MERKLEY. Chair, I see I'm over my time, but I had one more question to pursue, here. Thank you.

You also note that charges filed with IDHR show that religious—and I assume it's Illinois Department of Human Rights?

Ms. MADIGAN. Correct.

Senator MERKLEY. Show that religious institutions have not been impacted by the 2006 amendments to the Illinois Human Rights Act. Can you expand on that? You don't see a stream of complaints from religious institutions saying that they're being unfairly constrained?

Ms. MADIGAN. We do not. In fact, when we went to amend our Human Rights Act in 2005, there was significant support among people in the religious communities of our State for this amendment to include sexual orientation and gender identity. In addition, as my testimony indicates, no more than a handful of complaints. We have none since fiscal year 2009, so that would have been July 1, 2008.

Senator MERKLEY. It's probably appropriate to note here that we have received a letter from the Union of Orthodox Jewish Congregations of America, from the U.S. Conference of Catholic Bishops, and the General Conference of Seventh-Day Adventists, that I'd like to have entered into the record.

[The information referred to follows:]

GENERAL CONFERENCE—SEVENTH DAY ADVENTIST CHURCH,
SILVER SPRING, MD 20904,

UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA,
WASHINGTON, DC 20001,

U.S. CONFERENCE OF CATHOLIC BISHOPS,
WASHINGTON, DC 20017,
October 18, 2007.

Hon. GEORGE MILLER, *Chairman,*
Hon. HOWARD "BUCK" MCKEON, *Ranking Member,*
House Committee on Education and Labor,
U.S. House of Representatives,
Washington, DC 20515.

DEAR CHAIRMAN MILLER AND RANKING MEMBER MCKEON: While we have no position on the underlying legislation, 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—to express our support for the religious exemption language found in section 6 and section 3(a)(8) of H.R. 3685, the Employment Non-discrimination Act of 2007 (ENDA), being considered by the committee today.

As was the case in versions of ENDA that were introduced in previous congresses, the language in section 6 of H.R. 3685 contains a single sentence exempting religious organizations from its provisions. Also as in previous congresses, H.R. 3685 defines religious organization in a manner that is consistent with the language found in Title VII of the Civil Rights Act of 1964. We believe this language provides an indispensable protection for the free exercise rights of religious organizations and strongly support its inclusion in ENDA.

We understand that an amendment may be offered in the committee's markup that would alter the carefully calibrated language contained in section 6 and section 3(a)(8) of H.R. 3685. Adoption of such an amendment would present our organizations with grave concerns about unacceptable government infringement upon the freedoms guaranteed to religious organizations by the U.S. Constitution, as well as by Supreme Court and statutory precedents. We would oppose any such amendment.

By including language that is consistent with the religious exemption language from previous congresses, we believe that the religious liberties guaranteed by the U.S. Constitution, Supreme Court jurisprudence, and existing Federal law are better protected. We urge you to oppose any amendment that would upset this tradition.

Sincerely,

NATHAN J. DIAMENT, *Director of Public Policy,*
Union of Orthodox Jewish Congregations of America.

ANTHONY PICARELLO, *General Counsel,*
U.S. Conference of Catholic Bishops.

JAMES STANDISH, *Legislative Director,*
General Conference of Seventh-Day Adventists.

Senator MERKLEY. They have written to,

> "express our support for the religious-exemption language found in section 6, section 3(a)(8) of H.R. 3685, the Employment Non-Discrimination Act, being considered by the committee today."

I'll tell you, we had an intense discussion. Many of the types of detailed concerns, "the sky is falling" concerns, expressed by Mr. Parshall were part of the conversation we had in Oregon 2 years ago. We worked very hard to bring a lot of common sense to cre-

ating that boundary of fairness to religious institutions. We have had, to my knowledge, exactly zero complaints following implementation of this law. It sounds like that parallels your experience over a greater period of time in Illinois.

Ms. MADIGAN. It does, Senator. Again, this is a necessary and useful law to protect people—all people in the State of Illinois—and certainly it is long overdue that these protections exist across the country.

Senator MERKLEY. I'm out of time. But, thank you, Nike——

[Laughter.]

Senator MERKLEY [continuing]. So much for your leadership.

Thank you, to Diane Rosenbaum. She's a State senator from Oregon who was absolutely the heart of our effort to create fairness in the workplace, and I appreciate that she was able to come this morning.

Thank you.

The CHAIRMAN. We welcome you here. Thank you very much.

Senator Franken.

Senator FRANKEN. Mr. Chairman, thank you.

Mr. Carney, I heard you bring up, "life, liberty, and the pursuit of happiness."

Mr. CARNEY. Yes, sir.

Senator FRANKEN. It seems like that's a pretty basic principle here——

Mr. CARNEY. One would think so, sir.

Senator FRANKEN [continuing]. In this country.

Mr. CARNEY. Yes.

Senator FRANKEN. Ms. Nguyen, you brought up one of the credos of Nike—and by the way, I've been to the campus there in Beaverton; it is unbelievable. And all these credos that you have there seem to be working pretty good. And yours is, "bringing their full selves to work." Is that right? How did you put that?

Ms. NGUYEN. "An inclusive environment where people are bringing their full selves to work," yes.

Senator FRANKEN. OK.

Now, it seems like the result of not having this law is that people can't bring their full selves to work——

Ms. NGUYEN. Right.

Senator FRANKEN [continuing]. If they're fearing, "I could get fired, I could get harassed, I could be driven out of my job by an unfriendly environment if I let everybody know who I was." So, you feel like you get productivity from people when they bring their full selves to work.

Ms. NGUYEN. Yes. That's absolutely correct.

Senator FRANKEN. But, it seems like not having ENDA means that people aren't able to bring their full selves to work, and I just wonder about the loss in productivity, and what you see in the gain in productivity at Nike from people being able to bring their full selves to work.

Ms. NGUYEN. That's a great question.

For us, the heart of Nike is around innovation. We firmly believe, as I mentioned, that diversity is one of those key levers that keeps Nike on the leading edge of innovation. If we are not creating an environment that is inclusive and celebrates the diversity and is

able to tap into all the diverse perspectives that our wealth of talent brings, then we suffer—our innovation suffers, our creativity suffers, and our morale suffers.

Senator FRANKEN. So, in a way, what we're doing, by not letting people be themselves in the workplace, is suppressing productivity.

Ms. NGUYEN. Yes. People are not going to be giving their all, essentially, or playing at the top of their game in the workplace——

Senator FRANKEN. OK.

Ms. NGUYEN [continuing]. If they're not comfortable with being who they are in the workplace.

Senator FRANKEN. Professor Norton, I want to ask you a question. Mr. Parshall, I want you to be able to respond to it. So, I might go over my time, but not anywhere near——

[Laughter.]

Senator FRANKEN [continuing]. As much as Senator Merkley.

But, I'm not a lawyer. I'm one of the few members of this committee that isn't, but I did some research, and I discovered that most Americans aren't——

[Laughter.]

Senator FRANKEN [continuing]. So, I'm representing them.

But, as I was hearing Mr. Parshall talk about title VII and the religious exemption, which you heard all these different religious groups in Oregon commended and signed on to.

Senator MERKLEY. These are national groups.

Senator FRANKEN. Oh, those are national groups, sorry.

It seemed like he was making a kind of distinction. He was saying that the exemption is built around what the person is being discriminated against—like in title VII, which is race or gender—as opposed to defining the kind of organization that's exempt. I want you to speak to this, Mr. Parshall. It seems like you're kind of making a false distinction here, that title VII was basically defining what kind of organization and what kinds of organizations are exempt, and not really defining what the thing you can't be prejudiced against is. You understand what I'm saying? Because I'm not saying it so great.

[Laughter.]

Ms. NORTON. I understand you very well, Senator Franken. Thank you for the question.

I, respectfully but strongly, disagree with Mr. Parshall's description of the religious exemption and how it works.

Title VII, you're exactly right, defines a range of institutions—institutions that are exempt from title VII's prohibition on religious discrimination. There are two provisions.

One exempts religious corporations, associations, educational institutions, and societies. If you fall into that category of institutions, you may discriminate on the basis of religion without running afoul of title VII.

Title VII has another exemption for educational institutions that don't fall into that earlier exemption, but nonetheless are, in whole or in substantial part, owned, controlled, managed, or operated by a religious institution, or that had a curriculum that's directed toward the propagation of a religion. Again, if you fall in that category of institutions, you are relieved from title VII's prohibition on religious discrimination.

Now, if you fall into either of those categories, you must still comply with the remainder of title VII, which means you cannot discriminate on the basis of race, color, sex, or national origin.

ENDA very clearly—section 6 is very clear—that, "This Act shall not apply"—this Act, which prohibits sexual orientation and gender identity discrimination—"shall not apply to those institutions that are exempt under title VII." So, once this bill becomes law, if you fall into one of the religious institution exemptions, you are relieved from title VII's prohibition on religious discrimination, and you are relieved from ENDA's prohibition on sexual orientation and gender identity discrimination, period.

Senator FRANKEN. OK.

Mr. Parshall, I want you to respond to that.

Mr. Chairman, I really—I'm sorry about this, but——

I'd like you to respond to that Mr. Parshall. I am over my time. I wouldn't mind if you had a chance to respond to the response. OK?

[Laughter.]

Mr. PARSHALL. Thank you for your fundamental fairness, Senator, I appreciate that.

Senator FRANKEN. Fundamental fairness would have me allowing you to respond to her response to your response. And I'm not going to do that.

[Laughter.]

Mr. PARSHALL. Sometimes we lawyers enjoy a refreshing nonlawyer's perspective in getting down to the bottom of the bottom line. I think you've just touched on it. What does title VII really exempt? You've hit on part of it, but not all of it. No. 1, the nature of the organization—and it has a list—religious corporations, institutions, educational, and so forth—that describes the nature of the organization. That's one inquiry. But, there's a second prong that the courts apply, and that is, No. 1, are you a religious organization falling within title VII's language, but, No. 2, what is the focus of your conduct? The case—cases have said, "If your focus is to discriminate based on race or sex or gender, the exemption doesn't apply, but if it's directed to the faith, or lack of, of the employee, then we have a collision between faith and faith, and that's where the exemption kicks in."

Now, the problem is, if a homosexual or lesbian or transgender person applies at a Christian bookstore, as an example, and they said, "We're not going to hire you." Let's say they say, "We aren't hiring you because of your sexual orientation," the courts will look at the language—and I'm just going to quote one case, that is a Third Circuit case—Third Circuit Court of Appeals—that interprets the religious exemption under title VII this way, "The statute exempts religious entities and educational organizations from its nondiscrimination mandate to the extent that an employment decision"—and this is the important part—"is based on the individual's"—that is, the employee or prospective employee's—"religious preferences." So, if a person of sexual orientation that doesn't happen to coincide with the religious beliefs of a Christian bookstore or a Christian publisher, says, "Well, I'm a Lutheran. This isn't a Lutheran publishing company. No problem. You don't have an exemption." But, if he says, "I'm an atheist and a transgender," then

the Christian publishing might have an exemption. That's part of the confusion that I think occurs by section 6 just simply importing the whole title VII scheme.

Senator FRANKEN. Yes. I think I understand that. Can I just have a brief response to that?

Ms. NORTON. Yes, sir. Again, I respectfully but strongly disagree with Mr. Parshall's characterization. Title VII first asks, "Do you fall into one of these institutional categories?" If so, you're relieved from the prohibition on religious discrimination. If so, section 6 of ENDA is completely clear that you're also relieved of the prohibition on discrimination on the basis of sexual orientation and gender identity.

Senator FRANKEN. But, he's saying that religious discrimination is discriminating against the person's religious beliefs, as opposed to discriminating against their gender or sexual orientation or their gender identification.

Ms. NORTON. Sure, those are different things. But, the significance of the exemption in ENDA is that if, for example—we'll just use the example he used—if you are a Lutheran religious institution—actually, I don't want to pick on Lutherans; there's many in Minnesota and Iowa and elsewhere.

Senator FRANKEN. That's right. They're terrific.

[Laughter.]

Ms. NORTON. If you're—I'm Lutheran—if you're a religious institution within the meaning of title VII, you are free from ENDA. So, it's OK if you say, "I'm discriminating against him or her because"—it's OK as a legal standard, not as a moral standard.

Senator FRANKEN [I have actually gone further over my time than Senator Merkley.

Senator MERKLEY. Far over.

Senator FRANKEN. Yes.

Senator MERKLEY. Far over.

[Laughter.]

Senator FRANKEN. OK, thank you, Senator. That just took more time, didn't it?

[Laughter.]

But, why don't you guys talk between yourselves and settle this and let us know how it came out.

[Laughter.]

Thank you, Mr. Chairman.

The CHAIRMAN. I would say—Do you have a response to that, Mr. Parshall?

Mr. PARSHALL. Well, I do. I'll give you an example. This is a case—this is a recent case. I cited it in my written testimony. It's at the bottom of page 4 of my testimony—written testimony, page 5. Prowel versus Wise Business Forms, this is an August 28th, 2009, just but 2 months fresh out of the docket, from the Third Circuit Court of Appeals. This is a case where a person was clearly a person whose sexual orientation didn't meet the agreement of some people who are religious people in that small business. They directed religious comments, the plaintiff felt, in a harassing way. One of the claims this employee made was gender discrimination and also religious discrimination. Now, again, we don't have ENDA, so the court had to face whether or not there's the sex

stereotyping theory that can be used. By the way, by my count, four Federal Circuits—it would be the First Circuit, Third Circuit, Sixth Circuit, the Ninth Circuit of the Federal Circuits—have adopted the theory that if you're a homosexual and you're harassed on the job because you don't meet the gender stereotype of these heterosexuals that don't like you, you can file a claim without ENDA. But, in the course of that—in that decision, the Wise Business Forms decision, 2 months old, said that the nature of the discrimination against this individual really wasn't religious, even though he cited examples of it being motivated by the religious positions of employees and the employer allowed it to happen. They said, basically, this is gender—this is sex or gender type discrimination. I think that's what the courts are going to say. They've already said, in a number of cases, that the situation of a person who is discriminated based on sexual orientation is very similar to a gender discrimination case that we've already had under title VII. So, the proclivity of the court is, I think, clear, they're going to probably orient their decision and say, "It's very much like sex discrimination," which religious groups don't have a pass on, "or race discrimination," where we don't have a pass on, rather than say it's really having to do with the faith of the employee.

Ms. NORTON. Can I make—I'll make one last pass. With all due respect, Mr. Parshall's creating a problem that does not exist. The effect of the title VII religious exemption is that if a plaintiff files a claim of religious discrimination against an organization that falls within one of those exemptions, that plaintiff will lose on a motion to dismiss. We will never get to the merits. The courts will say, "Exempt under title VII." The effect of ENDA, once it becomes an act, is, if a plaintiff files a sexual orientation or gender identity discrimination claim against an institution that falls within that exemption, that plaintiff will lose on a motion to dismiss. We will not get to the merits. Those institutions do not have to comply with ENDA's prohibitions on sexual orientation and gender identity discrimination.

The CHAIRMAN. But, I assume that the court will look at the essence of the fundamental structure of the entity that the complaint is being filed against.

Ms. NORTON. To determine whether the exemption applies, that's true, yes.

The CHAIRMAN. Sure. To get back to facts, what are the facts in the case. No legislation that we ever pass here can cover every perceivable factual situation that might arise in the future. So, that's why—sure, you can bring up a fact situation and a fact that maybe we hadn't anticipated. But, again, we can't anticipate every factual situation that might come up. All we can do is give the broad guidance to courts as to exactly what we meant in this, with both the legislation as we frame it and the report language that encompasses it.

I've had that same experience with the Americans with Disabilities Act for all these years, for crying out loud. We had to come back, as you know, last year, and pass the ADA Act amendments to instruct that court over there as to what we meant. We did it with a bipartisan majority. So, this is not unusual for courts to either misinterpret or to kind of veer off from what we wanted to do.

So, I say that in the way of saying that when we pass broad civil rights legislation as the Americans with Disabilities Act was, or as this is, or title VII or some civil rights act, that we may have to from time to time come back as a Congress to instruct the courts as to what it is that we mean. I have no doubt that that's going to continue far beyond my lifetime.

I want to switch to a different subject. Ms. Nguyen—because this is going to come up; it was brought up by Ms. Olson, and it's going to come up—and that is accommodations——

Ms. NGUYEN. Yes.

The CHAIRMAN [continuing]. Accommodations about bathroom facilities. How do you handle that issue?

Ms. NGUYEN. Right.

The CHAIRMAN. Well, how do you do it at Nike?

Ms. NGUYEN. Thank you, Senator. At Nike, employees use the facility that corresponds to the gender to which they identify, regardless of their gender at birth, and that includes locker rooms in our fitness centers and our restrooms. So, in our locker rooms and, of course, the restrooms, there are private areas that employees could use if they so choose. If there are unusual circumstances that arise, those are dealt with on a case-by-case basis to arrive at solutions that are safe and convenient and dignified for our employees.

The CHAIRMAN. So, you haven't experienced a real problem.

Ms. NGUYEN. No, not at all.

The CHAIRMAN. That's why I wanted to cover it.

Senator Merkley.

Senator MERKLEY. Thank you very much, Mr. Chairman. I want to ask a couple more questions.

I want to note that the letter that I submitted for the record from the Union of Orthodox Jewish Congregations of America, the U.S. Conference of Catholic Bishops, and the General Conference of Seventh-Day Adventists, was a letter written 2 years ago about the other religious exemption language found in the House bill. It is the same language we've incorporated into this Senate bill. But, I did want to clarify that this was a 2007 letter written in the context of the House discussion.

I wanted to switch now and ask a little bit more, Ms. Nguyen, about Nike's leadership. The last year that we held a hearing on ENDA here in the Senate was 2002—7 years ago. In 2002, you testified, Nike was 1 of just 13 companies that got a perfect score from the Human Rights Campaign's Corporate Equality Index, but that there's been a lot of change over the last 7 years, in terms of companies signing up to provide fairness in the workplace. Maybe you could just describe the—I'm not sure how long you've been at Nike; I didn't catch that. But, can you describe——

Ms. NGUYEN. Since 2004.

Senator MERKLEY. OK. Then, since 2004, what kind of transition have you seen in the business community across America?

Ms. NGUYEN. Thank you. That's a good question. Someone said it before, I think, that the conversation has changed, especially around diversity in a corporate environment. We know that there is a direct correlation between diversity and leveraging diversity and inclusion and a company's bottom line. So, looking at it from

that perspective, it just makes sense. It's a huge business benefit for us at Nike. It's sort of simple as that.

Senator MERKLEY. Thank you. Can you expand a little bit on the group, Business Coalition for Workplace Fairness, a coalition of 80 leading companies who support passage. In addition to advocating for passage of this law, what kinds of other things are they doing to advance fairness in the workplace?

Ms. NGUYEN. I don't have all the information that the Coalition is doing; however, after the hearing, I'm happy to have someone contact you for more information specifically related to the Coalition.

[The information referred to may be found in Additional Materials.]

Senator MERKLEY. That would be great.

Ms. NGUYEN. Absolutely.

Senator MERKLEY. In terms of the Fortune 500 companies, if we turned the clock back just 6 years, 360 of the 500 companies provided protection, and now it's up to 425, only 75 that don't—a diminishing number. It's a similar progress, in terms of gender identity; it was only 26 companies, 6 years ago, and in your testimony, I believe, you said it was more than a third.

Ms. NGUYEN. Yes.

Senator MERKLEY So, more than 100-and-about-60 companies, at this point.

I'd just like to invite anyone else to speak, who has been part of this conversation over the years, on the type of transitions that have occurred between 2002, when we last held a hearing, and 2009. Would anybody like to share any comments or insights on that?

Ms. OLSON. If I might share just some comments on that question, as well as, I think, on the question from Senator Harkin that was posed earlier, in terms of, What are really the biggest challenges or the biggest impediments, in terms of incorporation of the kinds of prohibitions that we're talking about in ENDA and the workplace? I speak from an experience of both myself as well as over 100 labor and employment lawyers who work with employers across the country, counseling employers regarding their policies and practices and implementation of those policies and practices through training and through other methods, in terms of developing what are the appropriate practices. I think it is absolutely critical to have clarity. I noted a number of different issues, and I note them not as theoretical possibilities or issues, but I note them. The issue of shared facilities is an issue that comes up quite a bit. It does. ENDA, unlike almost all State laws—currently, the draft that you're looking at, contains specific language which directs employers, "Here are the two alternatives you have when this issue is posed." That's very, very helpful to employers.

And, in terms of the other issues that I raised, I think the more we can have clarity, the more that—the draft of ENDA that we're looking at has a 6-month implementation cycle. And to ensure that we have our policies and practices, we have training with employees and their supervisors regarding, What are the obligations if these policies and programs aren't already in place or if, because they have a policy that's not exactly in line with the requirements

of ENDA, that it's amended appropriately, I think it would be really helpful in terms of seizing an opportunity to make sure everybody has clear guidance and that they can implement the direction of Congress in this area.

Senator MERKLEY. Like my colleague from Minnesota, I'm not a lawyer, either.

[Laughter.]

Shocking, isn't it?

[Laughter.]

As you were going through your list, I was thinking back to the conversations we had in Oregon about very fine points of the law, what could produce a lawsuit, what could produce this. I think that conversation is very responsible. I think it's very useful. I also want to point out that the number of complaints that have come in States that have implemented workplace fairness from employers, it's incredibly few compared to the number of employers covered. We're not aware of a single such concern from a religious institution or any other institution in Oregon in the 18-month history of our implementation. While I think we should consider being as smart as we can, I also want to recognize that—let's not lose track of the forest for the trees. And that is that once you establish a principle of equality under the law, of equal opportunity, people get it, and their behavior changes, and it works. And we need to get to that point by passing this law.

Thank you, to the whole panel—oh, yes, Mr. Carney. We'll take this off of my colleague's clock.

[Laughter.]

Mr. CARNEY. Glad to do that, sir. I just wanted to say one thing. I find it twisted and ironic that my job as a public servant is to go out on the streets every day and to protect the civil rights of everyone. Most of those civil rights, I don't have as a gay American. I think it's time that Americans speak up to this. It's an act like this and a bill like this that offers a level playing field for all. It really, truly means that we will all be treated equal. Isn't this what it's all about?

Thank you.

Senator MERKLEY. That is what it's all about. Thank you. Thank you for your earlier powerful testimony.

The CHAIRMAN. Senator Franken.

Senator FRANKEN. Thank you.

I want to thank Senator Merkley for the statement he made, which is that once you lay out these principles—that it's not lawful to be prejudiced, to discriminate against people who are gay and transgender and lesbian and bisexual—it changes things.

I want to get into an area with Mr. Carney here. You spoke to the nature of your job: law enforcement. It seems to me that we've had problems, in the history of law enforcement, in terms of the police and being biased, in the way they protect the public safety, against, at certain times, blacks and against gays. To what extent do you think that it probably helps everybody to have a diverse population in our law enforcement?

Mr. CARNEY. Thank you, Senator. Very well put. You know, the last 19 years of my life, since I've come out, has truly been an unbelievable experience. It's been a learning experience for myself, as

well. Working with my community and my department, we have come up with several programs to work with kids. It builds and bonds the trust between the citizens and the police officers. We do the same thing with the gay community. The concept of community policing, which is, you know, a term that we've all used over the years, is having a department that looks like the community that it serves. I believe that that should be a department that should be integrated by race, gender, and sexual orientation. We have had a lot of luck working with the community. Specifically, I have been given information from the gay community on murders, that we were able to solve. We were targeted—we had a heterosexual man who was targeting gay men, and robbing them, and beating them. They came to me, and they asked me what I could find out about it. I went into the community, and we were able to solve these problems. We can. I can't, but we can. It's a fundamental—you know, it's just a concept that we need to work together on. I think that it really brings in a whole new concept into policing, having a department that looks like the communities that we serve. And that's everyone.

Senator FRANKEN. Thank you.

Mr. CARNEY. Thank you.

Senator FRANKEN. Thank you, Mr. Chairman.

The CHAIRMAN. Very true, Mr. Carney. Very true.

Mr. CARNEY. Thank you, Senator.

The CHAIRMAN. Let me cover one thing. Being a lawyer but not a very good one.

[Laughter.]

I do want to get something in the record regarding sovereign immunity. And again, for instructions to the courts down the way.

Attorney General Madigan, as the attorney general of Illinois, do you support abrogating sovereign immunity here? And, both you and Ms. Norton, do you think this is within the purview of Congress, within our constitutional authority, to abrogate sovereign immunity here?

Ms. MADIGAN. As the attorney general of Illinois, I have no objection to abrogating State eleventh amendment immunity under ENDA. In fact, the recent trend in Illinois has been for the State to abrogate that immunity itself from suits under Federal employment and Federal civil rights laws. So, I believe that the citizens of the State of Illinois should have an unfettered right to vindicate their Federal antidiscrimination claims. As I mentioned, we have been doing this since I've been the attorney general.

The CHAIRMAN. Very good.

Ms. Norton.

Ms. NORTON. Mr. Chairman, I certainly agree that ENDA, as drafted, satisfies the U.S. Supreme Court's criteria for congressional abrogation of State sovereign immunity. First, ENDA clearly and unequivocally announces Congress's intention to abrogate. And second, the record that has been developed over 15 years, and continues through today, clearly demonstrates that Congress has a valid source of congressional authority through the Fourteenth Amendment to abrogate State sovereign immunity here. That longstanding record was most recently supplemented by the Williams Institute report that you alluded to. That's the most recent, and as-

suredly the most extensive, discussion of widespread, persistent, and irrational—irrational—discrimination on the basis of sexual orientation and gender identity by State government employers. Because that discrimination is irrational and has no relation to ability in the workplace, it is unconstitutional, under any standard, and, as a result, fully develops the record necessary to establish that Congress has the fourteenth amendment authority to abrogate State sovereign immunity in this context.

The CHAIRMAN. Very good.

I believe we have a vote on the floor now on cloture on Commerce, State, and Justice Appropriations Act. Did anyone have any final comments, from our panel? You've come a great distance, some of you, and is there any final question that we didn't ask that you would like to make a statement on before we close shop here? Going once, going twice.

[No response.]

The record will remain open for 10 days for member statements and questions for the record.

Thank you all. I thank my fellow Senators for being here today. This is, again, I believe, one of the most important issues confronting us as Americans, the ongoing issue of the evolvement of our Nation in fulfilling civil rights. I don't believe our country has ever gone wrong when we expand civil rights. Never.

But I am respectful of Mr. Parshall and the community that he's here to represent. This is a balance. I am very respectful of people's religious beliefs. That's civil rights, also. But, we have to balance those out for the good of the Nation. Quite frankly, I feel that, through the evolvement of ENDA and through the evolvement—through the experiences that we have had with title VII, with other civil rights bills, one that—again, I'm particularly close to, the Americans With Disabilities Act—we find our way through these things. I remember the debate around the ADA, and, oh my gosh, the sky was going to fall, we were going to have to do all these things, and were going to have to hire people we didn't want to hire, and just—all these things we heard. None of it really came to fruition. Fears were shunted aside. Employers have found out that in many cases, the best employees they can hire are people with disabilities. We've opened up our whole society for families with children with disabilities.

Again, I think—in this context also, I think we're always going to be bumping up against different groups and what they consider to be their civil rights compared to the civil rights of other groups. But, I believe that, as I said earlier, courts will have their role to play, but, as the U.S. Supreme Court said in a very famous civil rights case involving the Americans With Disabilities Act, as the Court said, "We're not the final word on this. The Congress is." This Congress will continue to come back, come back in the future to look at these, and to make sure that we balance these out so that people's civil rights are respected in this country, but where no group can impose on another group their beliefs. No group can take their beliefs or their situations and force somebody else to do something against their conscience. We're not about that. We're about making sure that people can enjoy employment, can have their rights protected, so when they go to work they are judged not

on what their belief is or whether they're male or female, whether they're gay, bisexual, or transgender. Their status should not be relevant. That's what this is all about, is making sure that the structure is fair for everyone, and everyone gets an equal shot at employment opportunities in this country. That's what ENDA's about, and that's why I'm determined, as chairman, to get this bill through next year.

Thank you all very much for being here, and the committee will stand adjourned.

[Additional material follows.]

ADDITIONAL MATERIAL

PREPARED STATEMENT OF SENATOR DODD

Chairman Harkin, fellow members of the committee, thank you for holding this hearing.

While I am proud to speak in favor of this landmark civil rights legislation, I am troubled and a bit baffled that the question of whether or not we should permit discrimination in the workplace is still up for debate.

I'm proud to report that my home State of Connecticut has had laws on the books prohibiting employment discrimination based solely on sexual orientation since 1991. Nevertheless, in 29 other States, it is legal to fire someone because of their sexual orientation. In 38 States, it is legal to fire someone because of their gender identity. In an era that has seen so much progress towards equality, those are shocking numbers.

The 1964 Civil Rights act prohibits employment discrimination based on race, national origin, religion, and sex. We are, as a nation, rightfully proud of that legislation, and of the steps we have taken since to follow through on the promise of a society—or, at the very least, a workplace—free of discrimination.

But these employment protections have not been universally applied to gay, lesbian, bisexual, and transgender Americans. And that should offend us all.

I am proud to be an original co-sponsor of the Employment Non-Discrimination Act (ENDA). Modeled after Title VII of the Civil Rights Act, ENDA will make it illegal for private employers in this country to fire, refuse to hire, or otherwise discriminate against individuals because of their actual or perceived sexual orientation or gender identity. It will also empower the U.S. Equal Employment Opportunity Commission (EEOC) and the Justice Department to enforce these new protections in the same manner as for other forms of discrimination, and it will prohibit the use of preferential treatment or quotas in employment decisions.

For those who have faced discrimination in the workplace because of who they are, and for those who fear it today, this legislation is long overdue. But it is never too late to make history. Last week, we did so when we expanded Federal hate crimes statutes to cover violence motivated by sexual orientation and gender identity. Let us do so again today by finally remedying this unconscionable gap in our efforts to build a more perfect union. Thank you.

PREPARED STATEMENT OF SENATOR BROWN

Thank you, Mr. Chairman, for holding this hearing.

I am sure it was with a heavy heart that you took over the HELP Chairmanship after the passing of our dear friend Ted Kennedy.

But we are comforted knowing it is his spirit and his legacy of fighting for civil rights for all Americans that brings us to this important day.

Fifteen years ago, Ted Kennedy first introduced the Employment Non-Discrimination Act.

While there have been many battles since to extend the equal protection of law to all Americans, I am encouraged that the Senate will finally consider and pass this critical civil rights and labor legislation during the 111th Congress.

It's unacceptable that in this day and age, qualified, hard-working Americans are denied job opportunities or are fired simply because they are gay, lesbian, bisexual, or transgender (GLBT).

It's disheartening that many others live in fear that they may lose their jobs if they are open about their sexuality.

Many Americans believe, erroneously, that current Federal labor laws protect the GLBT community from discrimination of this type.

But it is a sad fact that no such protection exists—it is unfortunate that in many States, it is perfectly legal to fire qualified individuals simply because of their sexual orientation or identity.

The Employment Non-Discrimination Act is a common-sense solution to this problem.

It extends current Federal employment discrimination protections based on race, religion, gender, national origin, age, and disability to include sexual orientation and gender identity.

ENDA extends fair employment practices—not special rights—to all Americans. It would prohibit employers, employment agencies, and labor unions from using an individual's sexual orientation or gender identity as the basis for employment decisions such as hiring, firing, promotion, or compensation.

In a nation based on equal rights for all, it is inherently wrong that hardworking individuals could lose their incomes, their benefits, and their livelihoods simply for being who they are.

The time has come to afford all Americans equal protection under the law, to provide all Americans the dignity and respect they deserve.

The time has come to pass the Employment Non-Discrimination Act.

PREPARED STATEMENT OF SENATOR SANDERS

I would like to thank Chairman Harkin for holding this hearing on legislation that seeks to end employment discrimination based on sexual orientation. Let me add that this bill honors the late Senator Ted Kennedy, who strongly supported, through many years of dedicated work, ending discrimination in the workplace.

The battle for the rights of lesbian, gay, bisexual and transgendered citizens is part of the long and important struggle to ensure the civil rights of all Americans. Unfortunately, today 29 States still permit employers to make critical employment decisions based solely on an employee's sexual orientation. And in 38 States it is still legal to discriminate based on gender identity.

The Employment Non-Discrimination Act of 2009 (ENDA), of which I am a cosponsor, is not only an appropriate but a necessary step towards guaranteeing the civil rights of all Americans.

ENDA extends protections to lesbian, gay, bisexual and transgendered workers similar to protections provided in Title VII of the Civil Rights Act of 1964. Currently, employers are restricted from discriminating against citizens based on race, religion, national origin, sex, age, or disability. This legislation would make it illegal for business with more than 15 employees to fire, refuse to

hire, or refuse to promote employees based on their sexual orientation and/or gender identity. The bill's language is, I believe, free of ambiguities, and furthermore addresses sexual harassment and shared facilities.

This legislation has widespread support: 50 civil rights groups, over 60 Fortune 500 companies, the Business Coalition for Workplace Fairness, Conference of Catholic Bishops, and the Union of Orthodox Jewish Congregations of America support the bill. Forty-two Senators have cosponsored it. According to a 2008 Gallup Poll, 89 percent of the Americans believe that gay and lesbian Americans should have "equal rights in terms of job opportunities."

We know that our Nation benefits when *all* people can contribute their talents and skills in the workplace, where our economy and our society is built. I believe we have a responsibility to assure that all citizens are protected from losing their jobs based on their sexual or gender identity.

Vermont is one of the 13 States that have already recognized and protected the rights of all its citizens in the workplace. My State, 15 years ago, enacted legislation to prohibit discrimination based on sexual orientation. In 2007, Vermont extended its protections to include gender identity.

The movement to guarantee fairness and equality in employment for those individuals who identify as lesbian, gay, bisexual, or transgendered is a major step forward for our Nation and its citizens. I strongly support the Employment Non-Discrimination Act, and I commend Chairman Harkin and the HELP Committee for holding this hearing today on the need for, and importance of, this legislation.

STATEMENTS OF SUPPORT

PREPARED STATEMENT OF ELIZA BYARD, PH.D., EXECUTIVE DIRECTOR ON BEHALF OF THE GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK

Chairman Harkin, Ranking Member Enzi, and members of the committee: On behalf of the Gay, Lesbian and Straight Education Network (GLSEN), I am pleased to submit written testimony expressing our support for S. 1584, the Employment Non-Discrimination Act of 2009 (ENDA). We appreciate your addressing this important legislation that will support workplace fairness for all Americans by prohibiting employment discrimination based on sexual orientation and gender identity. I would like to especially thank Chairman Harkin, along with Ranking Member Enzi, for convening this hearing. It is absolutely critical for this committee and Congress to address the issue of workplace fairness, and to act decisively to end employment discrimination by passing ENDA.

GLSEN is the leading national education organization focused on ensuring safe schools for all students. Established nationally in 1995, GLSEN envisions a world in which every child learns to respect and accept all people, regardless of sexual orientation or gender identity and expression. In addition, we strive to ensure that each member of every school community is valued and respected regardless of sexual orientation or gender identity and expression.

Every year numerous qualified, hard-working Americans are denied job opportunities, are terminated, or experience on-the-job discrimination merely because they are lesbian, gay, bisexual, or transgender (LGBT). This kind of discrimination occurs in both public and private sector workplaces, across a range of types of workplaces, all across the country. Workplace discrimination threatens the well-being and economic survival of workers and their families. Like other workers, LGBT workers deserve to be judged on their skills and qualifications, on their work and its merit, not on their sexual orientation or gender identity, factors which are unrelated to job performance.

Experience has shown us that, as with all workers, sexual orientation and gender identity are not related in any way to an educator's performance in schools. Unfor-

tunately, State and local governments have engaged in a widespread pattern of discrimination against LGBT education employees.

Because LGBT education employees often fear being out in the workplace, they have been reluctant to out themselves further by pursuing complaints, and have faced administrative courts that have been hostile to their claims; there may be significantly more employment discrimination against LGBT education employees than the reported cases and surveys would indicate. Because of their actual or perceived sexual orientation or gender identity, educators have been removed from specific teaching or co-curricular responsibilities, or forced from the classroom and education profession altogether.

In considering discrimination against LGBT education employees, local discrimination cannot be meaningfully separated from discrimination by State governments; it is part of the same system of discrimination. Discrimination at the local level is rooted in a history of State purges of LGBT education employees; a history of State laws specifically prohibiting LGBT teachers from teaching; State licensing requirements for teachers that included morality fitness tests that were interpreted to exclude LGBT employees; State laws criminalizing same-sex behavior, including sodomy laws; and State laws that prohibit positive portrayals or discussions of same-sex or non-heterosexual topics, including sexuality education laws that stigmatize LGBT people.

As an organization that is working to end bullying and harassment of all students, GLSEN has explored the experiences of students and teachers in order to develop recommendations to improve school climate. One important factor is the presence of educators who are supportive of LGBT students. GLSEN's 2007 National School Climate Survey showed that students who could identify supportive educators were less likely to feel unsafe in school; had less absenteeism related to safety; and reported better educational indicators that included a greater sense of belonging, higher grade point averages, and higher educational aspirations.

The presence of LGBT school personnel who are out or open at school about their sexual orientation and/or gender identity provides another source of support for LGBT students by serving as visible examples of a supportive and accepting school climate. Yet only a third (36.5 percent) of students said they could identify any openly LGBT personnel at their school.

GLSEN understands that school employees best serve students when they have workplaces that are free from discrimination and harassment, and calls upon public policymakers to adopt and enforce measurable non-discrimination and anti-harassment policies that include sexual orientation and gender identity. ENDA would help to achieve the goals of improving academic outcomes, as well as ensuring basic fairness for hard-working Americans, by protecting employees from discrimination on the basis of their actual or perceived sexual orientation or gender identity.

Again, GLSEN thanks Chairman Harkin and Ranking Member Enzi for this hearing on the Employment Non-Discrimination Act. We appreciate the committee's attention to this issue, and we urge you to move forward in sending S. 1584 favorably to the full U.S. Senate. We deeply appreciate your efforts to ensure workplace fairness for all Americans, and an end to discrimination. If you have any questions, need any further information, or if there is any other way that GLSEN can be of assistance while you consider this important legislation, please contact Shawn Gaylord, Director of Public Policy, at 202–621–5822 or *sgaylord@GLSEN.org*.

PREPARED STATEMENT OF REA CAREY, EXECUTIVE DIRECTOR, NATIONAL GAY AND LESBIAN TASK FORCE ACTION FUND

Mr. Chairman, Vice-Chairman, and members of the committee: We thank Chairman Harkin and the committee for holding a hearing on the Employment Non-Discrimination Act (ENDA), S. 1584. On behalf of the National Gay and Lesbian Task Force—the oldest national organization advocating for the rights of lesbian, gay, bisexual and transgender (LGBT) people—we urge you to support this critically important legislation. Hard work and fair treatment are core American values and no American should be denied the opportunity to work because of factors unrelated to job performance.

Improvements in the Nation's current economic crisis hinge on the talents and expertise of a fully functioning workplace. An analysis of Census 2000 data shows a strong link between thriving tech-oriented economies and diverse populations, including those with high LGBT populations. Workplace equity encourages regional growth centers, as top-notch employees have migrated to centers where they can be assured that their talents will not be suppressed due to legal inequities and arbi-

trary prejudices. ENDA will ensure that all Americans have an equal playing field as they seek to secure a livelihood for their families and grow our communities.[1]

Currently, the playing field is far from even. Analyses of existing studies and new data suggest that up to two thirds of LGB people—and nearly all transgender people—have experienced employment discrimination. ENDA is essential to addressing this widespread problem.

LGBT AMERICANS FACE HIGH LEVELS OF EMPLOYMENT DISCRIMINATION

Over 50 studies of discrimination against LGB people have established that they face significant barriers to equality. Fewer studies have been conducted about discrimination against transgender people; our work surveying 6,450 transgender and gender non-conforming people about gender identity-based discrimination in the workplace begins to fill that gap. Further research is needed, particularly the inclusion of sexual orientation and gender identity in population-based surveys of the workforce, such as the Bureau of Labor Statistics surveys.

Discrimination against lesbian, gay, bisexual and transgender people in the workplace persists despite the increasing visibility of these communities and improved local and statewide protections against anti-LGBT prejudice and violence.

A 2007 meta-analysis of 50 studies of workplace discrimination against LGBT people found consistent evidence of bias in the workplace. Ranges for critical workplace concerns such as overt discrimination, firing, denial of promotion or negative performance evaluation (based on bias) were as follows:

- 16 percent to 68 percent of LGBT people report experiencing employment discrimination;
- 8 percent to 17 percent were fired or denied employment;
- 10 percent to 28 percent were denied a promotion or given negative performance evaluations;
- 7 percent to 41 percent were verbally/physically abused or had their workplace vandalized;
- 10 percent to 19 percent reported receiving unequal pay or benefits.

In addition, 12 to 30 percent of heterosexual co-workers report witnessing discrimination against their LGB peers. These realities, often minimized as a problem of subjective "self-reporting," have been confirmed in a study that surveyed observations of heterosexual co-workers. Researchers querying heterosexuals about witnessing discrimination against their LGB peers found that 12 percent to 30 percent of respondents in certain occupations, such as the legal profession, have witnessed anti-LGB discrimination in employment.

Discrimination and attendant loss of income and benefits can lead to poverty for LGB people over their lifespan. According to the Williams Institute, lesbian couples have a poverty rate of 6.9 percent compared to 5.4 percent for different-sex married couples and 4.0 percent for gay male couples. Outcomes are more severe when we examine LGB families. When we calculate the poverty rates for all members of the family, that is two adults and their children, the poverty rate for lesbian families is 9.4 percent compared to 6.7 percent for those in different-sex married couple families and 5.5 percent for those in gay male coupled families. In general, lesbian couples have much higher poverty rates than either different-sex couples or gay male couples. Lesbians who are 65 or older are twice as likely to be as poor as heterosexual married couples.

Poverty rates for children of same-sex couples are twice as high as poverty rates for children of married couples. Although gay and lesbian couples are less likely to have children in their households than are heterosexual married couples, children of same-sex couples are twice as likely to be poor as children of married couples. One out of every five children under 18 years old living in a same-sex couple family is poor, compared to almost 1 in 10 (9.4 percent) children in different-sex married couple families. The research points to the negative outcomes of discrimination for LGB people and refutes the common misconception that gay people have more money and live large. Workplace discrimination affects the entire family.[2]

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[1] Gates and Florida, 2002. The link between diversity and economic success was first proposed in a paper that examined 5 urban centers with the largest LGBT population—San Francisco, Washington, DC, Austin, Atlanta and San Diego. Richard Florida's research in this arena suggests a strong linkage between equal justice in the workplace and creativity and success within companies and communities.

[2] The Williams Institute: *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination, 2007 and Poverty in the Lesbian, Gay, and Bisexual Community, 2009*.

NATIONAL STUDY FINDS RAMPANT WORKPLACE DISCRIMINATION

The Bureau of Labor Statistics fails to ask sexual orientation and gender identity questions in its annual data collection efforts, making it impossible to get randomized data on LGBT people's experiences of workplace discrimination. Instead, the work of chronicling the community's experiences of bias has been left to community-based organizations and a handful of pioneering researchers and institutes. While the data on discrimination against LGB people is relatively scarce, there have been even fewer studies on the workplace experiences of transgender Americans.

To address this gap, in a joint effort with the National Center for Transgender Equality, the Task Force recently undertook a national survey of transgender people and the discrimination they endure in employment, education, health care, housing, public accommodation, criminal justice, family life, and access to governmental documents. Over a 6-month period, we surveyed 6,450 transgender people throughout the United States via an extensive questionnaire, including people in every State of the Nation as well as Washington, DC, Puerto Rico, Guam, and the U.S. Virgin Islands. Until this study, data on the prevalence of this discrimination has been limited to small studies and anecdotal reports.

Our key finding is this: the State of the workplace for transgender Americans is absolutely shameful.

Discrimination in employment against transgender people is a nearly universal experience.

- Ninety-seven percent (97 percent) of our sample reports transgender people being mistreated or harassed at work.
- Nearly half (47 percent) lost their jobs, were denied a promotion, or denied a job as a direct result of being transgender. These statistics are alarming and have multiple, spiraling negative affects on quality of life.

Transgender Americans face twice the rate of unemployment as the general population for our sample during the time of the study.

Black transgender people reported nearly four times the rate of unemployment as the general population (26 percent), while Latino and Multi-racial transgender people experienced nearly three times the rate of unemployment.

High unemployment had predictably detrimental effects on income, with participants in our study experiencing twice the level of extreme poverty as those in the general population. Census figures for 2005–7 show 7 percent of the general population living on incomes at or below $10,000 while our study found 15 percent in this income category. Again, transgender people of color are struggling with poverty at significantly higher rates, with 23 percent of multiracial transgender people living on $10,000 or less, Latino/as at 28 percent, and African-American transgender people at an outrageous 35 percent.

Survey respondents experienced a series of devastating negative outcomes, many of which stem from the challenges they face in employment. A large percentage of our sample has experienced negative impacts on their housing security as a direct result of their gender identity, with almost one-fifth of the respondents becoming homeless because they are transgender. In addition, 26 percent of our sample reported having to find different places to sleep for a short period of time and 25 percent were forced to leave their homes and move in with family or friends.

Employment issues also impact transgender people's access to health care. Transgender and gender non-conforming people do not have adequate health insurance coverage or access to competent providers. Respondents in our sample are uninsured at the same rate of the general population in the United States—19 percent—but only 40 percent of the sample enjoys employer-based insurance coverage, compared to 62 percent of the population at large. This figure underscores how high unemployment creates multiple liabilities for our sample.

These preliminary figures represent the tip of the iceberg for what employment discrimination does to transgender people. In the weeks to come, the Task Force and National Center for Transgender Equality will release data on housing instability, inability to access shelter, poor health care provision, harassment and violence at school and other alarming outcomes of far-reaching discrimination. Without work, transgender people are at the mercy of systems that are unwelcoming at best and, more often, actively hostile.

ENDA BENEFITS REAL PEOPLE

As our study and those of the Williams Institute demonstrate, employment discrimination against LGBT people is more prevalent and widespread than statistics

drawn from reported court decisions and administrative complaints generally indicate.

Our mandate today is clear: employment protections are paramount.

Because the law protects LGBT people in only 40 percent of the country, and many of these protections are in the form of hard-to-enforce local laws, there is unfortunately very little LGBT people can do to seek re-dress. Where there are laws and complaint processes, LGBT employees often are reluctant to use these processes because they must "out" themselves to members of the community or to future employers by filing official complaints.

ENDA is crucial because it will create a Federal standard that imposes a baseline of respect and equal treatment for LGBT people as a whole, while specifically addressing a desperate need for protections for transgender people in the workplace that are demonstrated by our survey data.

ENDA recognizes that a person's sexual orientation or gender identity bears no relationship to his or her ability to perform at work and provides employees with the same protections for sexual orientation and gender identity that all people receive for race, color, religion, sex, and national origin under Title VII of the Civil Rights Act. ENDA does not give special protection; it covers heterosexual and non-transgender people if they are discriminated against as well.

Nevertheless, those who are the most likely to benefit from this legislation are members of the LGBT community. Nearly every type of employer regularly engages in discrimination: there is no sector, private or public, technical, skilled or unskilled, in which LGBT people are safe from discrimination. State governments, in their capacities as employers, have acted as every other employer, engaging in a widespread pattern of employment discrimination against LGBT employees and applicants. When 97 percent of transgender people are experiencing mistreatment and harassment in employment and reporting rampant unemployment and underemployment, as our study showed, it is clear that every employment sector is discriminating, including State employers.

Below are a few examples of the employment discrimination and problems with underemployment that lesbian, gay, bisexual and transgender people have endured in the workplace simply for being who they are.

• *Laura Calvo:* Laura Calvo, a transgender woman in her fifties who resides in Portland, OR, worked for the Josephine County, Oregon Sheriff's Office for 16 years as a Deputy Sheriff and Sergeant. During the course of her employment, she served in many capacities: shift supervisor, Sheriff Sub-Station Commander, Detective in the Major Crimes Unit, Detective in the Josephine County Interagency Narcotics Task Force, S.W.A.T. team leader and Commander. Laura remained closeted in the workplace because she wanted to carry on a responsible career where she could contribute to society and knew if her transgender status was discovered she would be terminated. In October 1996, Laura Calvo was the victim of a burglary and many of her personal belongings were stolen. In the course of the recovery effort her transgender identity was discovered by her employers. She was called into her supervisor's office and told she could not retrieve her belongings because they needed to be examined for evidence of violations of department policy and potential crimes. She was then ordered by her supervisor to undergo a psychiatric determination for fitness of duty to return to work. The panel of doctors, selected by the Sheriff's office, determined she was not fit to return to duty. Laura was told that she could not return to work and that the Sheriff thought she was a "freak." Laura was then forced to resign. *Source: Testimony to the Oregon State Senate, 2007.*

• *Linda Czyzyk:* Linda is an attorney and her partner is a college professor who teaches biology and genetics. The couple lived in North Carolina and Linda worked at a law firm where she was openly gay. When Linda's partner accepted a faculty position at a university in Virginia, the couple needed to relocate to Virginia.

In August 2000, Linda had a phone interview with a law firm in Virginia and was invited for a second interview at the firm's office. During the interview, the firm repeatedly asked her why she was moving to Virginia. Linda replied that her spouse had taken a position at a local university, making sure that she avoided using pronouns. The law firm asked Linda to come back for a third interview, but this time she was told to bring her spouse because the interview would include a dinner with all the partners and their spouses "to make sure we all got along."

Linda told the only female partner at the law firm that her spouse was a woman. The female partner said that was fine by her, but she would have to inform the other two partners at the firm. After talking to the male partners, the female partner called Linda back to tell her that the male partners said the firm would not hire a lesbian and Linda should not bother coming to the third interview. *Source: American Civil Liberties Union, Living in the Shadows: Ending Employment Discrimination for LGBT Americans, 2007.*

• *Alexandra:* Prior to Illinois passing a gender identity inclusive non-discrimination law in 2002, Alexandra,[3] a transgender woman, worked in an Illinois State government office at the College of Lake County in Grayslake, IL. She transitioned from male to female at work with the help of her therapist who met with staff and supervisors. At this meeting, Alexandra's supervisors told her to continue to use the men's restroom. After the meeting, her supervisor and co-workers persisted in calling her by her male name and referring to her as "he." Alexandra voiced her issue with this, asking to be treated as the woman she had transitioned to become. She was told by her supervisor that she was acting confrontationally. This "confrontationalism" was cited as a reason Alexandra needed to improve her personal relations at work. The supervisor claims that the staff is trying to make "adjustments" for Alexandra, but the supervisor is one of the biggest culprits who continue to call Alexandra by male pronouns. Alexandra went to the steward of her union to ask for assistance in this matter, but even the steward did not want to help. Now, Alexandra believes she may have to get her own representation to deal with discrimination she has faced in the workplace. *Source: 6th Report on Discrimination and Hate Crimes Against Gender Variant People. It's Time, Illinois . . . Political Action for the Gender Variant Community, Spring 2002*.

• *Ronald Fanelle:* Ronald Fanelle taught seventh and eighth graders at a California middle school. The other faculty and the principal knew that Ronald was gay, but his students did not. A month after Ronald and his partner were married in February 2004, his co-workers congratulated him at a staff meeting. Then a teacher told his students that Ronald had gotten married to a man over the weekend and the news spread around the school. Ronald's students asked if it was true that he married a man. Ronald told them it was true.

In the following weeks, one parent, a personal friend of the school board president, vocalized his opposition to a gay man teaching in the school and arbitrarily accused him of bringing "his homosexual agenda into the classroom." The school hired a private investigator to investigate the situation and Ronald's background. Nothing damaging emerged. Ronald, however, received hate mail on his school e-mail account and dozens of viruses were sent to the district, which shut down its system. Ronald was instructed in writing to open a private e-mail account in order for parents and students to communicate with him.

In the following year, a few students created an anti-gay Web page that ridiculed Ronald. Offensive stickers relating to Ronald's sexual orientation were posted all over the school. The principal called a meeting prior to the new 2006–7 school year. In the meeting, the principal made disparaging comments to Ronald in front of another principal, the union president, and the district's superintendent of personnel. His principal went on to tell Ronald: "Your problem is you're angry because no one will accept your gay marriage!" The school district then began interrogating students about Ronald. The students reported that Ronald did not talk about his personal life and he was well liked. A week later, the superintendent of personnel formally disciplined Ronald for "inappropriate e-mail communication" with students and parents because Ronald was sending e-mail from a private e-mail account instead of his school account. Ronald was only using a private account because the school had shut down his school account, due to the amount of hate mail and viruses. Over 3 years, four students were removed from Ronald's classroom because their parents disapproved of his sexual orientation. The district's response to Ronald was simply stated as: "It's a conflict of family values." In February 2007, due to the principal's and the district's harassment, Ronald took an extended sick leave. *Source: American Civil Liberties Union, Living in the Shadows: Ending Employment Discrimination for LGBT Americans, 2007*.

• *Tony:* Tony,[4] a transgender man, was employed for 13 years by a nightclub in San Francisco, CA, a State that includes gender identity in its employment non-discrimination law. Tony informed his employers that he is transgender and his direct supervisor began egregiously harassing him. Tony's supervisor repeatedly asked Tony inappropriate questions about his body and his sexual preferences. The supervisor refused to address Tony with male pronouns and often made comments to Tony such as, "You are not a real man." Tony was demoted from a high-level management position to a low-level service position and his pay was severely cut. He became incredibly depressed. The harassment escalated over many months and finally culminated in an incident wherein Tony's supervisor chased Tony in the club calling him a "freak" and a "b**ch" and threatening him with physical violence. Tony could no longer handle the harassment and was forced to quit his job. Tony brought a lawsuit against his former employer under California's Fair Employment

[3] This is not the true name of the victim to protect her privacy.
[4] This is not the true name of the victim to protect his privacy.

and Housing Act, which bars discrimination based on gender identity, and reached a favorable settlement. *Source: Transgender Law Center, Kristina Wertz, Legal Director*.

• *Juan Moreno:* Juan is a Latino community college student studying nursing who also works to help support his single mom and teenage sister. Juan applied for a part-time job at a local fast food restaurant where his friend worked. He interviewed with a shift manager in February 2007. He had a successful interview with the shift manager who told Juan's friend that Juan would work out. The shift manager recommended to the store manager that Juan be hired. The store manager knew Juan was friends with a current employee and had seen Juan come into the store to visit his friend. The store manager asked Juan's friend: "Is he into men or women?" Juan's friend informed the store manager that Juan was gay, but then asked, "what does that have to do with hiring him?" The store manager replied: "I'm the head manager and I can do what I want to do." Juan was not hired. *Source: American Civil Liberties Union, Living in the Shadows: Ending Employment Discrimination for LGBT Americans, 2007*.

• *Jacqui Charvet:* Jacqui Charvet, a transgender woman, worked for 10 years as a consultant in computer technology with a firm with clients in the New Jersey and New York areas, with 16 years of computer technology experience that preceded her years as a consultant. Numerous consulting gigs were with the State of New Jersey, including with the NJ Department of Health, NJ Department of Treasury, and NJ Department of Human Services. She let her supervisor at the consulting firm know that, between assignments, she had plans to transition gender, so that at the next assignment, she would be coming to work as her new gender, including using her new name, Jacqui (instead of her old male name), dressing as other women employees, and that female pronouns would be appropriate for her at that point. She had planned to transition between assignments to keep the process as smooth as possible. However, instead of supporting her transition, her supervisor laid her off, refusing to assign her to a new gig. For the next 3½ years she attempted to find a job, public or private, in New Jersey, but to no avail. Upon discovering she was transgender and used to be a man, many hopeful employers turned her away. At one interview, she walked in and was told that they wanted to hire a "real man" for the position. With 26 years of work experience, 10 years as a consultant at the firm that "laid" her off, Jacqui found herself forced to leave the State to find employment with a private company in Florida that hired her after a phone interview. *Source: Conversations between Task Force staff and Jacqui Charvet, 2008 & 2009*.

• *Brooke Waits:* Brooke worked as the inventory control manager for a cell phone vendor. In the 4 months Brooke worked for the company, her supervisor continually praised her for her work. Brooke was not out to her co-workers at the store. She was quiet and kept to herself because she did not fit in with the other women who worked at the store and her male coworkers told a lot of lesbian jokes. In an effort to avoid controversy, Brooke did not say anything when her co-workers made anti-gay jokes and derogatory comments.

In May 2006, Brooke's manager approached Brooke's desk to ask her a question. Brooke was on the other side of the room sending a fax. Brooke's manager picked up Brooke's cell phone off of her desk, opened it, and then exclaimed "Oh my goodness!" Brooke's manager had seen the screen saver inside Brooke's cell phone, which was a picture of Brooke and her partner sharing a New Year's Eve kiss. Brooke's manager immediately left the room and did not speak to Brooke at all for the rest of the day. Later in the day, Brooke overheard the manager tell another co-worker, "I knew there was something off about her."

The next day, Brooke arrived at work and, as soon as she walked in the door, her manager asked to speak with her. The manager told Brooke that she was fired. When Brooke asked why, the manager told her that they needed someone more "dependable." Brooke told the manager that she was dependable and, in fact, had been coming to work an hour early every day to work on implementing the new inventory system. The manager replied: "I'm sorry, we just need to let you go." *Source: American Civil Liberties Union, Living in the Shadows: Ending Employment Discrimination for LGBT Americans, 2007*.

• *Dylan Scholinski:* Dylan Scholinski, a transgender man, lives on the edge of poverty despite holding a master's degree and writing an award-winning memoir of his institutionalization as a teenager for "gender identity disorder." Dylan was forced into "treatment" from the ages of 14–17 that included mandatory make-up sessions and the wearing of skirts and other attire to "cure" him of his gender identity. Now in his 40s, despite having experienced life-long depression as a result of abuse from teachers, medical providers and mental health professionals, Dylan has never qualified for disability as is commonly available to people with PTSD and debilitating depression. Dylan currently runs a free teen suicide prevention arts pro-

gram out of an art studio in Denver, CO. He is not compensated for his work, despite serving hundreds of LGBT youth struggling with gender identity and sexual orientation issues. Having lived his youth in enforced isolation and torment, he is committed to creating a safe space for LGBT youth in his community. Dylan continues to search for sustainable income to no avail. *Source: Conversation between Jaime Grant, Ph.D., Task Force Policy Institute and Dylan Scholinksi, 2009.*

• *Janice Dye:* Janice worked as a mechanic in an oil change service center in San Diego. Janice got along well with the other mechanics at the service center, who were excited to have a female mechanic working with them. Janice was out at work and her girlfriend occasionally brought her lunch at work. The service center's management, however, was not supportive of Janice. Janice was the only female mechanic in the shop, as well as the only African-American and lesbian who worked at the service center.

In 1997, Janice applied for a 3-month training program to become an assistant manager. At the end of the training program, she had to take timed tests. Janice was fired because she could not complete an oil change in less than 10 minutes. However, management made her do the oil change alone, even though the usual procedure was to use two workers to complete an oil change (one in the ground pit below the car, and one on the ground floor at the car's hood). Janice's coworkers told her that they heard managers in the break room saying: "we won't let that lesbo-b**ch get that job."

After being fired, Janice left the service center and started to work at another location owned by the same company. She hoped she would not be discriminated against at the new location, but the managers treated her the same. She had to take the same test of completing an oil change in 10 minutes and, again, she had to do the oil change alone (taking time to run up and down the stairs to the pit below the car). Management did not even let her finish the oil change because she had gone over the 10-minute limit. After 10 minutes, the manager yelled: "time's up" and "you're fired." *Source: American Civil Liberties Union, Living in the Shadows: Ending Employment Discrimination for LGBT Americans, 2007.*

• *Michelle Hansen:* Michelle Hansen is an Episcopal priest and computer industry trainer who lives in Connecticut. Michelle worked successfully at a medium-sized computer repair and training company for nearly 18 years, the latter part of her time as the company's senior technical trainer. In June 2004, a week after notifying her employer of her plans to transition from male to female, she was terminated from her job. Michelle's employer claims to have terminated her for economic reasons; however, the company had recently hired two other employees who were not fully trained or certified. Michelle has two Master's degrees from Yale University and a long list of certifications in the computer industry, but she has not been able to find employment since being terminated several years ago. *Source: Testimony to the Judiciary Committee of the Connecticut General Assembly, 2009.*

• *Brad Nadeau:* In April 2002, an insurance company in Bangor, ME employed Brad as a receptionist. After about a month, Brad was called into a meeting for his performance review. All of his work was rated satisfactory—he was not told that any areas of performance needed improvement. In fact, Brad trained a new employee who was hired a couple weeks after he was hired. Brad was not out at work because he was concerned that if he was honest about his sexual orientation, he might lose his job.

On June 2, 2002, Brad's partner picked him up at work and they went out for lunch together. When his partner brought him back to the office, they kissed goodbye in the parking lot. Brad noticed that an agency executive saw their kiss. The very same day, Brad was called into a meeting with his supervisor and the executive. His supervisor told Brad that he was being fired because his work was not satisfactory, despite his positive performance evaluation and the fact that he had over 4 years of office and administrative work experience.

Brad's termination seems to have violated company policy. The company policy states that the company is "committed to providing a work environment that is free of discrimination." The company also has a policy of progressive discipline, which the company states is "intended to give employees advance notice, whenever possible, of problems with their conduct or performance in order to provide them an opportunity to correct any problems." Regardless, the company did not give Brad any warning before they fired him. *Source: American Civil Liberties Union, Living in the Shadows: Ending Employment Discrimination for LGBT Americans, 2007.*

• *Kim Dower:* Kim Dower is a transgender woman who is employed as a pharmacist in Colorado. After working for 9 years as a pharmacist, Kim told her employer of her future plans to transition from male to female. In March 2004, Kim was ready to start coming to work as herself, but her employer informed her that she would not be allowed to work at the pharmacy unless she continued to dress

as a man. In effect, this would block her from transitioning to her new gender at work. In response, Kim filed a claim under Denver's anti-discrimination ordinance. She was given a preliminary ruling in her favor. However, this only resulted in mandatory mediation. In this mediation, Kim's employer refused to allow her to present as a woman unless she signed a nondisclosure agreement that would prevent her from telling anyone that she had won her case and that people in Denver do have the right to transition gender at work. Kim, wanting to be able to share her story so that other transgender people would know they have rights to transition and dress as themselves at work, refused to agree to this gag order. An entire year had passed with her employer threatening to fire her if she dared come to work dressed as herself. Eventually, with great trepidation, she came to work dressed as a woman hoping that her employer would choose not to fire her on the spot as they had threatened. To Kim's surprise the employer did not take action against her as they had previously threatened to do. All in all, it was a terrible year for Kim, unsure that the local law would be strong enough to protect her if she came to work as her true self. *Source: Testimony to the Colorado Civil Rights Commission, July 30, 2009*.

• *John Schumacher:* John is a Marine veteran who worked the overnight shift as stocker and "four star" cashier at a large retail store in Michigan's Upper Peninsula. In 3 years on the job, he was named "Associate of the Month" four times. He is the primary breadwinner because his partner has a disability. He and the cashier supervisor carpooled to work everyday. At the time, the cashier supervisor was not John's supervisor, however, because John worked in the stockroom. After 3 months of carpooling, John told the cashier supervisor he was gay and she immediately began treating him coldly.

For several months, John was ignored by the cashier supervisor and he went about his business. But when John was promoted to cashier, the cashier supervisor became his direct supervisor. "It was hell, starting off the bat," John said. The cashier supervisor treated John differently than the other cashiers. She assigned John stocking tasks in the shelves around the checkout lanes then yelled at him for leaving his register. This pattern of treatment continued over time. John complained to the head manager to no avail; each night the cashier supervisor would find a new way to make it more difficult for John to do his job.

On February 5, 2007, John came to work and realized he forgot to bring lunch. John called home and asked his partner to bring something for lunch. His partner brought him a frozen dinner from home. John ate the dinner in the break room in view of other workers and the cashier supervisor. Two weeks later, John was accused of stealing a frozen dinner from the store's grocery section. He was not able to produce a receipt for the frozen dinner because he and his partner had bought it weeks before and did not save the receipt. He was fired on the spot. *Source: American Civil Liberties Union, Living in the Shadows: Ending Employment Discrimination for LGBT Americans, 2007*.

• *Ethan St. Pierre:* Ethan St. Pierre, a transgender man from Massachusetts, was a respected security junior manager at Barton Protective Services, overseeing 30 employees that staffed the East Coast offices of Sun Microsystems. He was hired by Barton in 2001 and received numerous favorable performance evaluations and a number of corresponding pay raises. In 2002, he talked to his direct supervisor at Barton and the Sun Microsystems security manager that interfaced with him at Barton about his desire and intention to undergo a gender transition from female to male, and generally he was received favorably. When the time was right, an announcement was made to the 30 employees Ethan supervised that Ethan was now going to be Ethan and would be going by male pronouns. All of his 30 employees treated him with respect, including using his new name and male pronouns. All was fine for 6 months, until the Sun Microsystems manager happened to interface with Ethan for the first time since Ethan had transitioned and saw that Ethan had transitioned. The Sun Microsystems manager slowly whittled away Ethan's responsibilities. In the meantime, Ethan's supportive manager at Barton was replaced by someone who did not respect Ethan. This new manager told coworkers, including Ethan's supervisers, that he did not agree with Ethan's "lifestyle." One day, this manager informed Ethan that he was being removed from his position at Sun Microsystems because the Sun Microsystems manager did not believe Ethan could do the job because of his gender transition. That was the final word. Ethan repeatedly asked to be assigned to another of Barton Protective Services' clients, but to no avail. Ultimately, he had to seek unemployment benefits. Ethan's attempts to find other jobs in the security field failed because Barton provided an unfavorable job performance review. Ethan was never able to find another job in the security field after this experience. *Source: Testimony of Ethan St. Pierre to the Massachusetts*

Legislature, available at: http://www.masstpc.org/publications/legis/StPierre Firing.pdf.

• *Jacinda Meyer:* Jacinda is Latina and a licensed life and health insurance agent in California. She worked for a company that administers employee benefits to client companies. After she worked at the company for 9 months, she received positive feedback about her job performance and was given a raise. Her supervisors even gave her handwritten cards to thank her for her good service, teamwork, and positive attitude.

Throughout her tenure at the company, Jacinda's supervisors made several derogatory comments about lesbians. One of Jacinda's supervisors "warned" her before a meeting that the client was a lesbian and said: "I'm telling you now so you don't freak out when you see the pictures of two women on her desk." Jacinda did not respond to this comment but later told another of her supervisors about the conversation. That supervisor asked: "Do you swing that way?" Jacinda replied that she was gay. The supervisor said: "Well, I'm fine with it as long as you don't kiss or hold hands in public."

Soon after Jacinda came out to her supervisor, the owner of the company approached her and told her about a book, *The Road Less Traveled*, which helped his son, who was a recovering drug addict. Jacinda interpreted the owner's comment as comparing being gay to being a drug addict. Her supervisor gave Jacinda the assignment of reading the book and writing a one-page essay about how it could improve her life.

Jacinda was offended by the book's characterization of homosexuality as immoral behavior. She was also offended by other passages that mentioned masturbation. Additionally, the book's perspective on spiritual growth made her uncomfortable. Jacinda wrote a letter to her supervisor saying she was uncomfortable with the assignment because the book's message violated her beliefs and she requested that her assignment be changed to read another book. After she requested a different assignment, Jacinda's co-workers stopped talking to her and stopped asking her to join them at lunch. Shortly after that, Jacinda was fired on March 23, 2007. The company claimed that she was fired because the company's revenue was too low, but the company hired other people for the same job after they fired Jacinda. *Source: American Civil Liberties Union, Living in the Shadows: Ending Employment Discrimination for LGBT Americans, 2007.*

• *Alynna Lunaris:* Alynna Lunaris, a transgender woman from Maryland, was employed at the Washington Humane Society (WHS), a non-profit that receives a government contract from the District of Columbia for animal control services. She was first hired by WHS in January 2005, as a front desk assistant at the District of Columbia Animal Shelter, where she quickly rose through the ranks, being promoted to an Animal Control Officer soon after she started. In June 2006, Alynna began taking hormones and making other steps as part of her transition from male to female in all areas of her life. In September 2006, she took vacation, informing management that when she returned, she would be returning as a woman. When she returned, Alynna submitted a court order showing her change of name, as well as a copy of her new driver's license, which designated her as a female. Within 2 weeks of her return, however, she started feeling discrimination from WHS management. This began when a promotion to Field Services Supervisor became available. Alynna was asked to apply only to be told later that an application from her would not be considered.

Over the next 5 months she suffered under discriminatory conditions fostered by two managers. The managers continually referred to Alynna using male pronouns and were otherwise hostile toward Alynna. The situation escalated to the point where WHS transferred her to a position in the private law enforcement department that was not under the control of those two managers. Alynna worked for the next 6 months without incident, receiving many compliments on her work. Things were going well until the executive director left his position. One of the managers who had unfairly treated Alynna in her previous position was promoted to interim executive director. Upon the manager's promotion, the harassment and discrimination began again. Within 3 months, Alynna was fired from WHS by e-mail after management had filed several fabricated incident reports against her. Alynna has filed a complaint with the District of Columbia's Office of Human Rights which enforces the city's transgender-inclusive nondiscrimination law and has recently received preliminary findings related to probable cause. The appeals process is underway. *Source: Testimony to the Maryland House of Delegates, February 25, 2009 and Senate, March 3, 2009; Conversation between Thomas Bousnakis, Task Force Fellow and Alynna Lunaris, 2009.*

ENDA PROTECTS AMERICAN WORKERS

ENDA will help protect workers from discrimination in the workplace by prohibiting discrimination on the basis of sexual orientation or gender identity in the same way that Title VII of the Civil Rights Act prohibits discrimination on the basis of race, color, religion, sex, or national origin. ENDA provides employees with the same meaningful remedies that are available under title VII.

ENDA covers public employers, private employers, employment agencies, and labor organizations. It makes it unlawful to fire, refuse to hire, or take any other action that would negatively impact a person's status as an employee based on that person's sexual orientation or gender identity. Additionally, it would prohibit discrimination against an employee as a result of the sexual orientation or gender identity of someone with whom the employee associates. Furthermore, ENDA would make illegal any discrimination against an individual because that person has opposed or spoken out about an unlawful employment practice.

The military, religious organizations, and employers with fewer than 15 employees are all exempt from ENDA.

ENDA is consistent with existing Federal law and requires no changes in enforcement mechanisms. ENDA would grant the Equal Employment Opportunity Commission (EEOC) and other appropriate agencies the power to enforce its provisions. If an aggrieved employee's complaint is not resolved by the EEOC, the individual may then file suit.

MOST AMERICANS ALREADY SUPPORT ENDA

The Employment Non-Discrimination Act is also consistent with the opinions of the American public. According to numerous surveys, substantial majorities of likely voters in the United States support an inclusive Federal employment non-discrimination law. The Hart Research poll conducted in 2007, found that 6 in 10 Americans specifically support ENDA. Voters and their representatives in 12 States and more than 100 localities—areas comprising nearly 40 percent of the U.S. population—have already taken action by adopting employment protections for employees based upon their sexual orientation and gender identity.

Businesses, too, have realized the importance of nondiscrimination policies that protect against discrimination based upon sexual orientation or gender identity; 177 of the Fortune 500 companies have enacted non-discrimination policies inclusive of sexual orientation and gender identity to protect their employees. Companies such as AT&T, Bank of America, Best Buy, Boeing, Coca-Cola, Dell, Ford Motor, Google, IBM, Kraft Foods, Marriott International, Microsoft, Monsanto, Pfizer, Procter & Gamble, and Target have all adopted non-discrimination policies that include sexual orientation and gender identity.

CONCLUSION

Employment discrimination affects all Americans, preventing them from contributing to our Nation's workforce. Rampant discrimination leaves many LGBT Americans with the choice of either hiding their LGBT identity in the workplace or disclosing their LGBT identity and risking discriminatory treatment and harassment in the workplace.

The United States cannot afford to allow qualified people to be irrationally excluded from employment simply because of prejudice against their sexual orientation or gender identity. The competitiveness of the Nation in the world market depends on U.S. companies, and government employers, hiring and retaining the best qualified employees.

We urge Congress to support the Employment Non-Discrimination Act as a measured response to the problem of job discrimination and the havoc wreaked upon American families by job discrimination. Although we are unaware of efforts to measure the cost to society of employment discrimination, it is real. Ending both the toll that discrimination takes on individuals and families, and on society, is a worthwhile governmental and financial goal.

Passing ENDA into law would reaffirm America's longtime commitment to the values of honest, hard work and fair employment and would assure all Americans that they will be judged upon the merits of their work, not on the people they love or the gender they express.

In support of this goal, we respectfully ask that the committee support ENDA as a critical step toward securing fair treatment for all Americans.

PREPARED STATEMENT OF JENNIFER CHRISLER, EXECUTIVE DIRECTOR, FAMILY EQUALITY COUNCIL

Mr. Chairman and members of the committee, on behalf of the thousands of families that support Family Equality Council, the national organization working to ensure equality for lesbian, gay, bisexual, and transgender (LGBT) families by building community, changing hearts and minds, and advancing social justice for all families, I am pleased to submit written testimony expressing our support for the Employment Non-Discrimination Act of 2009. I would like to thank especially Chairman Harkin, along with Ranking Member Enzi, for convening this hearing on the Employment Non-Discrimination Act (S. 1584) (ENDA). It is imperative for this committee and Congress to support workplace fairness for all Americans by addressing the issue of employment discrimination based on sexual orientation and gender identity, and to act decisively to end employment discrimination by passing ENDA.

The mission of Family Equality Council is to create and protect happy, healthy families. At the foundation of a healthy family is economic security, the ability to earn a living, the economic stability to provide for a dependent partner and children. Each year in the United States, however, Americans are denied job opportunities, are terminated, or experience on-the-job discrimination merely because they are lesbian, gay, bisexual or transgender. This discrimination takes place at many different types of employers, including private employers, local governments, State governments, and companies large and small. Only 12 States and the District of Columbia currently have laws that specifically ban workplace discrimination based on sexual orientation and gender identity. Another nine States have laws that ban discrimination based on sexual orientation, but do not have clear gender identity protections. Right now, this patchwork of State and local laws protects only 40 percent of the U.S. population from employment discrimination based on sexual orientation or gender identity; 60 percent of Americans live in jurisdictions without explicit job protections based on sexual orientation and gender identity, or with protections that do not protect the LGBT community comprehensively.

Data from the 2000 U.S. Census shows that approximately 20 percent of LGBT Americans are parents, who are raising 2 million children across the United States. Substantial concentrations of these families live in Southern and Midwestern States, where they have limited or no protection from workplace discrimination based on sexual orientation and gender identity. Yet, like other parents, LGBT parents need to work to support themselves and their families. For these families, workplace discrimination has devastating consequences that reach beyond the well-being and economic survival of individual LGBT workers to that of the partners and children who depend upon them.

As a parent, I know what a struggle it would be to navigate such vulnerability and still raise my twin boys to be the happy, healthy, thriving pre-adolescents they currently are. My organization serves parents all across the Nation who face this struggle. On their behalf, I appeal to members of this committee to put S. 1584 on the fast track to passage. Let not one more day go by in the United States without protecting the ability of LGBT people to contribute to the workforce and provide for their families without fear of arbitrary and devastating discrimination.

In addition to its critical legal implications, this legislation also has symbolic value that should not go unrecognized. A member of my staff who has a gay dad who came out to her when she was 10 years old speaks eloquently about the personal shame and stigma she endured growing up in Arizona with a parent who she knew was unequal to other dads in the eyes of her State. Do not let children who have LGBT parents grow up feeling that their country does not value the economic stability and success of their parents and their families. America can do better than that. We have a long tradition of valuing and protecting individuals and families for the contributions they make to the workforce, through such laws as Title VII of the Civil Rights Act of 1964, the model which ENDA closely follows.

The actions of this committee today will send a message about whether America is truly a land of opportunity for all who work hard. LGBT people want to work and support their families. Like other workers, they deserve to be judged on their skills and qualifications, not on factors unrelated to job performance, such as sexual orientation or gender identity. As a parent, and on behalf of all the LGBT parents and children Family Equality Council serves, I urge this committee to act immediately to send ENDA to the full Senate.

I would like to thank Chairman Harkin and Ranking Member Enzi again for bringing this much-needed visibility in Congress to workplace discrimination based on sexual orientation and gender identity. I would also like to thank the committee for holding this hearing and for taking the time to review Family Equality Council's written testimony in support of the Employment Non-Discrimination Act of 2009.

On behalf of all our supporter families, I appreciate your efforts to ensure workplace fairness for all Americans. Please feel free to contact me regarding this important measure at any time.

PREPARED STATEMENT OF MASEN DAVIS, EXECUTIVE DIRECTOR, TRANSGENDER LAW CENTER

Mr. Chairman, Vice-Chairman, and members of the committee, we thank Chairman Harkin and the committee for holding a hearing on the Employment Non-Discrimination Act (ENDA), S. 1584. On behalf of the Transgender Law Center (TLC), we are writing to provide you with information showing why it is crucial that you support this critically important legislation.

TLC is a California statewide, non-profit, civil rights organization advocating for transgender communities. Created in 2002 in response to the overwhelming discrimination that transgender people and our families face in nearly every institution in California, we utilize direct legal services, education, community organizing, and policy and media advocacy to overcome this discrimination and help the State become one where every person's gender identity is respected and supported. We provide legal information and assistance to over 1,000 transgender and gender non-conforming people per year. Approximately 10–15 percent of the inquires we receive are related to employment. We also provide technical advice and assistance to private attorneys representing transgender and gender non-conforming clients. Accordingly, TLC has extensive knowledge of the widespread pattern of discrimination against transgender and gender non-conforming workers.

In 2008, TLC conducted the first California statewide survey documenting the financial, employment, health and housing experiences of transgender Californians. With data from nearly 650 respondents, we worked with a team of social scientists to create *The State of Transgender California: Results from the 2008 California Transgender Economic Health Survey*. The outcomes are stark. *The State of Transgender California* confirms that transgender and gender non-conforming people experience overwhelming discrimination and marginalization in employment based on their gender identity. A copy of *The State of Transgender California* is attached*, and the findings are discussed throughout this statement.

The protection that (ENDA) would provide is crucial to ensuring that transgender and gender non-conforming employees are able to work in an environment that is safe, respectful and professional, regardless of gender identity.

TRANSGENDER PEOPLE ARE WELL QUALIFIED TO WORK IN A VARIETY OF INDUSTRIES, YET FACE SIGNIFICANT ECONOMIC BARRIERS

The State of Transgender California reveals that transgender people who responded to the survey have remarkably high education levels. **Respondents are almost twice as likely to hold a bachelor's degree as the general California population.** Ninety-four percent of the transgender respondents over the age of 25 hold a high school diploma or equivalent compared to 80 percent in California generally. Overall 46 percent of transgender people hold a Bachelor's degree or higher compared to 29 percent of the general California population.

Nonetheless, transgender people are disproportionately represented below the poverty line. According to the most recent State census, approximately 11.7 percent of people 18–64 years old in California live below the national poverty level of $10,400 for single adult households. Yet **1 in 4 transgender people in California earn wages below the national poverty level.** This disconcerting trend continues, even at higher education levels. The average income for all individuals with a Bachelor's degree residing in California is over $50,000. **The average yearly income for transgender respondents with a Bachelor's degree is below $30,000—40 percent less than the average college graduate in California.**

The State of Transgender California also found that respondents who are employed work in a variety of fields and occupations. Thirty-nine percent work in the private sector, 28 percent work in the non-profit sector, 16 percent work in government, and 16 percent are self-employed. Despite high education levels and experience in a broad range of fields, **less than half of respondents are currently employed full-time**. The overall unemployment rate for transgender persons was twice the statewide average for the period this survey was administered.

*The report referred to may be found at *www.transgenderlawcenter.org/pdf/StateTrans CA_report_2009Print.pdf*.

TRANSGENDER PEOPLE FACE A WIDESPREAD PATTERN OF DISCRIMINATION AND HARASSMENT IN EMPLOYMENT

Discrimination and harassment based on gender identity is a reality for transgender and gender non-conforming workers. According to the *The State of Transgender California*, **two thirds of transgender Californians,** or **67 percent report some form of workplace harassment or discrimination directly related to their gender identity**. This harassment and discrimination ranged from verbal harassment to unfair scrutiny or discipline to termination of employment. Almost half of the surveyed population reports that they had experienced some loss of employment either directly as a result of their gender or as a possible result of their gender identity.

There was no difference between experiencing discrimination and type of employer. The widespread pattern of discrimination and harassment faced by transgender workers exists in private companies, in the non-profit sector, and in government.

DISCRIMINATION AGAINST TRANSGENDER EMPLOYEES IS UNDER-REPORTED

Despite widespread employ merit discrimination, **only 15 percent of those transgender Californians who reported some form of discrimination or harassment filed a complaint.** California has explicit protections against workplace discrimination based on gender identity, and still reporting rates are shockingly low. One can assume that reporting rates in States without such protections are far lower. Without explicit Federal protections, State and local employees are not only vulnerable to discrimination, but are also less likely to speak out about it or make complaints out of fear of retaliation by the employer, and a lack of legal recourse for such discrimination or retaliation.

The findings in *The State of Transgender California* are made even more compelling by the fact that the survey was conducted exclusively in California. Our State has strong employment nondiscrimination laws that support safer and more effective integration of transgender people into the workplace. However, a lack of Federal protections has a tremendous effect on the transgender community nationwide. Every week transgender people are living in States without protective legislation call TLC. These hard working Americans have little to no recourse in their home States.

Allowing employers to make decisions about hiring, firing. promotions, and discipline based on a worker's identity goes against America's core value of equal opportunity. All too often, we see transgender Americans forced out of successful careers when they express their gender identity. Many transgender people fear and experience discrimination and therefore must either hide who they are, to the detriment of their health; leave jobs they love in order to transition without risking termination; or face rampant harassment and discrimination in their current workplace. Federal protection from discrimination and harassment based on gender identity would help liberate the transgender community from this stark reality. Such legislation would allow transgender Americans to continue contributing to our country's workforce without fear of being terminated simply because of who we are.

We urge the committee to recognize this issue of basic fairness. Transgender Americans deserve to be ourselves in a workplace where we are judged exclusively on our ability to do our jobs. Work is an integral part of our lives, of who we are, just like our gender. No American should have to choose between their gender and their job. Thank you for your time and for your attention to the serious discrimination facing tens of thousands of workers in the United States that passage of EndA would address.

PREPARED STATEMENT OF JOE LAYMON, VICE PRESIDENT, CHEVRON CORPORATION, HUMAN RESOURCES

On behalf of Chevron Corporation, I am pleased to submit this statement for the record regarding S. 1584, the "Employment Non-Discrimination Act of 2009." This legislation would prohibit discrimination in employment on the basis of sexual orientation and gender identity, which is consistent with the policies and practices established by Chevron in this area. It is Chevron's policy to provide equal employment opportunity to all applicants and employees. No one should ever be subject to discrimination on the basis of race, religion, color, national origin, age, sex, gender identity, disability, veteran status, political preference, and sexual orientation.

Chevron is the second-largest U.S.-based integrated energy company, conducting business in more than 100 countries, producing crude oil, natural gas and other products essential for economic growth and progress. Our diverse and highly skilled

global workforce consists of approximately 62,000 employees, of whom 27,000 work here in the United States. Chevron works to maintain an inclusive work environment and we actively embrace a diversity of people, ideas, talent and experience. Diversity and inclusion are a part of Chevron's core values. Our commitment is laid out in detail in several Chevron policies, from the Chevron Way to formal policies on employment, nondiscrimination and anti-harassment.

Chevron was the first major energy company in the United States to add "sexual orientation" to its equal employment opportunity policies. We have also extended our domestic-partnership benefits package to include same-sex couples and their families in the United States, and extended our equal employment opportunity policies to include "gender identity." We have rigorous and mandatory employee training to re-inforce our policies; encourage reporting of EEO concerns, including by maintaining a toll-free Hotline; and maintain extensive non-retaliation policies for reporting such concerns.

We believe that this commitment is both the right thing to do and key to our ongoing success as a business. We operate in one of the most competitive industries in the world and our diverse and talented workforce is our most important asset. The richness of our culture and diversity increases our ability to achieve our vision and enhances Chevron's work environment. Chevron believes that as a company we can leverage our differences and similarities to achieve new perspectives and strengths, to reach common objectives.

In our view, the equal employment opportunity principles espoused in the Employment Non-Discrimination Act of 2009 would not require any changes in our existing policies, would promote practices that we believe in and follow, and Chevron continues to support the passage of this legislation. Please contact me if you have questions. I would be happy to provide more detail about our policies, practices, and commitment to a diverse workplace.

PREPARED STATEMENT OF THE NATIONAL CENTER FOR TRANSGENDER EQUALITY AND THE NATIONAL GAY AND LESBIAN TASK FORCE—NATIONAL TRANSGENDER DISCRIMINATION SURVEY

EMPLOYMENT AND ECONOMIC INSECURITY

Transgender people are targets of discrimination in many areas of their lives; this marginalization exposes them to tremendous social and economic insecurity. Until now, data on the prevalence and character of this discrimination has been limited to small studies and anecdotal reports. In the first comprehensive national effort to document this problem, the National Center for Transgender Equality and the National Gay and Lesbian Task Force launched a 6-month data collection process, interviewing 6,450 transgender people via an extensive questionnaire that covered critical topics such as employment, education, health care, housing, public accommodation, criminal justice, family life and access to government documents. Our final sample included residents of all 50 States, Puerto Rico, Guam and the U.S. Virgin Islands. Data gathered from respondents was compared to U.S. Census Bureau and Department of Labor data.

KEY FINDINGS

• ***Double the rate of unemployment:*** Survey respondents experience unemployment at twice the rate of the population as a whole.

• ***Near universal harassment on the job:*** Ninety-seven percent of those surveyed reported experiencing harassment or mistreatment on the job.

• ***Significant losses of jobs and careers:*** Forty-seven percent had experienced an adverse job outcome, such as being fired, not hired or denied a promotion.

• ***High rates of poverty:*** Fifteen percent of transgender people in our sample lived on $10,000 per year or less—double the rate of the general population.

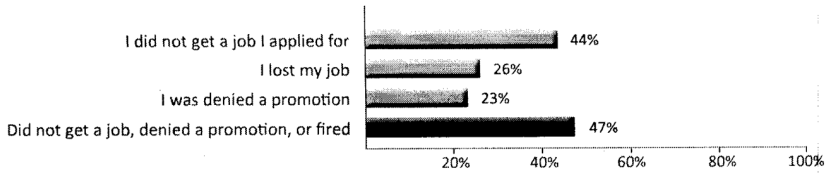
• ***Significant housing instability:*** Nineteen percent of our sample have been or are homeless, 11 percent have faced eviction and 26 percent were forced to seek temporary space.

EMPLOYMENT CHALLENGES

Unemployment and Loss of Jobs (26 Percent lost their jobs because they are transgender)

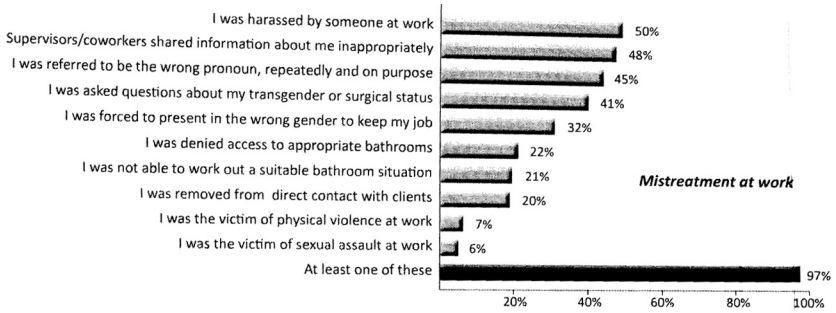
Transgender people are unemployed at alarming rates. Overall 13 percent of respondents were unemployed, nearly double the national average at the time of the survey. This is even more acute for respondents who are Black (26 percent), Latino (18 percent) and Multiracial (17 percent).

Forty-seven percent of survey respondents experienced an adverse job action because they are transgender—they did not get a job, were denied a promotion or were fired—that directly impacted their employment status. A staggering number of the people surveyed, 26 percent, lost their jobs due to their gender identity/expression. Particularly hard hit were those who were Black (32 percent) or Multiracial (37 percent).



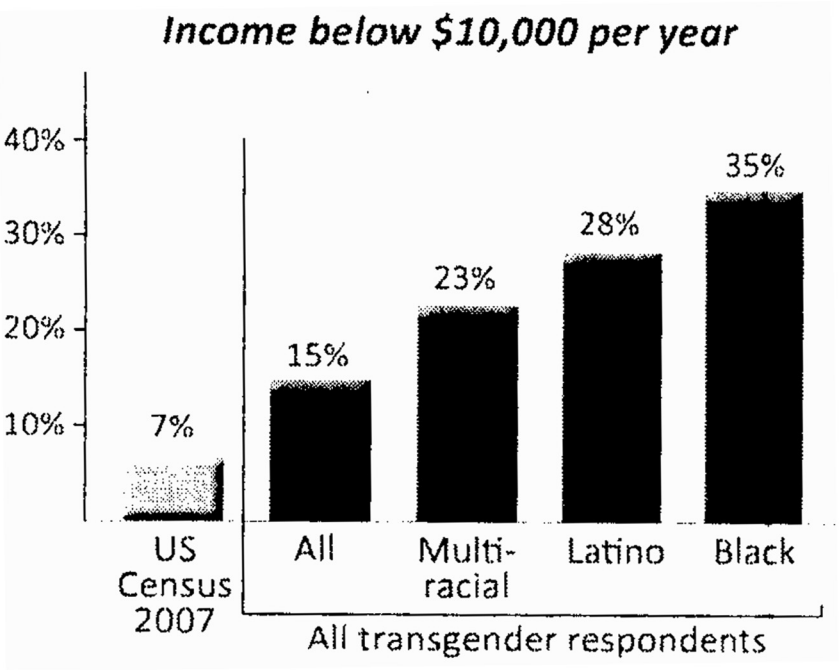
Mistreatment and Harassment at Work—A Universal Experience (97 percent were mistreated at work because they are transgender)

Ninety-seven percent have experienced mistreatment, harassment, or discrimination on the job including: invasion of privacy, verbal abuse, and physical or sexual assault.



Poverty (Twice the national average earn less than $10,000/year because they are transgender)

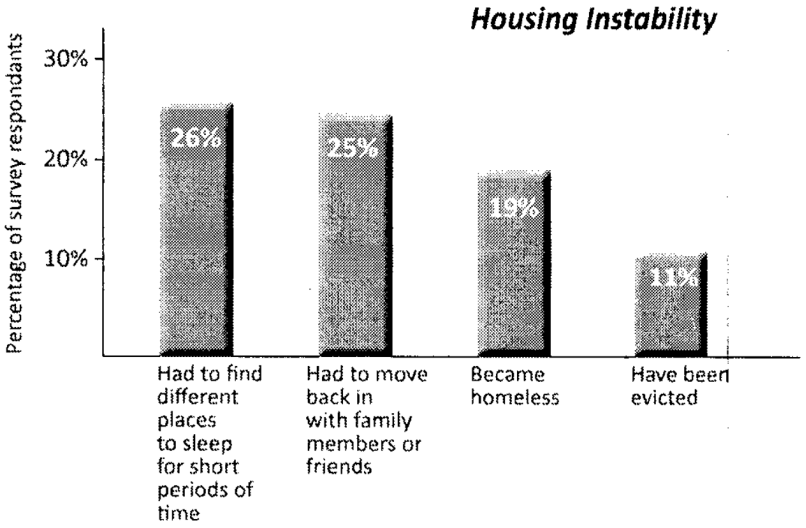
Study respondents experience poverty at a much higher rate than the general population, with more than 27 percent reporting incomes of $20,000 or lower and more than 15 percent reporting incomes of $10,000 or lower. Only 7 percent of the general population reports incomes of $10,000 or lower.


Income below $10,000 per year
40%
30%
20%
10%
7%
15%
23%
28%
35%
US Census 2007
All
Multi-racial
Latino
Black
All transgender respondents

NEGATIVE OUTCOMES AS A RESULT OF EMPLOYMENT DISCRIMINATION

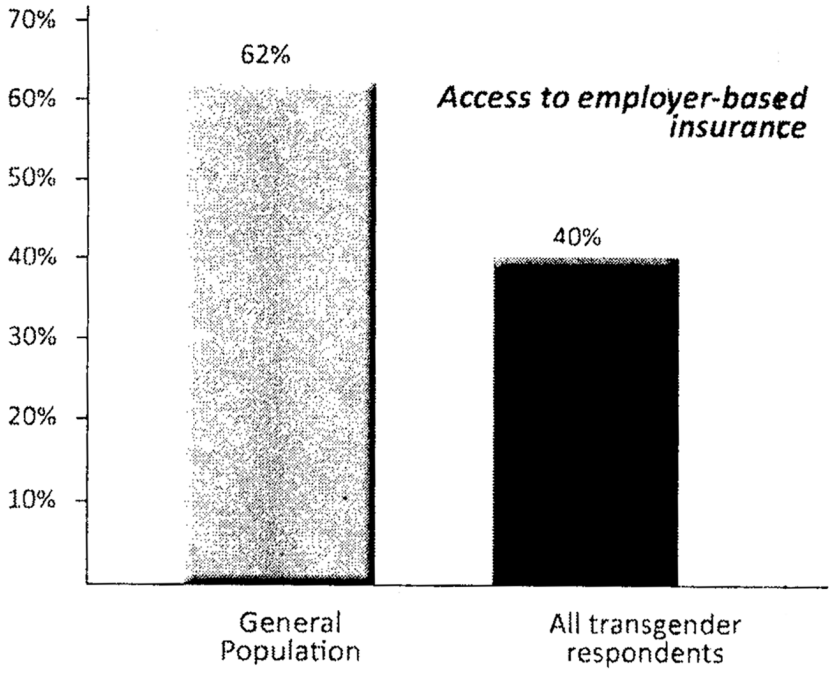
Housing Instability

Survey respondents experienced a series of negative outcomes, many of which stem from challenges they face in employment. A large percentage of our sample reports experiencing housing insecurity due to their gender identity, with almost one-fifth becoming homeless because they are transgender.



Lack of Health Insurance and Access to Appropriate Care

Employment issues also impact transgender people's access to health care. Transgender and gender non-conforming people do not have adequate health insurance coverage or access to competent providers. Respondents in our sample are uninsured at the same rate of the general population in the United States—19 percent—but only 40 percent of the sample enjoys employer-based insurance coverage, compared to 62 percent of the population at large. This figure underscores how high unemployment creates multiple liabilities for our sample.



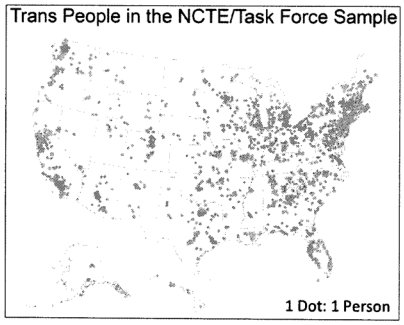
SUMMARY

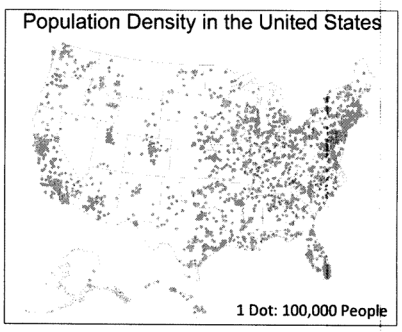
Employment protections are paramount. Transgender people face discrimination, harassment and anti-transgender violence in many areas of their lives. These conditions create significant barriers to employment and lead to devastating economic insecurity.

Basic employment protections for transgender people provide a crucial foundation for dignified, economically secure lives. Employment should be based on one's skills and ability to perform a job. No one deserves to be unemployed or fired because of their gender identity or expression.

SAMPLE DEMOGRAPHICS

Our sample reflects the geographic and racial and ethnic diversity of the Nation as a whole. The maps below show that the geographic distribution of our sample very much parallels that of the general population. Further, the 2007 American Community Survey reports that 75.1 percent of the Nation identifies as white and 24.9 percent identify as people of color across a range of racial and ethnic categories. Transgender and gender non-conforming people in the NCTE/Task Force sample identify as white at a percentage of 76 percent, while 24 percent of respondents identify as one or more of the following: Black/African-American, American Indian or Alaska Native, Hispanic or Latino, Asian or Pacific Islander, Arab or Middle Eastern, Multiracial or Mixed Race.





METHODOLOGY NOTE

A project team comprised of researchers, LGBT advocates and trans-community leaders distributed on-line links to our survey through a network of more than 800 trans-serving and trans-led advocacy and service organizations, support groups, listserves and online social networks. Nearly 2,000 paper surveys were distributed to hard-to-reach transgender and gender non-conforming populations. A total of 6,456 completed questionnaires were included in the final data set.

PREPARED STATEMENT OF NANCY RATZAN, PRESIDENT, NATIONAL COUNCIL OF JEWISH WOMEN (NCJW)

The 90,000 members and supporters of the National Council of Jewish Women (NCJW) strongly support the Employment Non-Discrimination Act (ENDA). ENDA protects basic civil rights in the workplace by prohibiting discrimination based on sexual orientation and gender identity.

For over a century, NCJW has been at the forefront of social change, speaking out on important issues of public policy. Inspired by our Jewish values, NCJW has been, and continues to be, an advocate for the needs of women, children, and families and a supporter of equal rights for all, regardless of sexual orientation and gender identity. Our national resolutions state: "discrimination on the basis of race, gender, national origin, ethnicity, religion, age, disability, marital status, sexual orientation or gender identity must be eliminated." ENDA is an important step toward that goal.

Federal law currently protects employees from discrimination on the basis of race, religion, gender, national origin and disability, but not sexual orientation or gender identity. ENDA remedies this unjust gap in Federal non-discrimination protections by prohibiting employers, labor unions and employment agencies from using an individual's sexual orientation or gender identity as the basis for employment decisions including hiring, promotion, and firing.

ENDA does not create "special rights" for gay Americans. It simply extends the same legal protections against discrimination provided for other individuals who have historically been denied equal employment opportunities. ENDA provides exemptions for small businesses, religious organizations, and the military and explicitly prohibits the adoption of quotas.

All people should have the right to seek employment and to work free from unfair and prejudicial practices. Job performance and ability are the only factors that should influence employment decisions. The National Council of Jewish Women supports and urges immediate passage of a strong Employment Non-Discrimination Act.

PREPARED STATEMENT OF ALLYSON ROBINSON, ASSOCIATE DIRECTOR OF DIVERSITY, HUMAN RIGHTS CAMPAIGN (HRC)

Chairman Harkin and members of the committee, my name is Allyson Robinson. I serve as Associate Director of Diversity at the Human Rights Campaign (HRC), the Nation's largest lesbian, gay, bisexual, and transgender civil rights advocacy organization, where I am staff lead for issues of concern to the transgender community. Prior to my tenure at HRC I was an ordained Baptist minister, serving congregations in the United States and Europe for nearly a decade. I am a 1994 graduate of the U.S. Military Academy at West Point (nominated by Senator Arlen Spec-

ter) and served 5 years as a U.S. Army officer in Europe and the Middle East. I am also a transgender woman.

A recent, first-of-its-kind comprehensive national survey of the transgender community[1] found that we are unemployed at distressing rates—overall, 13 percent of respondents, nearly twice the national average at the time of the survey, reported being out of work. Even more alarming is the finding that 97 percent had experienced harassment or mistreatment on the job solely due to their gender identity. As a result, 15 percent of respondents reported incomes below $10,000 a year, again, over double the rate of the general population.

Behind each of these statistics are stories, thousands of them. They are the stories of men and women who worked hard to prepare themselves in America's high schools, colleges, and universities. (A 2008 study of the transgender population in California by the Transgender Law Center found we are almost twice as likely to hold a bachelor's degree as the general population.)[2] They entered the workforce with high hopes and high ideals, devoted themselves to building successful careers and productive lives, and earned the respect of their managers and peers along the way—only to see it all vanish the moment they made the agonizing decision to be open and honest about who they were.

But standing unseen behind these brave men and women are others—wives, husbands, and children—who saw their own hopes and dreams dashed by discrimination as well. These families are frequently ignored or forgotten when discrimination against transgender people is discussed, but their suffering is very real. Most Americans assume that a married or partnered adult's decision to change genders necessarily means divorce from their spouse and estrangement from their children. Today, this is far less likely to be the case than it was decades ago. As a result, workplace harassment and employment discrimination against transgender people has a negative impact that increasingly reaches far beyond the target to the families they support, and that have supported them through their gender transition.

My own family's story illustrates the point. I have been married to my wife, a West Point classmate of mine, for 15 years, and we have four young children together. She and the children were my closest allies and strongest supporters throughout my gender transition. But in December, 2007 I began a transition of another kind that would test us all: I completed a graduate degree at Baylor University and began my first job search as an openly transgender woman.

As a family, we had prepared well for this career transition. We saved up several months' worth of income, organized our household for a potential move, and put our children's school records in order. I spent much of my last semester of graduate school researching the job market, working with a career counselor, and expanding my network. Given my West Point degree, my excellent military record, my high academic achievements, and my proven leadership ability in the non-profit sector, we believed I would receive a job offer within a relatively short amount of time.

Unfortunately, this proved not to be the case. Though I sent out dozens of resumes, I was rarely asked to interview and received no offers. As our savings began to dwindle, we were forced to look to our birth families to provide housing for our family of six. Though my own parents were very supportive of my gender transition and would have loved to host us, their homes were simply too small to accommodate our family. My wife's parents had a large home, but would only allow my wife and children to live with them; they refused to support my gender transition, pressured my wife to divorce me, and would not even speak to me. As a result, we had no choice but to enter into a very difficult arrangement. My wife and the children moved in with her parents in Billings, MT, a home environment which was openly hostile to my gender transition, while I moved in with my mother in Phoenix, AZ. We endured this painful separation for almost 10 months.

Though I was eventually offered an excellent position and our family was reunited, the effects of our forced separation, particularly on our children, linger to this day. My work requires me to travel often, and the children suffer tremendous separation anxiety, even if I'll only be away from them overnight. Recently, while watching a children's film with them which featured a subplot about a child separated from his parents, my 7-year-old daughter began to weep uncontrollably and could not be consoled. And this is to say nothing of the strain that unemployment

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[1] National Center for Transgender Equality and National Gay and Lesbian Task Force, "National Transgender Discrimination Survey, Preliminary Results," *http://docs.google.com/fileview?id=0BwKC1El_YwUWOTc1M2M2ZGQtN2JhMS00YTc0LWI2ODctNWI3MDE4NGEwOWJl&hl=en (accessed November 2, 2009).*

[2] Transgender Law Center, "The State of Transgender California Report: Results from the 2008 California Transgender Economic Health Survey," *http://www.transgenderlawcenter.org/pdf/StateTransCA_report_2009Print.pdf (accessed November 2, 2009).*

and separation placed on our marriage relationship or our financial situation. We were forced to spend much of our retirement savings to support ourselves, money we had set aside years ago while still serving in the Army. Pastoral counseling, offered by our church, has helped my family begin to overcome the emotional effects of this painful experience.

My work with the Human Rights Campaign takes me all over the United States, speaking with groups of transgender people and listening to their stories. I've heard stories of marriages which survive the very real challenges presented by a spouse's gender transition, only to collapse under the pressure of job termination and prolonged unemployment. I've listened to a transgender man describe having to live with his partner and their 2-year-old son out of their van for nearly a year because he was fired from his job in journalism for transitioning and could not find work. I've hugged a transgender woman while she told me through tears of being forced because of underemployment and poverty to choose between purchasing medication she herself needed or asthma medicine for her son. I've listened to transgender people tell of enduring years of brutal workplace harassment, terrified to seek a more inclusive employer because they believed they'd never find another job, who turned to alcohol or drugs to deal with the trauma. The effect of this on their families was just as traumatic. Many of the stories behind the statistics are like this—stories of sons and daughters, husbands and wives, who suffer needlessly because someone they love has chosen to follow the medically prescribed path to health, wholeness, and inner peace.

Our family has been very fortunate, and yet even we have learned that a happy ending alone sometimes doesn't heal the pain of the journey. To be sure, we aren't the only family that has had to endure a long separation—families do it every day and suffer the negative consequences. In our case, however, as with that of so many families like ours, these experiences are unnecessary and avoidable. It should not be so difficult for transgender people to find meaningful work through which we can support ourselves and our families. Our decision to live in ways that are honest, faithful to ourselves, and supported by the very best wisdom America's medical and mental health professionals can offer, should not be a barrier to gainful employment.

It is perhaps a sad fact of human nature that we tend to marginalize those whom we do not understand. In America, however, we have a proud history of rising above this nature and striking down policies and practices based on unawareness, misinformation, or bias. I urge the Senate to add to that proud history by passing the Employment Non-Discrimination Act in its fully transgender inclusive form as soon as possible.

Thank you most sincerely for receiving this testimony and holding this important hearing.

PREPARED STATEMENT OF JOE SOLMONESE, PRESIDENT, HUMAN RIGHTS CAMPAIGN

Mr. Chairman and members of the committee, my name is Joe Solmonese, and I am the president of the Human Rights Campaign, America's largest civil rights organization working to achieve lesbian, gay, bisexual and transgender (LGBT) equality. By inspiring and engaging all Americans, HRC strives to end discrimination against LGBT citizens and realize a nation that achieves fundamental fairness and equality for all. On behalf of our over 750,000 members and supporters nationwide, I am honored to submit this statement in support of S. 1584, the Employment Non-Discrimination Act ("ENDA").

Work is central to all of our lives. Our jobs enable us to support our families, develop our talents, contribute to our communities and our country, and realize our dreams. We all share the challenges of an economic downturn. But for far too many hardworking LGBT people, those pressures are intensified by the fear that they can be denied job opportunities, fired or otherwise be discriminated against just because of who they are. LGBT Americans, like everyone else, want their success to reflect their skills, ambition, and dedication. But this modest goal is not a reality for many LGBT people. In 29 States, it is still legal to fire someone because of their sexual orientation, and in 38 States, it is legal to fire someone because of their gender identity.

Because an employer in these States may legally fire, refuse to hire, or fail to promote an employee based upon sexual orientation or gender identity, LGBT people are at a great disadvantage in the workplace. For instance, studies show that sexual orientation has a negative impact on earnings among individuals with similar education and background. A 2007 survey of these studies found that gay men earn from 10 percent to 22 percent less than heterosexual men with the same education, experience, race, occupation, and geographic location.

Across this country, lesbian, gay, and bisexual employees must avoid simple actions that their heterosexual coworkers take for granted—placing a family picture on a desk; describing weekend plans over lunch; commuting to work with a partner; wearing a ring. For a transgender employee, the challenge is even greater. A person could have to forego living in her true gender at all, whether on or off of the job, in order to stay employed.

It is time for a Federal law that would make it illegal to fire a LGBT person just because of who they are. ENDA will bring the value of meritocracy to a community that has had to do without it for too long.

ENDA is a narrow, focused piece of legislation modeled after Title VII of the Civil Rights Act of 1964, the landmark legislation which protects individuals against employment discrimination on the bases of race and color, as well as national origin, sex, and religion. Title VII is a long-standing, respected employment statute with which employers, employees, courts and the American people are very familiar. By following this model, ENDA provides a clear roadmap to employers and employees as to their obligations and available remedies under the law, and treats the issue of discrimination against LGBT people in the same way as other victims of workplace bias. ENDA does not create any "special rights." It simply extends to all Americans basic employment protection from discrimination based on irrational prejudice.

Support for this legislation is strong. Polls demonstrate overwhelming public support for the principle of equal job opportunities for lesbian and gay Americans (89 percent in a May 2008 Gallup poll). Six in ten Americans specifically support the Employment Non-Discrimination Act (Hart Research poll, January–February 2007), including majorities of white (58 percent), African-American (61 percent), and Latino (56 percent) voters, as well as self-described Democrats (70 percent), independents (55 percent), and Republican women (52 percent).

America's top corporations and small businesses know, in order to remain competitive, they must recruit and retain the best possible talent, including members of the LGBT community. As of September 2009, 434 (87 percent) of the Fortune 500 companies have implemented non-discrimination policies that include sexual orientation. Two hundred and seven (41 percent) of those companies also cover gender identity in their policies—up from only 3 in 2000. Currently, 80 large corporations and 57 small businesses have joined the Business Coalition for Workplace Fairness in support of ENDA. Among this group of corporations from a wide range of geography and industry are: BP America, Citigroup, Coors Brewing, Ernst & Young, General Mills, General Motors, Kaiser Permanente, Marriott International, Microsoft, Nike and Time Warner. These companies understand that fairness and diversity are good for business.

The civil rights community also stands behind the Employment Non-Discrimination Act. The Leadership Conference on Civil Rights, a coalition of over 200 civil rights, religious, labor, and women's rights organizations, has endorsed ENDA. In addition, such well known leaders of the civil rights movement as Coretta Scott King and Rep. John Lewis have spoken out in support of ENDA in the past.

Some of ENDA's critics would like to misrepresent it as inconsistent with religious liberties. However, many communities of faith also support fairness. Numerous Christian and Jewish organizations and denominations, including The Interfaith Alliance; Presbyterian Church U.S.A.; Union for Reform Judaism; United Church of Christ; and the United Methodist Church have taken a strong stand against discrimination.

ENDA, like other civil rights laws, is sensitive to religious organizations and contains a very broad religious exemption. The act exempts the same religious entities that are exempt from the religious discrimination provisions of Title VII of the Civil Rights Act of 1964. As a result, houses of worship, parochial and similar religious schools and missions, as well as positions at other entities owned by or closely affiliated with a religious organization are not subject to ENDA's prohibition of discrimination based on sexual orientation or gender identity. In short, ENDA in no way interferes with a religious entity's ability to follow its beliefs in making employment decisions.

We are a country predicated on equality. And over the years, we have embraced a more inclusive vision of what that means. In the past five decades, Congress and the President have recognized that race, sex, national origin, religion, age and disability are irrelevant to the ability of a person to do a job and have enacted laws to address discrimination based on those characteristics. These civil rights laws have improved job opportunity for millions of Americans, raising standards of living and providing hope of a better future for each successive generation. Yet, there remains no Federal law protecting LGBT people from being fired from a job, being denied a promotion, or experiencing harassment at work simply because of who they

are. The time has come for Congress to finally act and ensure that discrimination has no place in the American workplace.

PREPARED STATEMENT OF MEGHAN STABLER

Chairman Harkin and members of the committee, thank you for this opportunity to submit written testimony in support of S. 1584, the Employment Non-Discrimination Act (ENDA), critical but incredibly simple legislation which would protect people from workplace discrimination based on their sexual orientation or gender identity. I commend the committee for holding the first hearing on a version of ENDA that protects lesbian, gay, bisexual ***and*** transgender people. Protecting Americans from gender identity-based employment discrimination is critically important. Lesbian, gay, bisexual and transgender people face a high risk of job discrimination and have no adequate remedy in Federal law. This bill would provide critically needed job protections.

My statement will focus on the discrimination faced by so many transgender men and women in the workplace, and its devastating implication on personal finance, health care insurance availability and even homelessness. My testimony, and that of others, is given in the hopes that you move forward with workplace protections, for all lesbian, gay, bisexual and transgender workers and help stop discrimination in any aspect of employment.

My name is Meghan Stabler; first and foremost I am a former business executive, having worked for major corporations throughout Europe and North America for the last 27 years.

Before transitioning my gender from male to female to resolve an inner sense of gender conflict that had been known to me since the age of 5, I enjoyed an amazing career with respect, increasing responsibilities, compensation, and an unlimited career path. I was married and have a wonderful teenage daughter.

Second, I am a woman, however, I am also labeled *transgender*, and more specifically *transsexual*, meaning I transitioned genders, as I mentioned, in my case from male to female. Simply and solely, because I am transgender, employers are able to fire, refuse to hire, demote, or refuse to promote or otherwise discriminate against me in 38 States, despite my job performance, history of accomplishments or the merits of my ability to perform my job.

My ability to finance health care coverage, and to provide myself with a home, is clearly linked to my ability to work and remain employed. Given the current economic climate in the USA this is tough enough; however because of discrimination in the workplace against transgender employees, it is harder still. Many transgender people face discrimination in the workplace, sometimes with employers terminating their jobs within hours of their coming out and "telling" their employer that they are transgender. Losing a job impacts access to health care, and faced with dwindling finances, can ultimately lead transgender people to homelessness. In fact, during 2006, the Transgender Law Center conducted a survey of transgender people living in San Francisco which discovered the following: only 25 percent of the transgender people surveyed were employed full-time, and altogether 35 percent were unemployed. Only 4 percent made more than the estimated median income for a San Franciscan. ***This is a remarkable statistic***, considering that the wider Bay Area is considered "home" to my profession of software and even more remarkable as San Francisco is considered one of the most progressive cities in North America.

I, too, have experienced discrimination during and, following my transition from male to female. Let me share my story.

Since my earliest memories I felt different.

I did not feel right about my gender.

This is known medically as Gender Identity Disorder.

Simply put, my emotional and psychological gender was not in alignment with my genetic, physiological sex. This is not an acquired condition; rather, it is an intrinsic part, a lifelong aspect of my being, something that I, and many others are born with. Despite all of the behaviors that I learned in trying to deny my true identity and feelings, this condition had been the source of unease and discomfort throughout my life. Eventually I received treatment through accepted medical practices for Gender Identity Disorder. While the types of medical or other treatments range widely, I took the necessary steps to change my physical gender from male to female. Doing so did not change the person I was or my ability to perform my job, or as a matter of fact, any job, but finally dealing with this, lifted a huge weight off my shoulders.

As a male in the workplace I enjoyed what I call "entitlements", I enjoyed a successful career, in meetings I was seen as a leader and I had employment protections. As I began to transition it changed. Initially there was no policy of protection

in my place of work, but over time my employer was willing to place EEO and Sexual Harassment policies in place. As a female in the workplace I see the "other side" of the business table, yet with a societal stigmatism labeled upon me as transgender, and like the majority of transgender persons I know, I have faced workplace issues.

Since I openly transitioned, I have received a number of job demotions: I am no longer a senior executive.

As a result, I have seen significant salary reductions, along with reductions in my participation and involvement in meetings, business transactions and customer meetings. As a result, I face a monthly struggle to keep my house payments and related bills, while ensuring that I pay court-ordered child support. I have had to use much of my savings to make up shortfalls and bill payments, including my daughter's educational needs.

Having a job is so important to transgender people, without the income we may not have access to essential medications and treatments, or even expensive surgeries that enable us to slip back into society in the new "legal" gender. Overall, I have been one of the fortunate few, yet I would like to cite a number of examples from friends that have not been so lucky.

The first is a story of a transgender friend who transitioned over 5 years ago. She was a Chief Technology Officer in a software development company, but upon announcing her need to transition from male to female, she was terminated from her position. She faced immediate workplace discrimination.

She relocated in the hopes that she could start a new life, without her male history following her. Over the coming months that evolved into years; her life savings dwindled to nothing despite her applying for jobs not only within her home State, but across the country. She was overlooked for many positions, and for those for which she received an initial call back, **she never received a second interview**. She used her remaining savings to complete a variety of necessary surgeries, as she still needed to resolve her inner need to change gender. With escalating costs and a declining source of finances, she became increasingly suicidal. Without a job and income, completing surgery was out of reach. She was very educated and qualified for positions; her knowledge of technology never changed between the day she announced transition and the day prior to transition, yet she was never hired for a job for over 5 years.

Second is the experience of another good friend of mine, a commercial pilot, who was placed on "paid-administrative leave" within 2 hours of talking to her companies HR executives about her intent to transition genders. Within 4 days, the company asked her to tender her resignation.

Third is the story of another friend, who was once a manufacturing engineer in a predominantly-male business. On announcing her need to transition, she was immediately terminated. She needed to complete transition, yet her finances were reduced and she found it increasingly hard to get a job in the line of work in which she was experienced. She relocated, but still could not find a position equal to her former job. After 2 years, despite her engineering expertise, she was working as a housekeeper in a Denver hotel.

For transgender (*transsexual*) people, gender transition is not a choice, but is rather an essential need.

Like other transgender people, I have been, and am still a productive, responsible, dedicated, loyal and passionate employee. I wish only to be measured on the merits of the job I do, and the capability to perform to the best of my ability. It is only when we are subject to discriminatory actions and a lack of workplace protections that our work begins to suffer.

Without work, we lose income.

Without income or savings, we lack access to affordable healthcare, and sometimes healthcare is not even available to us from certain providers just because of our transitional history or status.

Without healthcare we often cannot complete transition. With the stress placed on us, often suicide is a considered option.

I hope that you are able to comprehend from mine and other stories how much lesbian, gay, bisexual and transgender Americans need you to pass the Employment Non-Discrimination Act.

For every example of workplace discrimination you hear or read today, there are thousands, more across the country who have faced, and continue to face discrimination in silence, often without any recourse at all. Their voices cannot be heard today, but I assure you that they are watching, listening, and reading what happens with regards to this bill. They are productive Americans, they are hard working Americans. They, like I, are asking for the right to work.

I hope that we can move forward and finally end workplace injustice and discrimination based on a person's Sexual Orientation or Gender Identity and finally pass S. 1584 to ban discrimination against lesbian, gay, bisexual, and transgender people in the workplace and to protect LGBT people from being fired, refused a job, or harassed in the workplace.

In closing, I thank the committee for holding this important hearing on the Employment Non-Discrimination Act and for allowing me to submit written testimony in favor of this important legislation. I would like to leave you with this quote from Robert Francis Kennedy:

> "Each time a man stands for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends a tiny ripple of hope, and crossing each other from a million different centers of energy and daring, those ripples build a current which can sweep down the mightiest walls of oppression and resistance."

U.S. GOVERNMENT ACCOUNTABILITY OFFICE (GAO),
WASHINGTON, DC,
October 1, 2009.

Hon. TOM HARKIN, *Chairman,*
Committee on Health, Education, Labor, and Pensions,
U.S. Senate.

Hon. SUSAN M. COLLINS,
U.S. Senate.

Hon. JEFF MERKLEY,
U.S. Senate.

Subject: Sexual Orientation and Gender Identity Employment Discrimination: Overview of State Statutes and Complaint Data

Federal law prohibits discrimination in employment based on a number of factors, including race, color, religion, sex, national origin, disability, and age. Although Federal law does not prohibit discrimination in employment on the basis of sexual orientation,[1] 21 States[2] and the District of Columbia provide such protection in their statutes. Thirteen of these States[3] also have statutes explicitly prohibiting discrimination in employment on the basis of gender identity.[4] Based on your request to update our 2002 report on this subject,[5] we (1) reviewed State statutes that prohibit discrimination in employment on the basis of sexual orientation and gender identity, including the characteristics, coverage, and exclusions of the laws, and (2) gathered information concerning the number of administrative employment discrimination complaints filed in each State—both the total number and the number of complaints listing sexual orientation or gender identity as one of the claimed bases for discrimination.

In response to your request, we utilized legal databases to determine which States have laws specifically prohibiting discrimination in employment on the basis of sexual orientation and gender identity and compared our results with other organizations' lists.[6] We sent questionnaires to the 22 States we identified having such laws. We asked the States to verify information concerning their statutes and to provide us with data on the numbers of administrative employment discrimination complaints filed for the most recent 3 years for which data is available. All data are as reported by the State agency; we did not verify these data. We created a table for each State incorporating each State's responses and other information and sent these tables to the States for their comments, which we incorporated as appropriate. We conducted our review during August and September 2009.

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[1] Executive Order 13087, issued on May 28, 1998, amended Executive Order 11478 to prohibit discrimination based upon sexual orientation within executive branch civilian employment.

[2] These States are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin.

[3] Except where otherwise specified, we use the term "State" throughout this correspondence to refer to the District of Columbia as well as to the 21 States.

[4] Additionally, some States may permit gender identity complaints to be filed under provisions prohibiting discrimination based on sex, sexual orientation, or disability.

[5] U.S. General Accounting Office, *Sexual Orientation-Based Employment Discrimination: States' Experience with Statutory Prohibitions*, GAO–02–878R (Washington, DC: July 9, 2002).

[6] Specifically, we compared our research to information compiled by the Human Rights Campaign and the National Gay and Lesbian Task Force.

Of the 22 States that have laws prohibiting discrimination based on sexual orientation, the statutory definitions in all but one State (Minnesota),[7] define "sexual orientation" as including in some form the categories of heterosexuality, homosexuality, and bisexuality. All but five[8] of the statutory definitions include people who are perceived by others to be, or are identified with, a specific orientation, whether or not they identify with that orientation. Therefore, for instance, a person who is discriminated against because he is incorrectly perceived by an employer to be homosexual, but who is actually heterosexual, may still file an employment discrimination complaint based on sexual orientation.

Thirteen of the 22 States have laws explicitly prohibiting discrimination based on gender identity.[9] Gender identity generally refers to a person's identity and/or appearance, whether or not associated with a person's sex at birth. Five of these States[10] do not provide a separate statutory definition for "gender identity."[11] Some States reported that although their State statutes may not specifically prohibit discrimination based on gender identity, the State may nevertheless accept gender identity employment discrimination complaints under another basis, such as sexual orientation or sex. For instance, Massachusetts reported that it will accept, investigate, and adjudicate gender identity cases under the section of Massachusetts law prohibiting employment discrimination on the basis of sex. Wisconsin reported that, depending on the facts of the particular situation, an individual with a gender identity issue may be able to bring a claim of discrimination based on disability or sex.

Under the State statutes, the number of employees an employer has is a factor in determining coverage. Nine States cover employers having one or more employees.[12] Only four States require more than six employees for coverage.[13] In Illinois, the minimum number of employees an employer must have in order for the statutory protection from employment discrimination on the basis of sexual orientation and gender identity to be in effect is a different number than for the statutory protection for other bases of employment discrimination. Specifically, the sexual orientation discrimination and gender identity provisions apply only to a private employer with 15 or more employees, whereas an employer need only employ one person to invoke the application of the provisions providing protection from employment discrimination on the basis of sexual harassment or physical or mental handicap unrelated to ability.

All the States provide at least a limited exemption for employers that are religious organizations, although the exemptions may vary in scope.[14] They generally permit religious organizations to give preference to those of the same religion in hiring. In Maryland, the statute mentions sexual orientation specifically in exempting religious organizations from the employment non-discrimination provisions.[15] Washington provides a clear exception for religious organizations.[16] Minnesota law states that for religious or fraternal organizations, if sexual orientation is a bona fide occupational qualification for employment, the sexual orientation discrimination provisions do not apply; moreover, a not-for-profit religious association is exempt from these provisions except when the association is engaged in secular business activities unrelated to the religious and educational purposes for which it is organized.[17]

All but one (Massachusetts) of the States include employers that are non-profit organizations in the coverage of their sexual orientation and gender identity non-

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[7] Minnesota's statute defines "sexual orientation" in part as "having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person," or "having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness." Minn. Stat. § 363A.03, Subd. 44.

[8] The States that do not include such language in their definitions are Delaware, the District of Columbia, Maryland, Vermont, and Washington.

[9] These States are California, Colorado, the District of Columbia, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.

[10] Colorado, Illinois, Maine, Minnesota, and Oregon.

[11] Colorado's statute refers to "transgender status" rather than "gender identity."

[12] Some State laws explicitly state "one." Where a specific number was not stated in the law, the States confirmed that the minimum number of employees for coverage was one.

[13] Washington requires 8 and Illinois, Maryland, and Nevada each require 15.

[14] We are using the term "exemption" to include any cases in which a State statute provides any sort of exception, however limited, for religious organizations.

[15] Under Maryland statute the employment non-discrimination provision does not apply to "[a] religious corporation, association educational institution or society with respect to the employment of individuals of a particular religion or sexual orientation to perform work connected with the carrying on by such corporation, association, educational institution or society of its activities." Md. Ann. Code art. 49B, § 18(2).

[16] Under Washington law, the definition of employer "does not include any religious or sectarian organization not organized for private profit." Rev. Code Wash. Ann. § 49.60.040(3).

[17] Minn. Stat. §§ 363A.20, Subd. 20 and 363A.26(2).

discrimination statutes. However, these States may exempt specific types of organizations. For example, Minnesota exempts nonpublic service organizations whose primary function is providing occasional services to minors.[18] New Hampshire exempts exclusively fraternal and social clubs,[19] and Maryland and Nevada exempt private membership clubs.[20] Finally, all the State statutes include coverage of State and local government employers.

Generally, the administrative complaint data reported by States show relatively few employment discrimination complaints based on sexual orientation and gender identity. In some States, the laws proscribing sexual orientation and gender identity employment discrimination were enacted relatively recently; therefore, these States could not provide complete complaint data for the requested 3-year period.

Enclosed with this correspondence are tables for each of the 22 States for which we compiled information. For each State we listed specific information about the State statute, including relevant definitions and coverage (e.g., minimum number of employees and applicability of exemptions), and listed the complaint data provided by the States.[21] Some of the information in the tables came from our reading of the State statute, as verified by the States, and other information came from the States' responses to our questionnaire. It is important to note that case law, regulation, or other guidance may also address the specific elements listed in the tables. Our focus in this report was only on the language of the State statutes.

James M. Rebbe, Senior Attorney, and Doreen S. Feldman, Assistant General Counsel, prepared this report.

If you have any questions about this letter, please contact me at 202–512–8208.

DAYNA K. SHAH,
Managing Associate General Counsel.

State Tables

State	Information
California:	
Statutory provision(s) providing protection from employment discrimination on the basis of sexual orientation and/or gender identity.	Cal. Gov. Code § 12940 (sexual orientation and gender identity), Cal. Gov. Code § 12926(p) (gender identity).
Definition of ''sexual orientation''	''Heterosexuality, homosexuality, and bisexuality,'' including ''a perception that the person has any of those characteristics or that the person is associated with a person who has, or is perceived to have, any of those characteristics.'' Cal. Gov. Code §§ 12926(m) and (q).
Does statute prohibit discrimination on the basis of gender identity?.	Yes.
Definition of ''gender identify''	The definition of ''sex'' for purposes of the California fair employment statute ''includes, but is not limited to, a person's gender.'' This section then refers to the definition of ''gender'' in the California Penal Code, which is defined as ''sex, and includes a person's gender identity and gender-related appearance and behavior whether or not stereotypically associated with the person's assigned sex at birth.'' Cal. Gov. Code § 12926(p); Cal. Pen. Code § 422.56(c).
Minimum number of employees for coverage	5[22].
Does statute address workplace access to shared facilities?.	No.
Religious organizations exempt?	Yes.
Non-profit organizations exempt?	No.
Does statute apply to government employers?	Yes.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available.	2008[23]: 18,786; 2007: 16,396; 2006: 15,312.

[18] Minn. Stat. § 363A.20, Subd. 3.
[19] N.H. Rev. Stat. Ann. § 354–A:2(VII).
[20] Md. Ann. Code art. 49B, § 15(b); Nev. Rev. Stat. Ann. § 613.310(2)(c).
[21] All complaint data in the State tables are reported by State fiscal year (generally, July 1 through June 30), except where noted.

State Tables—Continued

State	Information
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is sexual orientation.	2008: 821; 2007: 815; 2006: 722.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is gender identity..	California does not have separate statistics on gender identity complaint data because gender identity discrimination is characterized as sex discrimination.
Colorado:	
Statutory provision(s) providing protection from employment discrimination on the basis of sexual orientation and/or gender identity.	Colo. Rev. Stat. 24–34–402 (sexual orientation and gender identity), Colo. Rev. Stat. 24–34–401(7.5) (gender identity).
Definition of ''sexual orientation''	''A person's orientation toward heterosexuality, homosexuality, bisexuality, or transgender status or an employer's perception thereof.'' Colo. Rev. Stat. 24–34–401(7.5).
Does statute prohibit discrimination on the basis of gender identity?.	Yes[24].
Definition of ''gender identity''	The Colorado statute includes ''transgender status'' in the definition of ''sexual orientation'' as a protected class but does not define that term in the statute.
Minimum number of employees for coverage	1.
Does statute address workplace access to shared facilities?.	No.
Religious organizations exempt?	Yes.
Non-profit organizations exempt?	No.
Does statute apply to government employers?	Yes.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available.	FY 2008–2009: 712; FY 2007–2008: 635; FY 2006–2007: 593.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is sexual orientation[25].	FY 2008–2009: 36; FY 2007–2008: 23.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is gender identity[26].	FY 2008–2009: 2; FY 2007–2008: 1.
Connecticut:	
Statutory provision(s) providing protection from employment discrimination on the basis of sexual orientation and/or gender identity.	Conn. Gen. Stat. § 46a–81c (sexual orientation).
Definition of ''sexual orientation''	''Having a preference for heterosexuality, homosexuality or bisexuality, having a history of such preference or being identified with such preference, but excludes any behavior which constitutes a violation of part VI of chapter 952 [relating to sex offenses].'' Conn. Gen. Stat. § 46a–81a.
Does statute prohibit discrimination on the basis of gender identity?.	No[27].
Definition of ''gender identity''	N/A.
Minimum number of employees for coverage	3.
Does statute address workplace access to shared facilities?.	No.
Religious organizations exempt?	Yes.
Non-profit organizations exempt?	No.
Does statute apply to government employers?	Yes.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available.	FY 2008–09: 1,716; FY 2007–08: 1,814; FY 2006–07: 1,783.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is sexual orientation.	FY 2008–09: 44; FY 2007–08: 61; FY 2006–07: 72.

State Tables—Continued

State	Information
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is gender identity.	Connecticut does not track gender identity complaints separately. They may appear as complaints based on sexual orientation, complaints based on sex, or both.
Delaware:	
Statutory provision(s) providing protection from employment discrimination on the basis of sexual orientation and/or gender identity.	19 Del. C. § 711 (sexual orientation).
Definition of ''sexual orientation''	''Exclusively means heterosexuality, homosexuality, or bisexuality.'' 19 Del. C. § 710(18).
Does statute prohibit discrimination on the basis of gender identity?.	No.
Definition of ''gender identity''	N/A.
Minimum number of employees for coverage	4.
Does statute address workplace access to shared facilities?.	No.
Religious organizations exempt?	Yes.
Non-profit organizations exempt?	No.
Does statute apply to government employers?	Yes.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available.	FY 2008–2009: 728; FY 2007–2008: 619; FY 2006–2007: 648.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is sexual orientation.	Coverage based upon sexual orientation status went into effect July 1, 2009, so Delaware has not yet collected any data.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is gender identity.	N/A.
District of Columbia:	
Statutory provision(s) providing protection from employment discrimination on the basis of sexual orientation and/or gender identity.	D.C. Code § 2–1402.11 (sexual orientation and gender identity).
Definition of ''sexual orientation''	''Male or female homosexuality, heterosexuality and bisexuality, by preference or practice.'' DC. Code § 2–1401.02(28).
Does statute prohibit discrimination on the basis of gender identity?.	Yes.
Definition of ''gender identity''	''‘Gender identity or expression’ means a gender-related identity, appearance, expression, or behavior of an individual, regardless of the individual's assigned sex at birth.'' D.C. Code § 2–1401.02(12A).
Minimum number of employees for coverage	1.
Does statute address workplace access to shared facilities?.	No.
Religious organizations exempt?	Yes.
Non-profit organizations exempt?	No.
Does statute apply to government employers?	Yes.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available[28].	FY 2008: 357; FY 2007: 282; FY 2006: 350.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is sexual orientation.	FY 2008: 28; FY 2007: 17; FY 2006: 29.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is gender identity.	FY 2008: 2; FY 2007: 0; FY 2006: 0.
Hawaii:	
Statutory provision(s) providing protection from employment discrimination on the basis of sexual orientation and/or gender identity.	H.R.S. § 378–2 (sexual orientation).

State Tables—Continued

State	Information
Definition of ''sexual orientation''	''Having a preference for heterosexuality, homosexuality, or bisexuality, having a history of any one or more of these preferences, or being identified with any one or more of these preferences'' but ''shall not be construed to protect conduct otherwise proscribed by law.'' H.R.S. § 378–1.
Does statute prohibit discrimination on the basis of gender identity?.	No[29].
Definition of ''gender identity''	N/A.
Minimum number of employees for coverage	1.
Does statute address workplace access to shared facilities?.	No.
Religious organizations exempt?	Yes.
Non-profit organizations exempt?	No.
Does statute apply to government employers?	Yes.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available.	FY 2007–2008: 617; FY 2006–2007: 461; FY 2005–2006: 515.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is sexual orientation.	FY 2007–2008: 8; FY 2006–2007: 3; FY 2005–2006: 7.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is gender identity.	Hawaii does not track gender identity complaints separately, but considers gender identity discrimination a form of sex discrimination.
Illinois:	
Statutory provision(s) providing protection from employment discrimination on the basis of sexual orientation and/or gender identity.	§ 775 ILCS 5/1–102(A), § 775 ILCS 5/2–102(A), § 775 ILCS 5/1–103(O–1) (sexual orientation and gender identity).
Definition of ''sexual orientation''	''Actual or perceived heterosexuality, homosexuality, bisexuality, or gender-related identity, whether or not traditionally associated with the person's designated sex at birth. 'Sexual orientation' does not include a physical or sexual attraction to a minor by an adult.' '' § 775 ILCS 5/1–103(O–1).
Does statute prohibit discrimination on the basis of gender identity?.	Yes.
Definition of ''gender identity''	There is not a separate definition of ''gender identity'' in Illinois statute. See definition of ''sexual orientation.''
Minimum number of employees for coverage	15[30].
Does statute address workplace access to shared facilities?.	No.
Religious organizations exempt?	Yes.
Non-profit organizations exempt?	No.
Does statute apply to government employers?	Yes.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available.	FY 2008–2009: 3,855; FY 2007–2008: 3,522; FY 2006–2007: 3,287.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is sexual orientation.	FY 2008–2009: 145; FY 2007–2008: 81; FY 2006–2007: 103.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is gender identity.	FY 2008–2009: 5; FY 2007–2008: 1; FY 2006–2007: 3.
Iowa:	
Statutory provision(s) providing protection from employment discrimination on the basis of sexual orientation and/or gender identity.	Iowa Code § 216.6 (sexual orientation and gender identity).
Definition of ''sexual orientation''	''Actual or perceived heterosexuality, homosexuality, or bisexuality.'' Iowa Code § 216.2(14).
Does statute prohibit discrimination on the basis of gender identity?.	Yes.

State Tables—Continued

State	Information
Definition of ''gender identity''	''A gender-related identity of a person, regardless of the person's assigned sex at birth.'' Iowa Code § 216.2(10).
Minimum number of employees for coverage	4.
Does statute address workplace access to shared facilities?.	No.
Religious organizations exempt?	Yes.
Non-profit organizations exempt?	No.
Does statute apply to government employers?	Yes.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available.	FY 2007–2008: 1,453; FY 2006–2007: 1,413; FY 2005–2006: 1,526.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is sexual orientation.	FY 2008–2009: 29; FY 2007–2008[31]: 17.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is gender identity.	FY 2008–2009: 3; FY 2007–2008: 4.
Maine:	
Statutory provision(s) providing protection from employment discrimination on the basis of sexual orientation and/or gender identity.	5 M.R.S.A. § 4552, 5 M.R.S.A. § 4553(9–C) and (10), 5 M.R.S.A. § 4571, 5 M.R.S.A. § 4572 (sexual orientation and gender identity).
Definition of ''sexual orientation''	''A person's actual or perceived heterosexuality, bisexuality, homosexuality or gender identity or expression.'' 5 M.R.S.A. § 4553(9–C).
Does statute prohibit discrimination on the basis of gender identity?.	Yes.
Definition of ''gender identity''	Maine does not have a separate statutory definition for this term.
Minimum number of employees for coverage	1.
Does statute address workplace access to shared facilities?.	No.
Religious organizations exempt?	Yes.
Non-profit organizations exempt?	No.
Does statute apply to government employers?	Yes.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available.	FY 2008–2009: 494; FY 2007–2008: 604; FY 2006–2007: 544.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is sexual orientation.	FY 2008–2009: 6; FY 2007–2008: 17; FY 2006–2007: 19.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is gender identity.	FY 2008–2009: 0; FY 2007–2008: 1; FY 2006–2007: 0.
Maryland:	
Statutory provision(s) providing protection from employment discrimination on the basis of sexual orientation and/or gender identity.	Md. Ann. Code art. 49B, §§ 14, 16[32] (sexual orientation).
Definition of ''sexual orientation''	''The identification of an individual as to male or female homosexuality, heterosexuality, or bisexuality.'' Md. Ann. Code art. 49B, § 15(j).
Does statute prohibit discrimination on the basis of gender identity?.	No.
Definition of ''gender identity''	N/A.
Minimum number of employees for coverage	15.
Does statute address workplace access to shared facilities?.	No.
Religious organizations exempt?	Yes.
Non-profit organizations exempt?	No[33].
Does statute apply to government employers?	Yes.

State Tables—Continued

State	Information
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available.	FY 2008–2009: 741; FY 2007–2008: 663; FY 2006–2007: 645.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is sexual orientation.	FY 2008–2009: 23; FY 2007–2008: 24; FY 2006–2007: 28.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is gender identity.	Maryland does not track gender identity complaints separately. It does accept gender identity complaints under ''sex'' but not ''sexual orientation.''
Massachusetts:	
Statutory provision(s) providing protection from employment discrimination on the basis of sexual orientation and/or gender identity.	M.G.L. c. 151B, § 4(1), (3) (sexual orientation).
Definition of ''sexual orientation''	''Having an orientation for or being identified as having an orientation for heterosexuality, bisexuality, or homosexuality.'' M.G.L. c. 151B, § 3(6).
Does statute prohibit discrimination on the basis of gender identity?.	No[34].
Definition of ''gender identity''	N/A.
Minimum number of employees for coverage	6.
Does statute address workplace access to shared facilities?.	No.
Religious organizations exempt?	Yes.
Non-profit organizations exempt?	Yes[35].
Does statute apply to government employers?	Yes.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available[36].	2008: 2,951; 2007: 2,862; 2006: 2,641.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is sexual orientation.	2008: 100; 2007: 96; 2006: 85.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is gender identity.	N/A.
Minnesota:	
Statutory provision(s) providing protection from employment discrimination on the basis of sexual orientation and/or gender identity.	Minn. Stat. § 363A.02, Minn. Stat. § 363A.08, Minn. Stat. § 363A.03, Subd. 44 (sexual orientation and gender identity).
Definition of ''sexual orientation''	''Having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness,'' but ''does not include a physical or sexual attachment to children by an adult.'' Minn. Stat. § 363A.03, Subd. 44.
Does statute prohibit discrimination on the basis of gender identity?.	Yes.
Definition of ''gender identity''	Minnesota does not have a separate statutory definition of ''gender identity,'' but includes this category in its definition of ''sexual orientation.''
Minimum number of employees for coverage	1.
Does statute address workplace access to shared facilities?.	No.
Religious organizations exempt?	Yes[37].
Non-profit organizations exempt?	No[38].
Does statute apply to government employers?	Yes.

State Tables—Continued

State	Information
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available[39].	2008: 880; 2007: 821; 2006: 926.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is sexual orientation.	2008: 24; 2007: 21; 2006: 28.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is gender identity.	The definition of sexual orientation under Minnesota statue includes gender identity and therefore the numbers listed above for sexual orientation complaints encompass all gender identity complaints.
Nevada:	
Statutory provision(s) providing protection from employment discrimination on the basis of sexual orientation and/or gender identity.	Nev. Rev. Stat. Ann. § 233.010, Nev. Rev. Stat. Ann. § 613.330 (sexual orientation).
Definition of ''sexual orientation''	''Having or being perceived as having an orientation for heterosexuality, homosexuality or bisexuality.'' Nev. Rev. Stat. Ann. § 613.310(6).
Does statute prohibit discrimination on the basis of gender identity?.	No.
Definition of ''gender identity''	N/A.
Minimum number of employees for coverage	15.
Does statute address workplace access to shared facilities?.	No.
Religious organizations exempt?	Yes.
Non-profit organizations exempt?	No[40].
Does statute apply to government employers?	Yes.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available.	FY 2007–2008: 1,401; FY 2006–2007: 1,218; FY 2005–2006: 972.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is sexual orientation.	FY 2007–2008: 55; FY 2006–2007: 30; FY 2005–2006: 25.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is gender identity.	N/A.
New Hampshire:	
Statutory provision(s) providing protection from employment discrimination on the basis of sexual orientation and/or gender identity.	N.H. Rev. Stat. Ann. § 354–A:6 (sexual orientation).
Definition of ''sexual orientation''	''Having or being perceived as having an orientation for heterosexuality, bisexuality, or homosexuality. This definition is intended to describe the status of persons and does not render lawful any conduct prohibited by the criminal laws of this State or impose any duty on a religious organization. This definition does not confer legislative approval of such status, but is intended to assure the basic rights afforded under New Hampshire law.'' N.H. Rev. Stat. Ann. § 21:49.
Does statute prohibit discrimination on the basis of gender identity?.	No.
Definition of gender identity	N/A.
Minimum number of employees for coverage	6.
Does statute address workplace access to shared facilities?.	No.
Religious organizations exempt?	Yes.
Non-profit organizations exempt?	No[41].
Does statute apply to government employers?	Yes.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available.	FY 2007–2008: 251; FY 2006–2007: 318; FY 2005–2006: 274.

State Tables—Continued

State	Information
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is sexual orientation.	FY 2007–2008: 7; FY 2006–2007: 14; FY 2005–2006: 5.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is gender identity.	New Hampshire does not allow a claim based on gender identity, but claims from transsexuals can be filed under the ''sex'' and ''disability'' categories.
New Jersey:	
Statutory provision(s) providing protection from employment discrimination on the basis of sexual orientation and/or gender identity.	N.J. Stat. § 10:2–1, N.J. Stat. § 10:5–3, N.J. Stat. § 10:5–4, N.J. Stat. § 10:5–12 (sexual orientation and gender identity).
Definition of ''sexual orientation''	''Affectional or sexual orientation' means male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation.'' N.J. Stat. § 10:5–5(hh).
Does statute prohibit discrimination on the basis of gender identity?.	Yes.
Definition of ''gender identity''	''Gender identity or expression' means having or being perceived as having a gender related identity or expression whether or not stereotypically associated with a person's assigned sex at birth.'' N.J. Stat. § 10:5–5(rr).
Minimum number of employees for coverage	1.
Does statute address workplace access to shared facilities?.	No.
Religious organizations exempt?	Yes.
Non-profit organizations exempt?	No.
Does statute apply to government employers?	Yes[42].
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available[43].	2008: 692; 2007: 717; 2006: 885.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is sexual orientation.	2008: 34; 2007: 39; 2006: 47.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is gender identity.	New Jersey has not received any complaints alleging employment discrimination based on gender identity or expression since the law went into effect in February 2007 banning such discrimination.
New Mexico:	
Statutory provision(s) providing protection from employment discrimination on the basis of sexual orientation and gender identity.	N.M. Stat. Ann. § 28–1–7 (sexual orientation and gender identity).
Definition of ''sexual orientation''	''Heterosexuality, homosexuality or bisexuality, whether actual or perceived.'' N.M. Stat. Ann. § 28–1–2(P).
Does statute prohibit discrimination on the basis of gender identity?.	Yes.
Definition of ''gender identity''	''A person's self-perception, or perception of that person by another, of the person's identity as a male or female based upon the person's appearance, behavior or physical characteristics that are in accord with or opposed to the person's physical anatomy, chromosomal sex or sex at birth.'' N.M. Stat. Ann. § 28–1–2(Q).
Minimum number of employees for coverage	15[44].
Does statute address workplace access to shared facilities?.	No.
Religious organizations exempt?	Yes.
Non-profit organizations exempt?	No.
Does statute apply to government employers?	Yes.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available.	FY 2008–2009: 674; FY 2007–2008: 747; FY 2006–2007: 705.

State Tables—Continued

State	Information
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is sexual orientation.	FY 2008–2009: 30; FY 2007–2008: 46; FY 2006–2007: 45.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is gender identity.	FY 2008–2009: 1; FY 2007–2008: 1; FY 2006–2007: 0.
New York:	
Statutory provision(s) providing protection from employment discrimination on the basis of sexual orientation and/or gender identity.	NY CLS Exec. § 296 (sexual orientation).
Definition of ''sexual orientation''	''Heterosexuality, homosexuality, bisexuality or asexuality, whether actual or perceived. However, nothing contained herein shall be construed to protect conduct otherwise proscribed by law.'' NY CLS Exec. § 292(27).
Does statute prohibit discrimination on the basis of gender identity?.	No[45].
Definition of ''gender identity''	N/A.
Minimum number of employees for coverage	4.
Does statute address workplace access to shared facilities?.	No.
Religious organizations exempt?	Yes.
Non-profit organizations exempt?	No.
Does statute apply to government employers?	Yes.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available.	FY 2008–2009[46]: 6,434; FY 2007–2008: 6,088; FY 2006–2007: 4,623.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is sexual orientation.	FY 2008–2009: 312; FY 2007–2008: 216; FY 2006–2007: 141.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is gender identity.	New York does not track this subset of sex and/or disability complaints in its system.
Oregon:	
Statutory provision(s) providing protection from employment discrimination on the basis of sexual orientation and gender identity.	ORS § 659A.006, ORS § 659A.030 (sexual orientation and gender identity), ORS § 174.100 (gender identity) (as amended by 2007 Oregon Laws Ch. 100 (S.B. 2)).
Definition of ''sexual orientation''	''An individual's actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's assigned sex at birth.'' ORS § 174.100(6).
Does statute prohibit discrimination on the basis of gender identity?.	Yes.
Definition of ''gender identity''	Oregon does not have a separate statutory definition of ''gender identity.''
Minimum number of employees for coverage	1.
Does statute address workplace access to shared facilities?.	No.
Religious organizations exempt?	Yes.
Non-profit organizations exempt?	No.
Does statute apply to government employers?	Yes.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available[47].	2008: 1957; 2007: 1916; 2006: 1857.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is sexual orientation.	2009 (year to date): 34; 2008: 28; 2007 and 2006: There are no data for these years because Oregon's statute prohibiting employment discrimination on the basis of sexual orientation and gender identity went into effect in January 2008.

State Tables—Continued

State	Information
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is gender identity.	These data are included in the sexual orientation data listed above.
Rhode Island:	
Statutory provision(s) providing protection from employment discrimination on the basis of sexual orientation and/or gender identity.	R.I. Gen. Laws § 28–5–3, R.I. Gen. Laws § 28–5–7 (sexual orientation and gender identity), R.I. Gen. Laws § 28–5–6(15) (sexual orientation), R.I. Gen. Laws § 28–5–6(10) (gender identity).
Definition of ''sexual orientation''	''Having or being perceived as having an orientation for heterosexuality, bisexuality, or homosexuality. This definition is intended to describe the status of persons and does not render lawful any conduct prohibited by the criminal laws of this State nor impose any duty on a religious organization. This definition does not confer legislative approval of that status, but is intended to assure the basic human rights of persons to obtain and hold employment, regardless of that status.'' R.I. Gen. Laws § 28–5–6(15).
Does statute prohibit discrimination on the basis of gender identity?.	Yes.
Definition of ''gender identity''	''Gender identity or expression' includes a person's actual or perceived gender, as well as a person's gender identity, gender-related self image, gender-related appearance, or gender-related expression; whether or not that gender identity, gender-related self image, gender-related appearance, or gender-related expression is different from that traditionally associated with the person's sex at birth.'' R.I. Gen. Laws § 28–5–6(10).
Minimum number of employees for coverage	4.
Does statute address workplace access to shared facilities?.	No.
Religious organizations exempt?	Yes.
Non-profit organizations exempt?	No.
Does statute apply to government employers?	Yes.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available.	FY 2008–2009: 277; FY 2007–2008: 336; FY 2006–2007: 301.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is sexual orientation.	FY 2008–2009: 3; FY 2007–2008: 11; FY 2006–2007: 5.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is gender identity.	FY 2008–2009: 0; FY 2007–2008: 0; FY 2006–2007: 1.
Vermont:	
Statutory provision(s) providing protection from employment discrimination on the basis of sexual orientation and/or gender identity.	21 V.S.A. § 495 (sexual orientation and gender identity)[48].
Definition of ''sexual orientation''	''Female or male homosexuality, heterosexuality, or bisexuality'' but ''shall not be construed to protect conduct otherwise proscribed by law.'' 1 V.S.A. § 143.
Does statute prohibit discrimination on the basis of gender identity?.	Yes.
Definition of ''gender identity''	''An individual's actual or perceived gender identity or gender-related characteristics intrinsically related to an individual's gender or gender identity, regardless of the individual's assigned sex at birth.'' 1 V.S.A. § 144.
Minimum number of employees for coverage	1.
Does statute address workplace access to shared facilities?.	No.
Religious organizations exempt?	Yes.
Non-profit organizations exempt?	No.

State Tables—Continued

State	Information
Does statute apply to government employers?	Yes (***see also*** footnote 48).
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available[49].	2008: 45; 2007: 41; 2006: 38.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is sexual orientation.	2008: 4; 2007: 4; 2006: 2.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is gender identity.	2008: 1; 2007: 0; 2006: N/A because gender identity discrimination was not proscribed at the time.
Washington:	
Statutory provision(s) providing protection from employment discrimination on the basis of sexual orientation and gender identity.	Rev. Code Wash. Ann. § 49.60.030 and § 49.60.180 (sexual orientation and gender identity).
Definition of ''sexual orientation''	''Heterosexuality, homosexuality, bisexuality, and gender expression or identity.'' Rev. Code Wash. Ann. § 49.60.040(15).
Does statute prohibit discrimination on the basis of gender identity?.	Yes.
Definition of ''gender identity''	''Gender expression or identity means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth.'' Rev. Code Wash. Ann. § 49.60.040(15).
Minimum number of employees for coverage	8.
Does statute address workplace access to shared facilities?.	No.
Religious organizations exempt?	Yes.
Non-profit organizations exempt?	No.
Does statute apply to government employers?	Yes.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available.	FY 2008–2009: 692; FY 2007–2008: 791; FY 2006–2007: 607.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is sexual orientation.	FY 2008–2009: 23; FY 2007–2008: 25; FY 2006–2007: 34.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is gender identity.	The statistics for ''sexual orientation'' employment discrimination complaints also encompass ''gender identity'' employment discrimination complaints. Washington does not track this category separately.
Wisconsin:	
Statutory provision(s) providing protection from employment discrimination on the basis of sexual orientation and/or gender identity.	Wis. Stat. § 111.31 (sexual orientation).
Definition of ''sexual orientation''	''Having a preference for heterosexuality, homosexuality or bisexuality, having a history of such a preference or being identified with such preference.'' Wis. Stat. § 111.32(13m).
Does statute prohibit discrimination on the basis of gender identity?[50].	No.
Definition of ''gender identity''	N/A.
Minimum number of employees for coverage	1.
Does statute address workplace access to shared facilities?.	No.
Religious organizations exempt?	Yes.
Non-profit organizations exempt?	No.
Does statute apply to government employers?	Yes.

State Tables—Continued

State	Information
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available.	FY 2008–2009: 3,430; FY 2007–2008: 3,504; FY 2006–2007: 3,502.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is sexual orientation.	FY 2008–2009: 62; FY 2007–2008: 56; FY 2006–2007: 51.
Total number of employment discrimination administrative complaints filed for the 3 most recent years for which data is available where at least one of the claimed bases for discrimination is gender identity.	The Wisconsin Fair Employment Law does not provide for filing of a complaint based on gender identity.

[22] California law also prohibits harassment on all the protected bases, including sexual orientation or gender identity harassment; the minimum number of employees for this protection is one.

[23] All complaint data in this table are reported by calendar year.

[24] Colorado's statute covers ''transgender status.''

[25] Sexual orientation status was not covered before FY 2007–2008.

[26] Transgender status was not covered before FY 2007–2008.

[27] According to a Connecticut official, discrimination based on gender identity or expression is treated as a form of discrimination because of sex, which is prohibited under Conn. Gen. Stat. § 46a–60. The Connecticut Commission on Human Rights and Opportunities treats gender identity discrimination in this manner based on a declaratory ruling involving a transsexual. ***See Declaratory Ruling on Behalf of John/Jane Doe*** (November 9, 2000). ***http://www.ct.gov/chro/cwp/view.asp?a=2526&Q=315942.***

[28] The District of Columbia uses the Federal fiscal year, which runs from October 1 through September 30.

[29] According to a Hawaii official, the Hawaii Civil Rights Commission has interpreted the ''because of sex'' provision of Haw. Rev. Stat. § 378–2 to include discrimination on the basis of gender identity. (H.R.S. § 378–2(1)(A) provides, in part: ''It shall be an unlawful discriminatory practice [b]ecause of . . . sex . . . [f]or any employer to refuse to hire . . . '') See D.R. No. 02–0015, June 29, 2002 (found at *http://hawaii.gov/labor/hcrc/decisions/decl_relief_pet/DR15OR.pdf), reversed on other grounds, RGIS Inventory* v. *Hawaii Civil Rights*, 104 Hawaii 158 (2004).

[30] The minimum number of employees required for application of the non-discrimination provisions depends upon the type of employer and/or the type of discrimination being alleged. For instance, State and other governmental employers need only employ one person. Private employers must employ 15 or more employees within Illinois during 20 or more calendar weeks within the calendar year of or preceding the alleged violation. In cases where the complainant alleges discrimination based upon his or her physical or mental handicap unrelated to ability, or sexual harassment, the non-discrimination provisions apply if the employer employs a minimum of one person.

[31] Iowa started accepting employment discrimination complaints on the basis of sexual orientation and gender identity on July 1, 2007.

[32] Effective Oct. 1, 2009, article 49B will be recodified as State Government Article, § 20–101, et seq., Md. Ann. Code.

[33] The statute exempts a ''bona fide private membership club (other than a labor organization) which is exempt from taxation under § 501(c) of the Internal Revenue Code.'' Md. Ann. Code art. 49B, § 15(b).

[34] According to a Massachusetts official, the Massachusetts Commission Against Discrimination will accept, investigate and adjudicate gender identity cases under the section of Massachusetts statute prohibiting discrimination on the basis of sex. In addition, the official stated that there is State case law concluding that a transgender individual could fall within the definition of handicapped.

[35] Under M.G.L. c. 151B, § 1(5), ''[t]he term 'employer' does not include a club exclusively social, or a fraternal association or corporation, if such club, association or corporation is not organized for private profit. . . .''

[36] All complaint data in this table are reported by calendar year.

[37] See discussion of Minnesota's religious exemption in the letter preceding the State tables.

[38] Nonpublic service organizations whose primary function is providing occasional services to minors are exempt.

[39] All complaint data in this table are reported by calendar year.

[40] Tax-exempt private membership clubs are exempt.

[41] Exclusively fraternal and social clubs are exempt.

[42] The statute does not cover bi-state entities such as the Port Authority of New York and New Jersey.

[43] All complaint data in this table are reported by calendar year.

[44] New Mexico's non-discrimination statute generally applies to employers having at least four employees; however, an employer must have at least 15 employees for the non-discrimination protections based on sexual orientation and gender identity to apply.

[45] A New York official provided a citation from the ***Resource Guide to the New York State Human Rights Law, 2008 Edition***, which states ''The definition of 'sexual orientation' set forth in the Human Rights Law does not specifically include transsexuals. However, precedent exists under other, pre-existing provisions of the Human Rights Law to the effect that post-operative transsexuals are deemed to belong to the gender to which they have been surgically reassigned, and that discrimination against them is deemed to be sex discrimination. ***Richards*** v. ***U.S. Tennis Association***, 93 Misc.2d 713, 400 N.Y.S.2d 267 (Sup.Ct.N.Y.Co. 1977). Furthermore, transsexuals who state that they have a disability are protected from discrimination under the disability provisions of the Human Rights Law, inasmuch as gender dysphoria is a recognized medical condition.''

[46] New York's fiscal year runs from April 1 through March 31.

[47] All complaint data in this table are reported by calendar year.

[48] This statute is part of the Vermont Fair Employment Practices Act (VFEPA) and is the principal statute proscribing sexual orientation and gender identity discrimination in employment. Claims alleging employment discrimination by private sector or municipal employers are enforced by the Civil Rights Unit of the State Attorney General's Office (CRU) and claims against Vermont State employers are enforced by the Vermont Human Rights Commission (HRC). VFEPA applies to all private and public sector employers. In addition, other non-discrimination statutes may also apply to State executive, judicial, and municipal employers and are enforced by the Vermont Labor Relations Board and/or State courts.

[49] Pursuant to Vermont's work-sharing agreement with the Equal Employment Opportunity Commission, the CRU and HRC also receive complaints alleging employment discrimination in violation of Federal law. The statistics shown only include those that allege at least one violation of the VFEPA. In addition, number of complaints is listed by calendar year.

[50] According to a Wisconsin official, Wisconsin does not specifically provide for filing of a discrimination complaint based on gender identity. However, depending on the facts of the particular situation, an individual with a gender identity issue may be able to bring a claim of discrimination based on disability or sex.

LETTERS OF SUPPORT

AFRICAN-AMERICAN MINISTERS IN ACTION (AAMIA),
WASHINGTON, DC 20036,
November 5, 2009.

Hon. TOM HARKIN, *Chairman,*
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC 20510.

DEAR CHAIRMAN HARKIN: On behalf of the African-American Ministers in Action, a project of People For the American Way, we applaud the Senate Committee on Health, Education, Labor, and Pensions for holding this hearing on S. 1584, the bipartisan Employment Non-Discrimination Act of 2009 (ENDA). We would also like to take this opportunity to once again thank Senator Merkley and the late Edward Kennedy for their relentless leadership in moving ENDA through Congress. It is time for Congress to pass this important civil rights legislation.

Discrimination is wrong no matter how it manifests itself, however it disguises itself. If we're going to build the beloved community that Dr. King spoke of, we must be conscious of discrimination, no matter where it rears its ugly head. As African-American ministers, we know what it takes to stand up against systemic oppression. It is in solidarity and love that we recognize the plight of others and support this struggle for the same protections. Passage of ENDA would be a major step in the right direction by ensuring that current protections are extended to include sexual orientation and gender identity.

In most States, it is currently legal for employers to engage in such discrimination despite the basic unfairness of such practices. These road blocks stand in the way of those Americans not protected under current law and who have found themselves unable to financially support themselves and their families. It is time for the laws of the country to reflect public support for the principle of employment fairness.

It is still legal to fire or refuse to hire someone simply because of his or her sexual orientation in 29 States, and in 38 States employers can do so solely based on an individual's gender identity. ENDA prohibits discrimination based on sexual orientation and gender identity in most workplaces.

ENDA is commonsense legislation that addresses injustice with a sensible solution. And, as we have noted, it would extend protections that some States and many large corporations already provide—without disruptive business consequences. We strongly urge the committee to swiftly pass ENDA, and we urge Senate Leadership to bring the bill to the floor as soon as possible.

Sincerely,

REV. TIMOTHY MCDONALD,
Chairman, African-American Ministers in Action.

REV. ROBERT P. SHINE,
Vice Chair, African-American Ministers In Action.

AMERICAN AIRLINES,
October 30, 2009.

Hon. TOM HARKIN, *Chairman,*
Committee on Health, Education, Labor, & Pensions,
U.S. Senate,
428 Dirksen Senate Office Building,
Washington, DC 20510.

Hon. MICHAEL ENZI, *Ranking Member,*
Committee on Health, Education, Labor, & Pensions,
U.S. Senate,
428 Dirksen Senate Office Building,
Washington, DC 20510.

Hon. GEORGE MILLER, *Chairman,*
Committee on Education and Labor,
U.S. House of Representatives,
2181 Rayburn House Office Building,
Washington, DC 20515.

Hon. JOHN KLINE, *Ranking Member,*
Committee on Education and Labor,
U.S. House of Representatives,
2101 Rayburn House Office Building,
Washington, DC 20515.

DEAR CHAIRMAN HARKIN, CHAIRMAN MILLER, RANKING MEMBER ENZI AND RANKING MEMBER KLINE: On behalf of our 80,000 employees, American Airlines is proud to express our strong support for S. 1584 and H.R. 3017, the Employment Non-Discrimination Act (ENDA), which would extend basic job protections to gay, lesbian, bisexual and transgender Americans. We are proud to have been the first major airline to implement same-sex domestic partner benefits, first to implement both sexual orientation and gender identity in our workplace non-discrimination policies, and first to have a recognized LGBT employee resource group—GLEAM.

Our endorsement of ENDA is consistent with our longstanding Statement of Equal Opportunity, which reads,

> "It is the expressed policy of American Airlines to provide equal employment opportunity to everyone without regard to age, race, sex, gender, gender identity, color, religion, national origin, sexual orientation, citizenship status, disability, or veteran status."

The principles fostered by ENDA are consistent with our corporate principles in treating all employees with fairness and respect. We appreciate your consideration and encourage Congress to enact this important legislation.

Sincerely,

DENISE LYNN,
Vice President, Diversity & Leadership Strategies.

MICHAEL WASCOM,
Managing Director, Int'l Government Affairs.

GEORGE CARRARICHO,
National Sales & Marketing Manager, LGBT Community.

AMERICAN BAR ASSOCIATION (ABA),
WASHINGTON, DC 20005–1022,
November 4, 2009.

DEAR CHAIRMAN HARKIN AND SENATOR ENZI: On behalf of the American Bar Association (ABA), I write to emphasize the ABA's long tradition of actively opposing discrimination. Whenever any of our basic civil rights are diminished or marginalized unjustifiably on the basis of personal characteristics, all of our basic civil rights are diminished and jeopardized. Neither our Constitution nor our Congress should tolerate such discrimination. Specifically, in 1989, the ABA adopted a policy calling upon local, State, and Federal lawmakers to prohibit discrimination on the basis of sexual orientation.

Sincerely,

CAROLYN B. LAMM.

AMERICAN PSYCHOLOGICAL ASSOCIATION (APA)
October 1, 2009.

Hon. JEFF MERKLEY,
B40b Senate Dirksen Building,
Washington, DC 20510.

DEAR SENATOR MERKLEY: On behalf of the 150,000 members of the American Psychological Association (APA), I am writing to express our strong support for the *Employment Non-Discrimination Act (ENDA) of 2009* (S. 1584).

APA is the largest scientific and professional organization representing psychology in the United States and is the world's largest association of psychologists. Comprising researchers, educators, clinicians, consultants, and students, APA works to advance psychology as a science, a profession, and as a means of promoting health, education and human welfare.

APA has a longstanding commitment to ending discriminatory practices targeting lesbian, gay, bisexual and transgendered (LGBT) persons. Specifically, APA adopted a resolution on "Opposing Discriminatory Legislation and Initiatives Aimed at Lesbian, Gay, and Bisexual Persons" in 2007, and another policy statement on "Transgender, Gender Identity, and Gender Expression Non-Discrimination" in 2008 (both enclosed for your consideration). As stated in these resolutions, not only is there no basis for discrimination against LGBT individuals, but also such discrimination is harmful to their mental health and the public good.

S. 1584, the *Employment Non-Discrimination Act of 2009*, lays a strong foundation for instituting a policy of nondiscrimination based on sexual orientation and gender identity in the U.S. workplace, consistent with anti-discrimination policies concerning race, gender, and disability status. In particular, this critical legislation would prohibit employers from making decisions about hiring, firing, promoting, or compensating an employee who belongs to a sexual or gender minority. As you probably know, it is currently legal to discriminate in the workplace based on sexual orientation in 29 States and in 38 States based on gender identity.

Psychological research supports the conclusion that people who accept and integrate their sexual orientation and gender identity are psychologically better adjusted than those who do not. To promote psychological well-being among workers, individuals should have the opportunity to disclose personal information without the threat of negative ramifications. Furthermore, research has consistently found that heterosexuals who have contact with LGBT populations have more positive attitudes towards LGBT people as a group. Taken together, these findings suggest that the presence of LGBT coworkers does not undermine employee morale or relationships, but rather may strengthen worker rapport.

Allowing an atmosphere of intolerance based on sexual orientation or gender identity in the workplace is detrimental for LGBT individuals as well as for everyone in the workplace. In addition, employment discrimination based on sexual orientation and gender identity inadvertently legitimizes other forms of prejudice and discrimination, including anti-gay violence.

In closing, we would like to thank you for your efforts in developing the *Employment Non-Discrimination Act of 2009*, and offer our association's assistance in furthering passage of this vital legislation. If you have any questions or would like more information, please contact Jutta Tobias, Ph.D., in our Government Relations Office, at (202) 336–5668.

Sincerely,

GWENDOLYN PURYEAR KEITA, PH.D.,
Executive Director, Public Interest Directorate.

AMERICAN CIVIL LIBERTIES UNION (ACLU),
NEW YORK, NY 10004–2400,
November 4, 2009.

Hon. TOM HARKIN, *Chairman,*
Hon. MICHAEL ENZI, *Ranking Member,*
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
428 Dirksen Senate Office Building,
Washington, DC 20510.

DEAR CHAIRMAN HARKIN AND RANKING MEMBER ENZI: On behalf of the American Civil Liberties Union (ACLU), I write to share our view that the enactment of S. 1584, the Employment Non-Discrimination Act of 2009 (ENDA), which would prohibit employment discrimination on the basis of sexual orientation or gender identity and, in doing so, abrogate the sovereign immunity that States enjoy under the

11th Amendment, would constitute a valid exercise of congressional power under Section 5 of the 14th Amendment.

The ACLU is a non-partisan, non-profit, national legal organization, the oldest and largest of its kind, with a presence in every State. Its mission has long included the defense of the civil liberties, and the fight for the civil rights, of lesbian, gay, bisexual, and transgender (LGBT) individuals. Indeed, its advocacy on behalf of this population dates back to the 1930s. For over 25 years, the ACLU has housed a legal division that is specifically devoted to the advancement of the full range of LGBT rights, including those related to State employment. In light of its longstanding work with the LGBT community, the ACLU is well-positioned to speak to both the ongoing concerns that LGBT State employees face as well as the legal considerations that they implicate.

Section 11(a) of ENDA would provide as follows: "A State shall not be immune under the 11th Amendment to the Constitution from a suit brought in a Federal court of competent jurisdiction for a violation of this Act." The 11th Amendment grants States immunity from suit by individuals in Federal court:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. 11th Am. At the same time, the Fourteenth Amendment grants Congress authority to enforce, among other things, its prohibition of irrational discrimination by States against individuals:

> Section 1 . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> * * * * * * *
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

U.S. Const. 14th Am. The Supreme Court has articulated the proper balancing of these constitutional considerations where Federal civil rights legislation provides enforcement mechanisms by individuals against States.

I. THE INTERPLAY BETWEEN THE 11TH AMENDMENT AND SECTION 5 OF THE FOURTEENTH AMENDMENT

In *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), the Court held that States are not immune from suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, which prohibits, among other things, employment discrimination on the basis of sex. In doing so, the Court emphasized that Congress expressly enacted title VII pursuant to its authority under section 5 of the Fourteenth Amendment. *Fitzpatrick*, 427 U.S. at 452–53 & n.9. The Court explained the relationship between the 11th Amendment and the Fourteenth Amendment as follows:

> [W]e think that the 11th Amendment, and the principle of State sovereignty which it embodies are necessarily limited by the enforcement provisions of [Section] 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on State authority. When Congress acts pursuant to [Section] 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority under one section of a constitutional Amendment whose other sections by their own terms embody limitations on State authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or State officials which are constitutionally impermissible in other contexts.

Id. at 456 (citations, and footnote omitted). The Court thereby confirmed that Congress may abrogate sovereign immunity under the 11th Amendment where it acts pursuant to Section 5 of the 14th Amendment.

In *City of Boerne* v. *Flores*, 521 U.S. 507 (1997), in the course of holding that States are immune from suit under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb, *et seq.*, which expressly overrides *Employment Div., Dep't of Human Res.* v. *Smith*, 494 U.S. 872 (1990), and requires that a neutral law of general applicability that substantially burdens religious liberty be narrowly tailored to further a compelling interest, the Court clarified the circumstances under

which Congress properly acts to abrogate sovereign immunity. The Court began by confirming that, in enacting RFRA, "Congress relied on its Fourteenth Amendment enforcement power." *Boerne*, 521 U.S. at 516 (citations omitted). The Court then turned to whether RFRA was a proper exercise of congressional power under section 5 of the Fourteenth Amendment to enforce rights guaranteed by Due Process Clause, which include those guaranteed by the Free Exercise Clause.

The Court emphasized that Congress may enforce rights guaranteed by the Fourteenth Amendment, *as interpreted by the courts*:

> Congress' power under § 5 . . . extends only to "enforc[ing]" the provisions of the Fourteenth Amendment. . . . The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States . . . Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.

Id. at 519. At the same time, the Court emphasized that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Id.* at 518. To determine whether such legislation properly abrogates sovereign immunity, the Court set forth the following test: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 519–20. Thus, in *Boerne*, the Court clarified that Congress properly exercises its power under section 5 of the Fourteenth Amendment to abrogate sovereign immunity either (1) where legislation enforces rights guaranteed by the Fourteenth Amendment, as interpreted by the courts, or (2) where legislation sweeps beyond the Fourteenth Amendment but is congruent and proportional to the injury to be prevented or remedied.

The Court could not have concluded that RFRA simply enforces rights guaranteed by the Free Exercise Clause, as interpreted by the courts. Given that RFRA expressly overrides *Smith*, to have concluded otherwise would have permitted Congress to alter the scope of the Free Exercise Clause, as interpreted by the courts. *See Boerne*, 521 U.S. at 532 ("[RFRA] appears . . . to attempt a substantive change in constitutional protections."). Accordingly, the Court applied the congruence and proportionality test.

In applying the test, the Court declared that "[t]he appropriateness of remedial measures must be considered in light of the evil presented." *Id.* at 530. Thus, while acknowledging that "[j]udicial deference, in most cases, is [not] based . . . on the state of the legislative record," *Id.* at 531, the Court examined RFRA's legislative record. Because "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry," the Court found that "it is difficult to maintain . . . that [RFRA's legislative record] indicate[s] some widespread pattern of religious discrimination in this country." *Id.* at 530.

Moreover, the Court found that, because RFRA sweeps so far beyond the Free Exercise Clause, it is not proportional to the injury to be prevented or remedied:

> Regardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior . . . Preventive measures prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional . . . RFRA is not so confined.

Id. at 532 (citation omitted).

In light of both the absence of an evil of a magnitude that would justify an abrogation of sovereign immunity, and the overly broad sweep, the Court concluded that "[t]he stringent test RFRA demands of State laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved." *Id.* at 533.

The principles articulated in *Boerne* are reflected in both the reasoning and the result of both *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62 (2000), and *Bd. of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2001), in which the Court concluded, respectively, that the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621, *et seq.*, which prohibits employment discrimination on the basis of age, and Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12111, *et seq.*, which prohibits employment discrimination on the basis of disability, were not valid exercises of congressional power to abrogate sovereign immunity.

In *Kimel*, the Court began by observing that the 11th Amendment "does not provide for Federal jurisdiction over suits against nonconsenting States." *Kimel*, 528 U.S. at 73 (citations omitted). Nevertheless, the Court recognized that States are not immune from suit by individuals in Federal court where both (1) "Congress unequivocally expressed its intent to abrogate that immunity," and (2) "Congress acted pursuant to a valid grant of constitutional authority." *Id*. (citation omitted).

Undertaking this two-step analysis, the Court first concluded that, in enacting the ADEA, Congress clearly expressed its intent to abrogate the rights that States enjoy under the 11th Amendment:

> To determine whether a Federal statute properly subjects States to suits by individuals, we apply a simple but stringent test: Congress may abrogate the States' constitutionally secured immunity from suit in Federal court only by making its intention unmistakably clear in the language of the statute. We agree with petitioners that the ADEA satisfies that test. . . . Read as a whole, the plain language of these provisions clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees.

Id. at 73–74 (quotation omitted). The Court, however, went on to hold that Congress did not properly exercise its authority under section 5 of the Fourteenth Amendment to abrogate sovereign immunity.

As in *Boerne*, the Court in *Kimel* recognized that Congress may abrogate sovereign immunity either (1) where legislation enforces rights guaranteed by the Fourteenth Amendment, as interpreted by the courts, or (2) where "prophylactic" legislation is congruent and proportional to the injury to be prevented or remedied. *Id*. at 81. Because classifications based on age, unlike classifications based on race or sex, do not enjoy a presumption of unconstitutionality that may be overcome only upon the requisite evidentiary showing, *see, e.g., Mass. Bd. of Retirement* v. *Murgia*, 427 U.S. 307 (1976), the ADEA's broad prohibition of employment discrimination based on age does not purport to simply enforce rights guaranteed by the Equal Protection Clause. Accordingly, the Court applied the congruence and proportionality test.

Although the Court acknowledged that "[i]t is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference," and that "Congress must have wide latitude in determining where [the] line [between appropriate remedial legislation and a substantive redefinition of the Fourteenth Amendment right at issue] lies," the Court affirmed that "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Kimel*, 528 U.S. at 80–81 (quotations omitted). The Court defined the congruence and proportionality test as an inquiry into both (1) whether the law is in proportion to its remedial or preventive objective such that it can be understood as responsive to, or designed to prevent, unconstitutional behavior (hereinafter, "the proportionality inquiry"), and (2) whether the legislative record contains evidence of unconstitutional conduct that reveals a widespread pattern of discrimination by States against individuals (hereinafter, "the evidentiary inquiry"). *Id*. at 81–82.

With respect to the proportionality inquiry, the Court reached the following conclusion:

> Judged against the backdrop of our equal protection jurisprudence, it is clear that the ADEA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. The Act, through its broad restriction on the use of age as a discriminating factor, prohibits substantially more State employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard.

Id. at (86 quotation omitted). In reaching its conclusion, the Court relied on the fact that classifications based on age, unlike classifications based on race or sex, do not enjoy a presumption of unconstitutionality that may be overcome only upon the satisfaction of the requisite evidentiary showing:

> Age classifications . . . cannot be characterized as so seldom relevant to the achievement of any legitimate State interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy. Older persons . . . have not been subjected to a history of purposeful unequal treatment. Old age also does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it. . . .
>
> . . . Under the Fourteenth Amendment, a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests.

Id. at 83–84 (quotations and citation omitted); *see also id*. at 85 (age is a rational proxy for the physical and mental fitness that certain types of employment require).

With respect to the evidentiary inquiry, the Court found that, in enacting the ADEA, "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." *Id*. at 89. In doing so, the Court bolstered its conclusion that the ADEA did not constitute a valid exercise of congressional power to abrogate sovereign immunity:

> "A review of the ADEA's legislative record as a whole . . . reveals that Congress had virtually no reason to believe that State and local governments were unconstitutionally discriminating against their employees on the basis of age."

Id. at 91.

Significantly, the Court expressly stated that its finding under the proportionality inquiry, standing alone, was not dispositive:

> That the ADEA prohibits very little conduct likely to be held unconstitutional, while significant, does not alone provide the answer to our § 5 inquiry. Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation. . . . The appropriateness of remedial measures must be considered in light of the evil presented.

Id. at 88–89 (quotation omitted). Similarly, the Court made clear that its finding under the evidentiary inquiry, standing alone, was not dispositive:

> Although that lack of support is not determinative of the § 5 inquiry, Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field.

Id. at 91 (citations omitted). Thus, its holding necessarily rested on both "the indiscriminate scope of the Act's substantive requirements" and "the lack of evidence of widespread and unconstitutional age discrimination by the States." *Id*.

In *Garrett*, the Court engaged in a similar analysis. Because classifications based on disability are presumptively constitutional, *see, e.g., City of Cleburne* v. *Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), Title I of the ADA's broad prohibition of employment discrimination does not purport to simply enforce rights guaranteed by the Equal Protection Clause. Accordingly, after confirming that, in enacting Title I of the ADA, Congress acted pursuant to section 5 of the Fourteenth Amendment, *Garrett*, 531 U.S. at 363–64, the Court applied the congruence and proportionality test.

The Court first "examine[d] whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled." *Id*. at 369. In doing so, the Court found that "[t]he legislative record of the ADA . . . simply fails to show that Congress did in fact identify a pattern of irrational State discrimination in employment against the disabled." *Id*.

The Court then found that, even if it were otherwise, "the rights and remedies created by the ADA against the States would raise . . . concerns as to congruence and proportionality." *Id*. at 372. Its assessment that Title I of the ADA sweeps far more broadly than the Equal Protection Clause was predicated on the absence of a presumption of unconstitutionality, given that disabled individuals constitute a "large and amorphous class" that "possesses distinguishing characteristics relevant to interests the State has authority to implement." *Id*. at 366 (quotations omitted).

In light of its findings, the Court held that Title I of the ADA did not abrogate sovereign immunity:

> [I]n order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation. Those requirements are not met here.

Id. at 374.

In sum, the case law confirms that the interplay between the 11th Amendment and section 5 of the Fourteenth Amendment requires an analysis of whether (1) Congress unequivocally expressed its intent to abrogate sovereign immunity, and (2) Congress acted pursuant to a valid grant of constitutional authority. With respect to the second step of the analysis, the threshold inquiry is whether (1) the legislation at issue is legislation that enforces rights guaranteed by the Fourteenth Amendment, as interpreted by the courts, or (2) the legislation at issue is prophylactic legislation that is congruent and proportional to the injury to be prevented or remedied. Legislation that generally prohibits the use of a classification that is presumptively *unconstitutional* falls under the first category, and no further inquiry

is necessary. *See Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). In contrast, legislation that generally prohibits the use of a classification that is presumptively *constitutional* falls under the second category, and the congruence and proportionality test applies. *See Bd. of Trustees of Univ. of Ala.* v. *Garrett*, 531 U.S. 356 (2001); *Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62 (2000); *City of Boerne* v. *Flores*, 521 U.S. 507 (1997). The congruence and proportionality test is an inquiry into both (1) whether the law is in proportion to its remedial or preventive objective such that it can be understood as responsive to, or designed to prevent, unconstitutional behavior, and (2) whether the legislative record contains evidence of unconstitutional conduct that reveals a widespread pattern of discrimination by States against individuals.

II. SECTION 11(A) OF ENDA WOULD PROPERLY ABROGATE SOVEREIGN IMMUNITY

Where ENDA is concerned, there is no question that section 11(a) would clearly express congressional intent to abrogate sovereign immunity. Thus, we focus our analysis on whether section 11(a) would constitute a valid exercise of congressional power under section 5 of the Fourteenth Amendment. Given the principled conclusion that classifications based on sexual orientation or gender identity are presumptively unconstitutional, ENDA's prohibition of employment discrimination based on sexual orientation or gender identity simply enforces rights guaranteed by the Equal Protection Clause. *See* § II.A. *infra*. Even if this were not so, the proposed scope of ENDA is in proportion to the scope of the Equal Protection Clause, and there is evidence of a widespread pattern of irrational discrimination by States against their LGBT employees, and therefore ENDA satisfies the congruence and proportionality test. *See* § II.B. *infra*. Either way, section 11(a) of ENDA would properly abrogate sovereign immunity.

At the outset, we emphasize that municipal employment discrimination has unique relevance to the analysis where sexual orientation and gender identity are concerned. *See Tennessee* v. *Lane*, 541 U.S. 509, 527 n.16 (2004) ("THE CHIEF JUSTICE dismisses as irrelevant the portions of this evidence that concern the conduct of nonstate governments. This argument rests on the mistaken premise that a valid exercise of Congress' § 5 power must always be predicated solely on evidence of constitutional violations by the States themselves. . . . [O]ur cases have recognized that evidence of constitutional violations on the part of non-state governmental actors is relevant to the § 5 inquiry.") (quotation omitted). This is so because such discrimination has often been the product of unconstitutional discrimination by States against LGBT individuals. In particular, until recently, State laws criminalizing same-sex sodomy have translated into high barriers to municipal employment for LGBT individuals. *See Lawrence* v. *Texas*, 539 U.S. 558, 575 (2003) ("[T]he Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms."). This has been true across all areas of municipal employment, including law enforcement and public education. *See, e.g., Nat'l Gay Task Force* v. *Bd. of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1984) ("We see no constitutional problem in the statute's permitting a teacher to be fired for engaging in 'public homosexual activity.'"); *Clearfield City* v. *Dep't of Employment Sec.*, 663 P.2d 440, 443 (Utah 1983) ("The act of sodomy violated the laws the officer and his employer had a sworn duty to uphold and enforce. . . . This entire course of events . . . would surely have a significant adverse effect upon the officer's credibility as a police officer and as a witness in the courts of law."). The adverse effects of such laws on LGBT individuals linger to this day.

Accordingly, we present scores of instances in which both States and municipalities across the country have engaged in unconstitutional discrimination against their employees on the basis of sexual orientation or gender identity. *See* § II.B.2. *infra*. Such discrimination encompasses all types of adverse employment actions—whether termination, refusal to hire, refusal to promote, hostile work environment, differential terms and conditions of employment, retaliation, or censorship. It encompasses actual as well as perceived sexual orientation or gender identity, as well as associational discrimination based on sexual orientation or gender identity. Significantly, it is commonly intertwined with unconstitutional discrimination on the basis of sex, whether in the form of sex stereotyping, sexual harassment, or associational discrimination based on sex.

A. ENDA Would Properly Abrogate Sovereign Immunity Because Classifications Based on Sexual Orientation or Gender Identity Are Presumptively Unconstitutional Absent the Requisite Evidentiary Showing

As a prudential matter, the Supreme Court has thus far refrained from ruling on whether classifications on the basis of sexual orientation enjoy a presumption of constitutionality that may be overcome only upon the requisite evidentiary showing. *See Romer* v. *Evans*, 517 U.S. 620, 632 (1996) ("[I]f a law neither burdens a funda-

mental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end. Amendment 2 fails, even defies, this conventional inquiry.") (citation omitted); *see also Hooper* v. *Bernalillo County Assessor*, 472 U.S. 612, 618 (1985) ("[I]f the statutory scheme cannot pass even the minimum rationality test, our inquiry ends."). The Court has not yet had an opportunity to consider whether classifications on the basis of gender identity merit such a presumption.

The principled conclusion is that classifications based on sexual orientation or gender identity are presumptively unconstitutional. Each of the factors that independently renders a classification especially suspect because the classification is especially likely to reflect invidious discrimination is satisfied where classifications based on sexual orientation or gender identity are concerned. LGBT people have "experienced a history of purposeful unequal treatment" and have "been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Cleburne*, 473 U.S. at 441, 445 (quotation omitted). In addition, neither sexual orientation nor gender identity is an aspect of personal identity that an individual either can or should be compelled to change in order to escape governmental discrimination, *see Frontiero* v. *Richardson*, 411 U.S. 677, 685, 686 (1973), and LGBT people are particularly vulnerable politically so as to "command extraordinary protection from the political processes," *Murgia*, 427 U.S. at 313, although neither of these factors is essential to a finding that a classification is presumptively unconstitutional. *See generally* Br. of Amici Curiae Nat'l Lesbian & Gay Law Ass'n, et al., *Lawrence* v. *Texas*, No. 02–102, 2003 WL 152348 (Jan. 16, 2003) (enclosed).

[Editor's Note: The enclosed information referred to may be found at: www.aclu.org/files/assets/ACLU_Letter_to_Senate_HELP_Committee_on_ENDA_and_Sovereign_Immunity_Enclosure_Part_1.pdf.]

It cannot be seriously disputed that LGBT people have long suffered and continue to suffer systemic and egregious discrimination. *See Varnum* v. *Brien*, 763 N.W.2d 862, 889 (Iowa 2009) ("The County does not, and could not in good faith, dispute the historical reality that gay and lesbian people as a group have long been the victims of purposeful and invidious discrimination because of their sexual orientation.") (ruling under State analog to Equal Protection Clause); *Kerrigan* v. *Comm'r of Pub. Health*, 957 A.2d 407, 434 (Conn. 2008) ("There is no question . . . that gay persons historically have been, and continue to be, the target of purposeful and pernicious discrimination due solely to their sexual orientation.") (ruling under State analog to Equal Protection Clause); *In re Marriage Cases,* 183 P.3d 384, 442 (Cal. 2008) ("[S]exual orientation is a characteristic . . . that is associated with a stigma of inferiority and second-class citizenship, manifested by the group's history of legal and social disabilities.") (citations omitted) (ruling under State analog to Equal Protection Clause); *Tanner* v. *Or. Health Scis. Univ.*, 971 P.2d 435, 447 (Or. Ct. App. 1998) ("[C]ertainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social . . . prejudice.") (ruling under State analog to Equal Protection Clause).

It also cannot be seriously disputed that one's sexual orientation and one's gender identity are not indicative of one's ability to participate in or contribute to society. *See Varnum*, 763 N.W.2d at 892 ("[I]t is clear sexual orientation is no longer viewed in Iowa as an impediment to the ability of a person to contribute to society."); *Kerrigan*, 957 A.2d at 435 ("[H]omosexuality bears no relation at all to an individual's ability to contribute fully to society.") (quotation omitted); *Marriage Cases*, 183 P.3d at 442 ("[S]exual orientation is a characteristic . . . that bears no relation to a person's ability to perform or contribute to society.") (citation omitted); *Tanner*, 971 P.2d 435 at 447 ("[C]ertainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social stereotyping."); *see also http://www.aclu.org/pdfs/lgbt/ discrim_map_bw.pdf* (21 States and the District of Columbia have sexual orientation-inclusive civil rights laws; 13 States and the District of Columbia have gender identity-inclusive civil rights laws).

Moreover, sexual orientation and gender identity are so intrinsic to personal identity that, even if one could, one should not be compelled to change them to escape governmental discrimination. *See Varnum*, 763 N.W.2d at 893 ("Sexual orientation is not the type of human trait that allows courts to relax their standard of review because the barrier is temporary or susceptible to self-help."); *Kerrigan*, 957 A.2d at 438–39 ("This prong of the suspectness inquiry surely is satisfied when, as in the present case, the identifying trait is so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change it. In other words, gay persons, because they are characterized by a central, defining trait of personhood, which may be altered if at all only at the expense of significant damage to the individual's sense of self are no less entitled to consideration as a suspect

or quasi-suspect class than any other group that has been deemed to exhibit an immutable characteristic. To decide otherwise would be to penalize someone for being unable or unwilling to change a central aspect of individual and group identity, a result repugnant to the values animating the constitutional ideal of equal protection of the laws.") (quotations and citations omitted); *Marriage Cases*, 183 P.3d at 442 ("Because a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment.") (citations omitted); *Tanner*, 971 P.2d 435 at 446–47 ("[T]he focus of suspect class definition is not necessarily the immutability of the common, class-defining characteristics, but instead the fact that such characteristics are historically regarded as defining distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice. . . . Sexual orientation . . . is widely regarded as defining a distinct, socially recognized group of citizens, and certainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.").

Finally, LGBT people have long lacked and continue to lack political power to a sufficient degree to warrant judicial solicitude. *See Varnum*, 763 N.W.2d at 895 ("We are convinced gay and lesbian people are not so politically powerful as to overcome the unfair and severe prejudice that history suggests produces discrimination based on sexual orientation."); *Kerrigan*, 957 A.2d at 444 ("We apply this facet of the suspectness inquiry not to ascertain whether a group that has suffered invidious discrimination borne of prejudice or bigotry is devoid of political power but, rather, for the purpose of determining whether the group lacks sufficient political strength to bring a prompt end to the prejudice and discrimination through traditional political means. Consequently, a group satisfies the political powerlessness factor if it demonstrates that, because of the pervasive and sustained nature of the discrimination that its members have suffered, there is a risk that that discrimination will not be rectified, sooner rather than later, merely by resort to the democratic process. Applying this standard, we have little difficulty in concluding that gay persons are entitled to heightened constitutional protection despite some recent political progress.") (citation omitted); *Marriage Cases*, 183 P.3d at 443 ("[O]ur cases have not identified a group's *current* political powerlessness as a necessary *prerequisite* for treatment as a suspect class.") (emphasis in original); *Tanner*, 971 P.2d 435 at 447 ("[C]ertainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse . . . political stereotyping and prejudice.").

Significantly, Federal case law concluding that discrimination based on sexual orientation or gender identity is presumptively constitutional heavily relies on *Bowers* for the proposition that the liberty interest in forming an intimate relationship with a partner does not extend to LGBT people. *Bowers* has been wholly repudiated. The Supreme Court has held not only that *Bowers* "is not correct today" but indeed that it "was not correct when it was decided." *Lawrence*, 539 U.S. at 578. Thus, for example, *Lofton* v. *Sec'y of Dep't of Children & Fam. Servs.*, 358 F.3d 804, 818 & n.6 (11th Cir. 2004), is unpersuasive because it relies on Federal case law that in turn relies on *Bowers*. *See Equality Found. of Greater Cincinnati, Inc.* v. *City of Cincinnati*, 128 F.3d 289, 292–93 (6th Cir. 1997) ("[U]nder *Bowers* . . . and its progeny, homosexuals [do] not constitute either a 'suspect class' or a 'quasi-suspect class' because the conduct which define[s] them as homosexuals [is] constitutionally proscribable.") (citation and footnote omitted); *Holmes* v. *Cal. Army Nat'l Guard*, 124 F.3d 1126, 1132 (9th Cir. 1997) (relying on progeny of *Bowers*); *Richenberg* v. *Perry*, 97 F.3d 256, 260 & n.5 (7th Cir. 1996) (relying on *Bowers* and its progeny); *High Tech Gays* v. *Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) ("[A]lthough the Court in [*Bowers*] analyzed the constitutionality of the sodomy statute on a due process rather than equal protection basis, by the [*Bowers*] majority holding that the Constitution confers no fundamental right upon homosexuals to engage in sodomy, and because homosexual conduct can thus be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class entitled to greater than rational basis review for equal protection purposes.") (citations and footnote omitted); *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes.") (footnote omitted); *Woodward* v. *United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("After [*Bowers*] it cannot be logically asserted that discrimination against homosexuals is constitutionally infirm.").[1]

[1] The remaining Federal case law on which *Lofton* relies does not address whether sexual orientation is presumptively constitutional.

Moreover, such Federal case law erroneously relies on *Romer* for the proposition that classifications based on sexual orientation are presumptively constitutional. As discussed above, in *Romer*, the Court did not reach whether classifications based on sexual orientation are presumptively constitutional. Thus, such case law is unpersuasive. *See, e.g., Lofton*, 358 F.3d at 818 & n.6 (relying on *Holmes*, 124 F.3d at 1132, and *Richenberg*, 97 F.3d at 260 n.5, both of which in turn rely on a misapprehension of *Romer*).

Finally, we note that discrimination against LGBT people is also presumptively unconstitutional both because it implicates the liberty interest in forming an intimate relationship with a same-sex partner, *see, e.g., Witt* v. *Dep't of Air Force*, 527 F.3d 806 (9th Cir. 2008) (holding, in the public employment context, that a penalty on formation of an intimate relationship with a same-sex partner is subject to heightened scrutiny), and because it implicates sex discrimination, *see, e.g., Glenn* v. *Brumby*, __F. Supp. 2d__, No. 1:08–CV–2360–RWS, WL 1849951 (N.D. Ga. June 25, 2009) (transgender State employee was subjected to sex stereotyping); *see also, e.g., Smith* v. *City of Salem*, 378 F.3d 566 (6th Cir. 2004) (transgender municipal employee was subjected to sex stereotyping); *Schroer* v. *Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (transgender Federal applicant was subjected to sex stereotyping and discrimination on the basis of change of sex).

Because classifications based on sexual orientation or gender identity enjoy a presumption of unconstitutionality that may be overcome only upon the requisite evidentiary showing, no further inquiry is necessary. *See Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976).

B. In the Alternative, ENDA Would Properly Abrogate Sovereign Immunity Because it Would Satisfy the Congruence and Proportionality Test

1. The Proportionality Inquiry

Even if classifications based on sexual orientation or gender identity were not presumptively constitutional, ENDA would easily satisfy the proportionality inquiry. As discussed below, the proposed scope of ENDA would largely mirror the Equal Protection Clause's prohibition on irrational discrimination. Moreover, it would be in proportion to the Equal Protection Clause's prohibition on sex discrimination. Furthermore, it would be in proportion to the Due Process Clause's prohibition on penalizing the exercise of a liberty or expression interest.

The Equal Protection Clause prohibits States from classifying on *any* basis where the classification does not even rationally further a legitimate State interest. *Hooper*, 472 U.S. at 618. In other words, the Equal Protection Clause prohibits irrational discrimination by States. Thus, it is significant that courts have routinely found that discrimination by States and municipalities against their LGBT employees lacks even a rational basis. *See, e.g., Lovell* v. *Comsewogue Sch. Dist.*, 214 F. Supp. 2d 319 (E.D.N.Y. 2002); *Miguel* v. *Guess*, 51 P.3d 89 (Wash. Ct. App. 2002); *Emblen* v. *Port Auth.*, No. 00 Civ. 8877 (AGS), 2002 WL 498634 (S.D.N.Y. Mar. 29, 2002); *Quinn* v. *Nassau County Police Dep't*, 53 F. Supp. 2d 347 (E.D.N.Y. 1999); *Glover* v. *Williamsburg Local Sch. Dist. Bd. of Educ.*, 20 F. Supp. 2d 1160 (S.D. Ohio 1998); *Weaver* v. *Nebo Sch. Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998); *Alaska Civil Liberties Union* v. *Alaska*, 122 P.3d 781 (Alaska 2005) (ruling under State analog to Equal Protection Clause); *Snetsinger* v. *Mont. Univ. Sys.*, 104 P.3d 445 (Mont. 2004) (same); *see also United States* v. *Georgia*, 546 U.S. 151, 158 (2006) ("[N]o one doubts that § 5 grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions.") (emphasis in original). While significant, it is not surprising that courts have found that employment discrimination based on sexual orientation or gender identity is generally irrational.[2] Simply put, one's sexual orientation and gender identity have no bearing on one's ability to do one's job.[3]

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[2] It need be only that employment discrimination based on sexual orientation or gender identity is *generally* irrational. *See Nev. Dep't of Human Res.* v. *Hibbs*, 538 U.S. 721, 727–28 (2003) ("Congress may, in the exercise of its § 5 power, do more than simply proscribe conduct that we have held unconstitutional. Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text. In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.") (quotation and citation omitted).

[3] Whether discrimination based on sexual orientation or gender identity is generally irrational in contexts *other than employment* is immaterial to the analysis. *See Lane*, 541 U.S. at 530–31 ("[N]othing in our case law requires us to consider title II, with its wide variety of applica-

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Moreover, the factors on which the Court specifically relied in *Kimel* and *Garrett* for the proposition that discrimination based on age or disability is generally rational are not present where discrimination based on sexual orientation or gender identity is concerned. Even courts that have held that classifications based on sexual orientation or gender identity do not enjoy a presumption of unconstitutionality have acknowledged that LGBT individuals constitute a discrete and insular minority who have suffered a history of discrimination, and that one's sexual orientation and gender identity are not indicative of one's ability to participate in or contribute to society. *See Conaway* v. *Deane*, 932 A.2d 571, 614 (Md. 2007) (holding that sexual orientation classifications are subject to rational basis review under State analog to Equal Protection Clause, but acknowledging that "gay, lesbian, and bisexual persons in recent history have been the target of unequal treatment in the private and public aspects of their lives, and have been subject to stereotyping in ways not indicative of their abilities, among other things, to *work* and raise a child") (emphasis added); *Andersen* v. *King County*, 138 P.3d 963, 974 (Wash. 2006) (holding that sexual orientation classifications are subject to rational basis review under State analog to Equal Protection Clause, but acknowledging that "[t]here is no dispute that gay and lesbian persons have been discriminated against in the past").

Furthermore, ENDA would sweep less broadly than the Equal Protection Clause in significant ways. In particular, section 8(b) of ENDA makes express that ENDA would not apply to the differential terms and conditions of employment that the LGBT employees of 28 States suffer with respect to the health, pension, and other dependent benefits that constitute a substantial portion of the compensation package of employees who may marry their partners in a manner that would be recognized under ENDA. *See www.hrc.org/documents/Employment*__Laws__and__Policies.pdf. Such differential treatment violates the Equal Protection Clause. *See, e.g., Alaska Civil Liberties Union* v. *Alaska*, 122 P.3d 781 (Alaska 2005) (ruling under State analog to Equal Protection Clause); *Snetsinger* v. *Mont. Univ. Sys.*, 104 P.3d 445 (Mont. 2004) (same); *Tanner* v. *Or. Health Scis. Univ.*, 971 P.2d 435 (Or. Ct. App. 1998) (same). ENDA's express limitations serve only to bolster the conclusion that ENDA would satisfy the proportionality inquiry.

Separate and apart from the analysis above, it is significant that the discrimination at issue is commonly intertwined with sex discrimination. *See, e.g., Rene* v. *MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (gay employee was subjected to sexual harassment); *Smith* v. *City of Salem*, 378 F.3d 566 (6th Cir. 2004) (transgender municipal employee was subjected to sex stereotyping); *Nichols* v. *Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001) (gay employee was subject to sex stereotyping); *Glenn* v. *Brumby*,__F. Supp. 2d__, No. 1:08–CV–2360–RWS, WL 1849951 (N.D. Ga. June 25, 2009) (transgender State employee was subjected to sex stereotyping); *Schroer* v. *Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (transgender Federal applicant was subjected to sex stereotyping and discrimination on the basis of change of sex). In other words, it is significant that sexual orientation and gender identity discrimination are contexts in which sex discrimination persists with particular tenacity. The Court has already ruled that Congress may abrogate State sovereign immunity where employment discrimination based on sex is at issue. *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976). The Court has also already ruled that Congress may continue to enact prophylactic legislation to deter and remedy sex discrimination to the extent that sex discrimination persists. *Hibbs*, 538 U.S. at 730 ("[After Congress enacted title VII,] State gender discrimination did not cease. . . . States continue to rely on invalid gender stereotypes in the employment context. . . . [T]he persistence of such unconstitutional discrimination by the States justifies Congress' passage of prophylactic § 5 legislation."). Thus, in enacting ENDA, Congress would also abrogate sovereign immunity by virtue of the constitutional concern that employment discrimination based on sex presents.[4]

It is also significant that, in addition to equality considerations under the Equal Protection Clause, ENDA would implicate liberty and expression considerations under the Due Process Clause. *See Tennessee* v. *Lane*, 541 U.S. 509 (2004) (Congress

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tions, as an undifferentiated whole. Whatever might be said about title II's other applications, the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts. Because we find that title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further.") (citation and footnotes omitted).

[4] The fact that some of the discrimination at issue might not be intertwined with sex discrimination does not alter the analysis. Again, "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Hibbs*, 538 U.S. at 727–28.

may enforce Due Process rights under section 5 of the Fourteenth Amendment); *City of Boerne* v. *Flores*, 521 U.S. 507 (1997) (Congress may enforce First Amendment rights under section 5 of the Fourteenth Amendment). The Due Process Clause prohibits States and municipalities from penalizing their LGBT employees for exercising their constitutionally protected liberty interests. *See, e.g., Witt* v. *Dep't of Air Force*, 527 F.3d 806 (9th Cir. 2008) (holding, in the public employment context, that a penalty on formation of an intimate relationship with a same-sex partner is subject to heightened scrutiny). It also prohibits States and municipalities from penalizing their LGBT employees for exercising their constitutionally protected expression interests. *See, e.g., Weaver* v. *Nebo Sch. Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998) (recognizing, in the public employment context, that the censorship of pro-LGBT expression is unconstitutional). Given that State and municipal employers routinely penalize their LGBT employees for forming an intimate relationship with a same-sex partner or for expressing pro-LGBT viewpoints, *see* § II.B.2. *infra*, ENDA would constitute an appropriate prophylactic measure to deter and remedy such unconstitutional conduct.

For all of these reasons, the scope of ENDA would largely mirror the scope of section 1 of the Fourteenth Amendment and therefore readily satisfy the proportionality inquiry.

2. The Evidentiary Inquiry

We cannot emphasize enough that our data egregiously underreport the magnitude of the constitutional concern. Precisely because such discrimination is so prevalent, many LGBT employees are understandably reluctant to disclose their sexual orientation or gender identity, as seeking redress for discriminatory acts often necessitates. *See Kerrigan*, 957 A.2d at 446 n.40 (Conn. 2008) ("Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena.") (quotation omitted). Moreover, despite some recent favorable legal developments, many LGBT employees have been understandably discouraged from exploring suit when they suffer workplace discrimination, given that many courts have exhibited hostility toward their claims. *See, e.g., Ulane* v. *Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) (adverse title VII ruling against transgender employee); *DeSantis* v. *Pac. Tel. & Tel. Co., Inc.*, 608 F.2d 327 (9th Cir. 1979) (adverse title VII ruling against lesbian and gay employees). Furthermore, our data capture only a small fraction of the inquiries that we field from the small minority of LGBT employees who have the wherewithal to contact us, and purport to represent only a snapshot of our records during recent times. Accordingly, our catalog below is merely illustrative of the constitutional concern.

Still, our data confirm that there is, in fact, a widespread pattern of irrational discrimination by States and municipalities against their LGBT employees, as reflected in the 87 examples of discrimination from 35 States—24 examples of State discrimination and 63 examples of municipal discrimination—referenced below.

First, our outreach to the LGBT community over just the past month, and our review of the inquiries that we have fielded from LGBT employees over just the past 18 months, readily yielded 16 stories of irrational discrimination by States and 48 stories of irrational discrimination by municipalities. The following stories are illustrative:

• **Shannon P. Dietz of Baton Rouge, LA.**—I was hired in 2006 as a faculty member and coordinator of the 4–H Program at Louisiana State University. The program had 500 participants, 8–18 years old, and I built a strong youth program for at-risk and underserved youth. My job also involved serving as the liaison between the 4–H office and the University. I had never received a negative comment on any past evaluations and, in December 2007, I was promoted to office supervisor of an off-campus parish office. I had also received a Distinguished Service Award from the 4–H Program.

In April 2009, I was called away from a camping event where I was supervising at-risk youth. The University's Human Resources manager said I needed to come back immediately for a meeting. At the meeting, she informed me that the school had received an anonymous letter saying that I had a personal ad on a gay dating site. After the meeting was over, I was not allowed to go back to camp and collect my personal items because I was told I could not interact with the youth in my program anymore.

I was immediately put on administrative leave and told I was going to be fired eventually. However, I refused to quit and, despite the threats, they did not fire me. Instead, I was demoted from my job as the office supervisor and taken off all pro-

grams involving interacting with youth. Now, I am researching and writing curricula and my contract has not been renewed, so I have no job security.

This demotion has been very stressful. Although I have been out to my family for a long time, I was always very careful not to give any indications or signs at work about my sexual orientation. My career with the 4–H Program is ruined because people are starting rumors about my sexual orientation.

• **Kathleen Culhane of St. Paul, MN.**—I was hired in 1998 as a research assistant for an orthopedic surgeon at the University of Iowa. In August 2001, I came out as transgendered, and the surgeon I worked for immediately quit coming into the lab. The department administrator told me, to my face and in front of witnesses, that my condition (transsexuality) was such that they didn't feel I could give sufficient effort to the department and they were firing me.

I went to the University's affirmative action department, who found enough merit to my story that my termination was stopped, as long as I agreed to find work in another department. I had a few interviews, but no one gave me a second one, so, effectively, I was fired.

I chose to relocate to Minnesota in March 2002, specifically because the State offers civil rights protections. At the time, it was overwhelming and terrible to lose my job and leave Iowa and the city I had lived in for 16 years.

• **John Schmidt of Fort Mill, SC.**—I was hired as a New Jersey State Trooper in 1982. I loved working in law enforcement and received many promotions as well as many commendations for my work in alcoholic beverage control.

In January 1997, I was beaten up by other troopers while on an assignment. I was undercover waiting for other troopers to arrive in a sting operation. When they arrived, one of the troopers headed straight towards me (even though they knew that I was a trooper) and started beating me with his baton. He knocked me to the ground and kicked me, shouting anti-gay slurs.

I enjoyed my job, but the incident made me feel scared, depressed, and very uncomfortable. I filed a lawsuit, but it was dismissed on procedural grounds because my lawyer missed court deadlines.

The culture of the New Jersey State Troopers is notoriously intolerant, and it is well-documented in the press and in lawsuits that many African-American and gay and lesbian troopers have faced workplace hostility and harassment.

I retired from law enforcement in 2003 on disability because of a cardiac condition. In all honesty, my cardiac condition is not such that it would prevent me from working in some capacity in law enforcement. However, the hostility of my work environment made me realize that I was lucky to be able to retire before I faced further harassment or violence.

• **Gypsey Teague of Pendleton, SC.**—In 2002, I was hired as the Branch Librarian for the Oklahoma City Branch of Langston University, Oklahoma's only historically black college or university (HBCU). I have both an MLS and an MBA and so, not only was I the library director, but I also taught classes in the business department.

In late 2004, after I had been successfully employed at the University for almost 3 years, I decided to begin the process of transitioning from male to female. The administration was very accommodating, both in supportive words and in providing generous leave, which made my transition very easy. I spoke with the Campus Director, my Library Director, and the Vice President of Academic Affairs. All three were helpful, and promised to support me and help in creating a smooth transition. I was pleased, but not surprised, to find that this historically black university understood issues of diversity. With their encouragement, I took an extended vacation over the Christmas holiday to finalize my transition. When I returned, I conducted myself as a woman, professionally and properly dressed at all times, and afforded myself of the bathroom of my new gender. Things went extremely well, and I felt that success in both my professional life and my personal life.

I went to a professional conference in February 2005. When I returned, I was stunned to learn that a student had circulated a hate-filled petition calling for my removal from campus, and had posted offensive flyers around the campus.

Various reasons were cited, but all were related to my transgender identity. I never saw the actual petition but there were over 100 copies circulated throughout the small campus building. I spoke with the Campus Director, and asked for his assistance in removing the offensive flyers. I was stunned to hear him say that the student had a right to freedom of speech, and that he could and would do nothing. In fact, when other students also complained about these hateful flyers as being inappropriate, he went so far as to support the right of the students to pass out the flyers.

The very next day, the Campus Director issued a rule that all faculty and staff must use the bathrooms in the break room, at the other end of the building, and

not the student bathrooms across the hall from the library. Surprised by this, I noticed that none of the other faculty were adhering to this policy. When I mentioned this to the Director, he told me that he could not control the actions of all faculty and staff, but that I would adhere to the policy or be disciplined.

The petition-circulating student, encouraged by the administration's failure to support me, circulated another petition, this one stating that God wished me dead, and expressing the hope that something to this effect should happen. I spoke to several high-level administrators, who I was sure would see reason at this point. Instead, they told me my concerns were unwarranted, and to stop causing drama. Then, suddenly and surprisingly, my teaching schedule for the summer was changed to the late-night 7:30–10 p.m. time slot. This meant I would be the last instructor to leave the building, and I would have to exit into an empty parking lot in a dangerous section of the city.

I decided to apply for a job at another college, even though it would require relocating. In May 2005, I left Langston University and accepted a position as Branch Head of the Architecture Library at Clemson University in South Carolina. Having to relocate was difficult because my mother was in a nursing home in Oklahoma and she passed away there before I could return to see her.

Had the administrators who were charged with my welfare stood up and supported me in the face of mean-spirited prejudice, I think I would have been able to stay and to prosper. When they failed to take decisive action, I was forced to choose between my safety, both emotional and physical, and my job.

• **Laura J. Doty of Boise, ID.**—I was hired in April 1997 as an Adult Probation Officer in Power County, ID. I was closeted except for my direct supervisor, who had no problem with my sexuality. It was a professional environment, and my peer reviews indicated I was respected and did a good job. I liked being able to help people overcome difficulties and improve themselves. I had letters of recommendation from the Prosecuting Attorney, a letter of recommendation from my direct supervisor, and positive reviews from a judge and the Public Defender.

In September 1997, I ran into a co-worker from the county building at a store and introduced my partner to her. Two days later, the Power County Commissioners called me in and told me I was unhappy at work and I could quit or be fired. I said they would have to fire me.

After I was fired, I immediately called the Human Rights Commission in Boise, and they told me I had no basis to make a claim because sexual orientation is not a protected status. I was devastated because I considered myself a dedicated employee and hard worker. I cared about my probationers, and I worked very hard to help them succeed, whether in getting a GED or staying in a 12-step program.

My partner at the time was in graduate school, so we struggled financially after I lost the job.

• **Laura Elena Calvo of Portland, OR.**—From 1980 to 1996, I worked for the Josephine County Sheriff's Office in Grant's Pass, Oregon. At the end of my employment, I held the rank of Sergeant, although, during the course of my employment, I was promoted often and worked in a variety of capacities including as a S.W.A.T. team commander and a detective in both the Major Crimes Unit and the Narcotics Task Force.

During my 16 years at the Sheriff's Office, I received numerous commendations, including commendations for removing an automobile accident victim from a burning vehicle, delivering a baby alongside a roadway, disarming an armed man intent on harming himself, and for the expertise and diligence shown in a number of complicated criminal cases. I was named Deputy of the Year in 1994, and I also taught law enforcement classes at Rogue Community College and at the Oregon Police Academy.

Apart from a distinguished employment record and career in law enforcement, from my earliest recollection at about age 4, I felt I was very different than other boys. I would have preferred to be born female. In my late teens, I felt the need to express my female gender identity, and I began to cross-dress in private. In the day, this sort of thing was shameful, confusing and considered counter-social. I compartmentalized that part of my identity, keeping it a very well-kept secret. I went out of my way to be sure that, when I did express my gender identity, it was such that it was very unlikely it would be discovered. I rented a storage locker in another city and another county where I kept my cross-dressing items.

On Labor Day 1995, I was on duty in an extremely remote area of Josephine County searching for a fugitive when a police dog attacked me, penetrating the bones in my leg with its teeth. I suffered major blood and tissue loss, and my injuries required emergency surgery. After this incident, I was put on administrative leave until my leg could heal.

Roughly a month after this attack, the storage unit I rented in Medford, OR, was broken into and the contents stolen. I was notified of the theft and requested to file a police report. Since this storage unit contained only my female effects and belongings, I felt I could not report the crime because I would need to provide a list of the stolen property. I also assumed the items would never be recovered anyways.

However, within a week of the break-in, my immediate supervisor called me into the Sheriff's Office for a meeting. Instead of an office, I was brought into one of our interrogation rooms where I was informed that the Medford Police Department had recovered my stolen property alongside some railroad tracks. I was told that I was personally identified from very personal intimate pictures contained within the property and that these pictures had been seen by both Medford County and Josephine County officers.

I was told by my supervisor that the Sheriff felt that I would no longer be able to perform my duties because of the fact I had been discovered to dress as a woman and that it would be a big mistake to try to come back to work.

In the spring of 1996 after my leg had healed, I was ordered to travel to Portland for a psychiatric determination for fitness of duty. I went before a panel of doctors, selected by the Sheriff's Office, who determined I was not fit to return to work. I was informed that the Sheriff, in conjunction with the County's Risk Manager and Attorney, were in the process of putting together a settlement offer in return for my resignation.

The direct impact of the discrimination I experienced has been devastating on so many levels. I don't have a college degree or any other skills except law enforcement. I tried working as a school bus driver and driving a senior citizen bus, but found the work unrewarding. I contacted attorneys, but they said I had no legal protections. Had employment non–discrimination laws been in effect, I likely would have continued serving the citizens of Josephine County to this day.

• **Shawn Wooten of Jonesboro, GA.**—In February 2001, I started working as school bus coordinator for the Henry County School District in McDonough, GA. I was always considered one of the best drivers during my 6 years of employment.

In 2006, another employee found a personal ad I had posted 6 years previously on a gay dating site. She printed it and distributed it at one of the high schools. In June 2006, as soon as word got out that I was gay, I was fired. When I pressed for a reason, I was told that it was "in the best interests of the school system" and that I knew the answer.

I complained to board of education members but got no response. I also contacted Atlanta Legal Aid and tried to find an attorney to take my case, but I was told Georgia was a right-to-work State and I had no legal protection.

I applied for school bus coordinator jobs in other districts, but, every time, after expressing initial interest, the school district refused to hire me. I believe that word got around from Henry County that I was gay. I was unemployed for 2 years. I have Lupus, and I am constantly in need of medical attention, but couldn't get it because my insurance was canceled when I was terminated.

• **Nerissa Belcher of Douglasville, GA.**—In September 2005, I moved to Georgia and applied for a job as a Disease Investigator with the Fulton County Health Department in Atlanta, GA.

I had originally applied for the job with a male name, but, by the time they called me back, I had legally changed my name, and so I started work as Nerissa.

The first month or so with the Health Department went very well. I did well in the training, and I had highest testing scores of all disease investigators trained by my mentor. However, the supervisor of the Department was very uncomfortable with my transition.

The supervisor tried to make my life miserable at work and forbid me from using the female restroom. I complained to Human Resources, but my private conversation with them was related to my supervisor without my consent. In February 2006, I was fired without cause.

When I was fired, I lost my ability to be financially self-sufficient and to provide assistance to my children. It was also frustrating because I was extremely well-qualified for my job and was replaced by a medically untrained Parks Department employee.

• **Johnny Woodnal of Concord, MA.**—I was hired in the spring of 2002 to teach English at a public high school in Medford, MA. Medford appealed to me initially because it is a fairly urban district with a lot of diversity and a need for talented teachers (the turnover rate is quite high). I loved everything about teaching, and all of my formal observations were written up in a positive light.

During the spring of my first school year, 1 year after my hire, the school became aware of my sexual orientation when my partner (now husband) directed the school

musical with me. I was the only openly gay teacher on staff at the high school at the time.

In 2005, I was told I would not be receiving tenure during the final month of my tenure year (year three). When no actual proof could be offered as validation for why my teaching was so bad they did not want to continue my employment, I pressed for answers. I was told by the superintendent that I shouldn't be known for my "activities outside the classroom," which everyone involved took to mean that I should have been quiet about my sexual orientation rather than open in dealing with a high school community.

I pursued action with my union, including legal action, but was told that discrimination could be difficult to prove. The district only backed down and gave me tenure after students and parents expressed their outrage. Even after the community forced the administration to back down and give me tenure, they found other ways to harass me, continually beating me down professionally and robbing my self-esteem. I am still in therapy now, nearly 5 years later, in relation in part to the experience.

My husband and I now have two children, and they are our entire world. When our daughter came to our family, I knew that I needed to leave the hostile environment in order to protect my family. So, in 2007, I got a new job with a district outside of the city, serving a much more heterogeneous and wealthy population. I don't feel quite as needed as I did by the lower socio-economic groups of Medford.

• **Camille Hopkins of Portland, OR.**—I was hired in 1987 as a planner for the city of Buffalo in upstate New York. My job offered me an opportunity to improve the quality of life for poor residents of Buffalo. I was good at and enjoyed making a difference in people's lives.

In August 2001, I informed the Mayor of Buffalo that I was a transgender woman and was hoping he would support my transition in the workplace. At this time, I had been working for the city of Buffalo for over 15 years and had developed a method of improving a Federal program that assists poor HIV+ individuals and persons with AIDS from becoming homeless. My management method impacted more HIV+ people than ever before. As a result of my work and initiative, I received a county-wide civic award.

However, not long after my transition, I was demoted. I was heartbroken to be removed from the program I had worked so hard to develop. For the previous 15 years (as a male), I never had difficulty in the workplace. However, after my transition in September 2002, I received unwarranted criticism of my work and hostility in the workplace.

On a "casual" Friday in July 2007, I wore a gay pride t-shirt to work. Later that day, I was informed by the Director of Labor Relations that someone in my department was offended by my shirt. I was instructed to remove it or cover it. When I did not, I was charged with harassment and insubordination. At the informal hearing, the Legal Department offered to drop the charges if I signed a waiver stating I would never sue them for past grievances. I refused to sign. I was then informed they would in all likelihood terminate me after the formal hearing to follow. This hearing was constantly postponed but the workplace hostilities continued.

This incident, as well as other workplace transphobic events, put pressure on me that I never had experienced before. I became anxious and nervous and had difficulty sleeping at night. My family doctor put me on medication to help. These conditions eventually affected the quality of my work. In August 2008, worn down by the stress, depression and fear of retaliation, I resigned. I filed grievances with the city of Buffalo Human Resource Department and the Commission on Citizen Rights as well as the New York State Division of Human Rights and the Federal EEO Commission, but all to no avail.

• **Nikki Fultz of Fort Wayne, IN.**—This is my 4th year teaching 5th grade at Adams Elementary, an inner city school in Fort Wayne, IN. I am out to everyone in my life but my students. All of my co–workers know about my sexual orientation and are very supportive, as is my principal.

Last year, my partner and I had a commitment ceremony, and I legally had my name changed. I had discussed with my principal whether it would be OK for me to come out to students, and she thought it would be fine. I was not planning on going into depth, obviously, but students knew my name changed.

However, my principal checked with our legal department, and they told her it would be inappropriate. I was told that, if I come out directly or even indirectly to students, I would be fired. After that, I was very nervous. Last year, some of my 5th grade students Googled my name and found out that I am the director of Fort Wayne's Pride Committee. Luckily, the principal did not find out this had occurred. I can't relax, though, because the same thing could happen this year. My partner,

who now also teaches school in the same district, was actually fired for being out at a small high school in northern Indiana, so we know the threat is very real.

It's also frustrating because, as teachers, we're encouraged to talk about our families at school. My partner and I are foster parents and are in the process of adopting a child, and so it's very strange not to be able to talk about the fact I have a family. I also want to be honest with my students so that they know I am not ashamed.

• **Rachel White of Los Angeles, CA.**—I was hired as the Chief Deputy Director of the Department of Children and Family Services for Los Angeles County in March 2002. I had over 100 direct and next-level subordinates. I liked being in service to children and families and thought the challenge of transforming a large government bureaucracy was exciting. In my time with the County, I was recognized for settling a large labor dispute without a strike or making ill-advised concessions, took a 10 percent cut in the Department's budget and still maintained services at pre-existing levels, and made major progress in reducing the number of children in out-of-home care.

I told my Director in late May, early June 2002 that I would be transitioning on the job from male to female. She was supportive and immediately assumed responsibility for transition planning throughout the County. The Board of Supervisors gave their verbal approval to my transition plan, HR was engaged, press releases were developed, and I wrote an article for the Department Web site's news section.

Three weeks after my transition plan was quietly put in place, my Director was fired. It is noteworthy that my Director was the only one who could fire me. The interim director assured me I could transition on the job, and the CAO assured me all was well; however, in September 2002, 3 weeks before my transition date at work, the interim director fired me without cause. I was told I was an "at will employee" and a political appointee. I was deeply hurt, shocked and professionally devastated. I found work again, but my income suffered and so did my self-esteem.

I filed an official complaint with the County and involved the Ombudsman, to no avail. I also sought legal advice, but ultimately decided that the suit wasn't worth the years of legal wrangling that it would entail and the damage it would cause to other employees in the Department.

The callousness of the County's actions was inexcusable and clearly was related to changing my gender identity.

• **William "Bart" Birdsall of Tampa, FL.**—I was hired in 1997 as a teacher and then a school librarian and medial specialist for the School District of Hillsborough County in Tampa, FL.

In July 2005, I was involved in protesting the dismantling of a gay pride book display at the local public library. I was quoted in the local paper saying that I was upset that the book display was prematurely taken down, both as a gay man and a school librarian.

The school superintendent was concerned that I was quoted in the paper and proceeded to have my behavior reviewed by the school district's Professional Standards Office. Professional Standards decided not to punish me for taking part in protests but warned me not to bring the issue into the workplace. I have always taken my work very seriously, and to have my professionalism called into question was hurtful and upsetting.

I continue to work as a school librarian and have always received satisfactory or outstanding marks on evaluations. I have lots of anger about the incident and my therapist says I show signs of post-traumatic stress.

• **Brianne Rivera of Hollywood, FL.**—I was hired as a Technical Support Specialist for Broward College in August 2007. Computer repair is my passion, and I liked the job because I could use my technical knowledge and experience to troubleshoot computer hardware and software on a daily basis. I also learned to like the social interaction between myself and the users whose computers I was repairing. I was given a letter stating that I was dependable, able to work independently and a skilled technician.

About 2 months prior to my firing from the college, I came out to my boss as a transgender lesbian. I told him that I was undergoing hormone therapy and that I would be transitioning on the job.

On Friday, March 27, 2009, I was called on my day off and asked to come in to work for 2 hours in order to attend a technical staff meeting. As I was provided only four uniforms and I had worked the four previous days, my uniforms were in the washing machine. I informed my boss of this and said I would come in but that it would be in women's clothes (which up until this point I had not worn to work). He agreed that that was fine, so I left to attend the meeting.

When I arrived on campus, I started getting multiple hostile looks from faculty and staff, as they only knew me as a man. This made me feel uncomfortable and a bit scared. I called one of the other technicians who I was friendly with in order

to meet up with him and have some safety by being around someone accepting. But, as soon as I started to explain what was happening, he hung up. This freaked me out, so I dialed my friend back multiple times, but he wouldn't pick up.

My boss was standing next to my friend when I was repeatedly calling, and he asked my friend who kept calling him so many times. My boss claimed that these calls were harassment, and so he moved me to another shift. Unfortunately, the new shift interfered with all of my support group, psychological therapy and speech therapy appointments. It was critical to the treatment of my gender identity disorder that I make these appointments; so I had to choose between my job with Broward College and continuing my transition.

Since the incident occurred, my finances have suffered dramatically, as I still am unemployed. Over the previous 6 years, I had saved over $14,000 to use towards my gender reassignment surgery. I've had to spend a lot of my savings, and, now, I may be forced to give up on transitioning altogether because soon I won't be able to afford my medications and doctors' visits.

• **Michael DiSchiavi of Brooklyn, NY.**—I was hired as a sixth grade English teacher at Dyker Heights I.S. 201 in 1998. I wasn't out at work, except to a few of my colleagues, but I knew there were rumors about my sexual orientation. Also, during my job interview the school's principal asked whether I was married or had a girlfriend, so she probably had her suspicions that I was gay.

I worked for a year and a half without incident. All of my work was fine, and my observation reports were all satisfactory. In April 2000, I was called into a meeting with the assistant principal. During the meeting, he said I was a very hard worker and very conscientious, and then proceeded to tell me I was not invited to return to teach the following year. I told him I was confused because I'd always received satisfactory ratings, to which he replied that I had "classroom management" issues. He said he would do me a favor and let me resign at the end of the school year, but, if I failed to do so, I would receive an unsatisfactory rating on my next report.

I reported this threat to my union rep, but he said it would be my word against theirs if I tried to fight back. Then, 2 days after my meeting with the assistant principal, my classroom was vandalized with "faggot" written across the chalkboard. At this point, I didn't have tenure, and the union wasn't prepared to back me up. Feeling that I lacked any other option, I resigned at the end of the school year.

• **Marlin Earl Bynum of Irving, TX.**—I was originally hired in the summer of 2006 as a mathematics teacher for the Keller Learning Center, an alternative public high school in Keller, TX. All of my evaluations for the last 3 years have been "exceeds expectations," which is the highest rating one can receive. I have also been named teacher of the month. In 2008, I was asked to get qualified to teach special education, which I did, so I am now the special education teacher for our school.

Two years ago, I had a student ask me directly if I was gay, and I said yes. I was called into the assistant principal's office and warned not to disclose my sexual orientation to students. She warned me that I endanger myself and my job by being out.

In response to this, I wrote a letter explaining that I wouldn't hide being gay because I would not send the message to a student that it was something to be ashamed of. As a result, I had three students removed from my classroom because their parents were upset about my sexual orientation.

Another time, I mentioned to my assistant principal that I wanted to learn to dance Country and Western. She offered to teach me, and I said I needed to learn to lead and follow, as that is what gay men do when dancing. In response, she said, "Eww, Marlin," and immediately changed the subject. Also, last year, my request to have a diversity training was denied by the assistant principal.

These homophobic incidents have made me feel increasingly isolated. The more I try to be open at work about my sexual orientation, the more I am persecuted. I interact with my fellow teachers on a professional basis, but I have learned to keep personal life and interaction to a minimum because I realize now that it is too problematic to try and educate people about LGBT discrimination.

The remaining stories are summarized below:

• A transgender scientist was not hired by a Virginia State agency on account of her gender identity in 2006.

• A transgender electrician was not hired by an Ohio State university on account of her gender identity in 2006.

• A lesbian Michigan State corrections officer was fired on account of her sexual orientation in 2007.

• A transgender editor in the Georgia legislative counsel's office was fired on account of her gender identity in 2007.

• A transgender applicant for a position in the Montana State attorney general's office was not hired on account of her gender identity in 2008.
• A lesbian California State corrections officer was subjected to a hostile work environment on account of her sexual orientation in 2008.
• A lesbian Virginia State corrections psychologist was subjected to a hostile work environment on account of her sexual orientation in 2008.
• A gay employee at a New Mexico State university was constructively discharged on account of his sexual orientation in 2008.
• An athletic trainer at a Virginia State military academy was subjected to a hostile work environment on account of her association with lesbian individuals in 2008.
• A transgender applicant for an analyst position at a Pennsylvania State agency was not hired on account of his gender identity in 2008.
• A gay employee was fired by a Virginia State museum on account of his sexual orientation in 2009.
• A Virginia State agency retaliated against an employee for supporting a claim of discrimination based on sexual orientation by a gay employee in 2009.
• A gay North Carolina county deputy planning director was fired on account of his sexual orientation in 1991.
• A gay firefighter at a Washington County fire district was subjected to a hostile work environment on account of his sexual orientation in 1996.
• A gay nurse at a Pennsylvania county adult day health services center was subjected to a hostile work environment on account of his sexual orientation in 1996.
• A gay employee at a Florida county clerk's office was subjected to a hostile work environment on account of his sexual orientation in 1997.
• A gay public school principal and a gay public school teacher in Indiana were subjected to a hostile work environment on account of their sexual orientation from 1997 to 2000.
• A lesbian firefighter in Florida was subjected to a hostile work environment on account of her sexual orientation in 2000.
• A transgender Florida city public works supervisor was fired on account of her gender identity in 2001.
• A gay public school teacher in Alabama was fired on account of his sexual orientation in 2002.
• A transgender New Hampshire county corrections officer was subjected to a hostile work environment on account of her gender identity from 2005 to 2007.
• A gay emergency medical technician was fired by a South Carolina county on account of his sexual orientation in 2006.
• A transgender nurse was fired by an Arizona county hospital on account of his gender identity in 2006.
• A transgender Illinois city chief naturalist was fired on account of her gender identity in 2006.
• A gay deputy sheriff in Utah was subjected to a hostile work environment on account of his sexual orientation in 2007.
• A lesbian applicant was not hired by a Maryland city police department on account of her sexual orientation in 2007.
• A lesbian public school teacher in Minnesota was subjected to a hostile work environment on account of her sexual orientation in 2007.
• A gay public school teacher in Virginia was subjected to a hostile work environment on account of his sexual orientation in 2007.
• Lesbian kitchen workers at a Missouri sheriff's office were fired on account of their sexual orientation in 2007.
• A gay police officer in Michigan was constructively discharged on account of his sexual orientation in 2008.
• A lesbian police officer in New York was subjected to a hostile work environment on account of her sexual orientation in 2008.
• Another lesbian police officer in New York was subjected to a hostile work environment on account of her sexual orientation in 2008.
• A transgender public school teacher in Nevada was fired on account of her gender identity in 2008.
• A perceived gay applicant for a public school teacher position in Missouri was not hired on account of his perceived sexual orientation in 2008.
• A lesbian public school teacher in Illinois was subjected to a hostile work environment on account of her sexual orientation in 2008.
• A gay applicant for a position in a Missouri county prosecutor's office was not hired on account of his sexual orientation in 2008.
• A lesbian California State corrections psychiatric technician was denied permission to accompany her partner to the hospital during an emergency in 2008.

• A gay public school administrator and a bisexual public school administrator in Kentucky were subjected to a hostile work environment and denied job-related funding and travel on account of their sexual orientation in 2008.
• A gay public school bus driver in New Jersey was subjected to a hostile work environment and fired on account of his sexual orientation in 2008.
• Lesbian public school bus drivers in California were subjected to a hostile work environment on account of their sexual orientation in 2008.
• A gay professor at an Illinois community college was subjected to a hostile work environment in 2008.
• Lesbian nurses at a California county health clinic were subjected to a hostile work environment on account of their sexual orientation in 2008.
• A lesbian public school teacher in Virginia was subjected to a hostile work environment on account of her sexual orientation in 2009.
• A lesbian public school teacher in Texas was subjected to a hostile work environment on account of her sexual orientation in 2009.
• A public school teacher in Texas was censored for expressing pro-LGBT viewpoints in 2009.
• A transgender public school teacher in New Jersey was censored from expressing pro-LGBT viewpoints in 2009.
• A lesbian Arizona city crime scene investigator was fired on account of her sexual orientation in 2009.
• A lesbian public school guidance counselor in Texas was subjected to a hostile work environment on account of her sexual orientation and censored from expressing pro-LGBT viewpoints in 2009.

Second, a partial survey of formal and informal advocacy on behalf of LGBT State and municipal employees reveals another 8 instances of irrational discrimination against LGBT State employees and another 15 instances of irrational discrimination against LGBT municipal employees. *See* Examples of Anti-LGBT Discrimination by State and Municipal Employers (enclosed).

[Editor's Note: The enclosed material referred to may be found as Attachment 1 at the end of this letter].

Separate and apart from the 86 examples referenced above, 28 States discriminate against all of the LGBT employees in their workforce in the terms and conditions of their employment by refusing to extend dependent employment benefits to their same-sex domestic partners—health and pension benefits that are often critical to the well-being of the employee's family. *See www.hrc.org/documents/Employment_Laws_and_Policies.pdf.* Significantly, of the States that have come to offer same-sex domestic partner benefits, several have done so only in response to litigation. *See, e.g., Alaska Civil Liberties Union* v. *Alaska*, 122 P.3d 781 (Alaska 2005); *Snetsinger* v. *Mont. Univ. Sys.*, 104 P.3d 445 (Mont. 2004); *Tanner* v. *Or. Health Scis. Univ.*, 971 P.2d 435 (Or. Ct. App. 1998); *Bedford* v. *N.H. Cmty. Technical College Sys.*, Nos. 04–E–229, 04–E–230, 2006 WL 1217283 (N.H. Super. Ct. May 3, 2006); *Levitt* v. *Bd. of N.M. Retiree Health Care Auth.*, No. CV–2007–01048 (N.M. Dist. Ct.) (settled).

In sum, even our cursory and limited investigation yielded numerous examples of discrimination by States and municipalities against their LGBT employees. All such evidence confirms a significant pattern of employment discrimination based on sexual orientation or gender identity by States and municipalities.

For the foregoing reasons, the ACLU submits that, in enacting ENDA, Congress would properly exercise its authority under section 5 of the Fourteenth Amendment to abrogate the rights of States under the 11th Amendment.

Sincerely,

MATTHEW A. COLES,
Director, ACLU LGBT & AIDS Project.

ATTACHMENT 1.—EXAMPLES OF ANTI-LGBT DISCRIMINATION BY STATE AND MUNICIPAL EMPLOYERS

Sources:

• Nan D. Hunter, Courtney G. Joslin & Sharon M. McGowan, *Government Employees, in* The Rights of Lesbians, Gay Men, Bisexuals, and Transgender People: The Authoritative ACLU Guide to a Lesbian, Gay, Bisexual or Transgender Person's Rights 35 (4th Ed. 2004) [Hereinafter Hunter, et al., *Government Employees*].
• ACLU, *Annual Update of the ACLU's Nationwide Work on LGBT Rights and HIV/AIDS* (2003, 2004, 2005, 2006, 2007) [hereinafter ACLU, Annual Update 200x].
• Christopher E. Anders, *Federally Funded Religion Will Trample Civil Rights, in* ACLU, Annual Update 2003, at 18 [hereinafter Anders].

• James Esseks, *How "Sodomy" Laws Affect You, in* ACLU, Annual Update 2003, at 8 [hereinafter Esseks].

Number of examples:

State: 8
Local: 15
Total: 23
Pre-1985: 7

States represented:

CA, DE, GA, IN, KS, MD, MI (2), MN, NM, NY (2), OH (2), SC, TX (3), UT (2), WA (2), WI

Employer types:

Law Enforcement: 6
Education: 10
Health/Welfare: 2
Other: 5

CALIFORNIA

Debro v. *San Leandro Unified School District*
(local—school district/teacher)

"When Karl Debro, a heterosexual high school teacher in the San Leandro public schools, expressed his opposition to racism and homophobia in a classroom discussion, the school disciplined him for raising 'objectionable' topics in class. He sued the school district in Federal court, arguing that the district had violated his First Amendment right to free expression. After the trial court ruled against him, the ACLU of Northern California helped his appeal with a friend-of-the-court brief, arguing that Debro's speech was constitutionally protected. Before the Federal appeals court heard the case, the case settled favorably for Debro. Cooperating attorneys Thomas R. Burke and Eric M. Stahl, Ann Brick and Maggie Crosby of the ACLU of Northern California, and Romana Mancini of the Project authored the brief, which was joined by Lambda Legal and the California Teachers Association." ACLU, Annual Update 2003, 27.

DELAWARE

Aumilier v. *University of Delaware*
(State—university/professor)

434 F. Supp. 1273 (D. Del. 1977) (invalidating discharge of college teacher who had been quoted in several newspapers about gay rights). Hunter, et al., *Government Employees* 46 n. 45.

GEORGIA

Shahar v. *Bowers*
(State—Attorney General/attorney)

"In *Shahar* v. *Bowers*, Robin Shahar was denied the opportunity to work in the Georgia Attorney General's Office after the State attorney general, Michael Bowers . . . learned that she had engaged in a private commitment ceremony with her female partner. Bowers had insisted that the public would be confused if an open lesbian worked at an office that was charged with the mission of upholding Georgia's laws, including the sodomy law that was still in force at the time. The Eleventh Circuit Court of Appeals allowed Bowers to revoke his job offer. It agreed that there could be a loss of morale or cohesiveness from allowing an open lesbian to work in the attorney general's office, enforcing the State's criminal laws. In upholding Bowers' decision, the court stressed 'the sensitive nature of the pertinent professional employment.' Hunter, et al., *Government Employees* 40 (citing *Shahar* v. *Bowers*, 114 F.3d 1097, 1108, 1110 (11th Cir. 1997) (en banc), *reh'g denied*, 120 F.3d 211 (1997), *cert. denied*, 522 U.S. 1049 (1998)). *See* Hunter, et al., *Government Employees* 46 n. 32–34. *See also* Esseks, at 9 ("Public employers have fired or refused to hire lesbians and gay men based on laws against intimacy. For example, Georgia's attorney general fired Robin Shahar, an attorney in his office, based on his assumption that, as a lesbian, she must be violating the State's sodomy law.").

INDIANA

Cornell v. *Roberson*
(State—agency/employee)

"When the State of Indiana denied employee Jana Cornell's request for bereavement leave so she could attend the funeral of her partner's father, the Indiana Civil Liberties Union sued the State. The ICLU argued that the exclusion of same-sex

partners from the bereavement leave policy violates the State constitution. A trial court recently dismissed Cornell's lawsuit, saying that the bereavement leave policy is lawful because it discriminates based on marriage not sexual orientation. An appeal is pending." ACLU, Annual Update 2003, at 36.

KANSAS

PFLAG Mom Silenced for Speaking Out
(local—library/employee)

"The day of the historic *Lawrence* v. *Texas Supreme Court* decision, PFLAG mom Bonnie Cuevas, an employee of the Topeka and Shawnee County Public Library in Kansas, received a few unsolicited phone calls at work from friends and reporters about the decision. The following day, after a story about the decision featuring comments by Cuevas appeared on the front page of *USA Today*, library supervisors told Cuevas she was never to talk about the *Lawrence* decision at work again. To justify the censorship, the library managers told Cuevas that a co-worker had complained that Cuevas was creating a 'hostile work environment.' When Cuevas asked whether her talking with the press had been a concern, the managers told her it was not. PFLAG contacted the Project, which sent a letter to the library warning that it is a violation of the First Amendment to censor the speech of public employees about matters of public concern and demanded that the library lift its restrictions on Cuevas's speech. The library ultimately agreed to these demands and agreed that Cuevas was free to discuss the *Lawrence* decision at work." ACLU, Annual Update 2004, at 39.

MARYLAND

Ancanfora v. *Board of Education*
(local—board of education/teacher)

491 F.2d 498 (4th Cir. 1974) (holding that a teacher could not be transferred to administrative position solely because he admitted in press interviews that he was gay). Hunter, et al., *Government Employees* 46 n. 45.

MICHIGAN

Mack v. *City of Detroit*
(local—city/police officer)

"A lesbian police officer was discriminated against because of her sexual orientation and sued the city of Detroit under Detroit's human rights ordinance. Detroit argued in court that it could not be sued in State court under its own local law. The case was appealed all the way to the Michigan Supreme Court, which agreed with the city. The court ruled that there is no right to sue in State court under a local civil rights law. The ACLU of Michigan filed a friend-of-the-court brief in support of the lesbian police officer's right to sue. ACLU attorneys Jay Kaplan and Mike Steinberg worked on the case with Saura Sahu of the Sugar Justice Center at the University of Michigan Law School." ACLU, Annual Update 2003, at 43–44.

Substitute Teacher 'Wrongful Discharge'
(local—school district/substitute teacher)

"When a gay substitute teacher was terminated after telling students he was gay and had a partner, the ACLU of Michigan wrote a letter to the school district demanding that the teacher be reinstated. The school district invited him back." *Docket: Discrimination, in* ACLU, Annual Update 2004, at 39, 43.

MINNESOTA

McConnell v. *Anderson*
(State—university/employee)

451 F.2d 193, 196 (8th Cir. 1971) (University of Minnesota employee fired for attempting to secure license to marry his same-sex partner). Hunter, et al., *Government Employees* 46 n. 48.

NEW MEXICO

Bernalillo County Assessor—Retaliatory Discharge
(local—county assessor's office/employee)

"The ACLU of New Mexico represents an employee of the Bernalillo County Assessor's office who was subjected to threatening comments by coworkers and other discriminatory work conditions related to his sexual orientation. In April 2005, the employee filed an internal complaint; in retaliation, the Assessor's office discharged him. The affiliate sent a demand letter seeking reinstatement of the employee and back pay." *Docket: Discrimination, in* ACLU, Annual Update 2006, at 50, 54.

NEW YORK

Lovell v. *Comsewogue School District*
(local—school district/teacher)

"Finally, in 2002, a Federal district court in New York ruled that a lesbian high school teacher who had sued school officials for failing to take measures to prevent students from harassing her based on her sexual orientation stated a valid equal protection claim." Hunter, et al., *Government Employees* 40 (citing *Lovell* v. *Comsewogue Sch. Dist.*, 214 F. Supp. 2d 319 (E.D.N.Y. 2002). *But cf. Schroeder* v. *Hamilton Sch. Dist.*, 282 F.3d 946 (7th Cir. 2002) (rejecting comparable claim), *cert. denied*, 123 S. Ct. 435 (2002)). *See* Hunter, et al., *Government Employees* 45 n. 28.

Quinn v. *Nassau County Police Department*
(local—police department/police officer)

"[I]n *Quinn* v. *Nassau County Police Department*, a Federal district court in New York agreed with a gay police officer who alleged that the police department violated his constitutional right to equal protection when it looked the other way and allowed officers to harass and abuse him on the job. Although the police department insisted that it was legal to discriminate because of sexual orientation, the judge strongly disagreed: '[G]overnment action . . . cannot survive rational basis review when it is motivated by irrational fear and prejudice towards homosexuals.'" Hunter, et al., *Government Employees* 41 (citing *Quinn* v. *Nassau County Police Dep't*, 53 F. Supp. 2d 347, 356, 357 (E.D.N.Y. 1999)). *See* Hunter, et al., *Government Employees* 46 n. 36–37).

OHIO

Rowland v. *Mad River Local School District*
(local—school district/guidance counselor)

"[A] Federal appeals court allowed an Ohio school system to fire a guidance counselor after she told a secretary and several other teachers that she was bisexual." Hunter, et al., *Government Employees* 39 (citing *Rowland* v. *Mad River Local Sch. Dist.*, 730 F.2d 444, 446 (6th Cir. 1984), *cert. denied* 470 U.S. 1009 (1985) ("Justices Marshall and Brennan vigorously dissented from the decision of the Supreme Court not to hear Rowland's case, insisting that 'discrimination against homosexuals or bisexuals based solely on their sexual preference raises significant constitutional questions under both prongs of our settled equal protection analysis.' 470 U.S. at 1014 (Brennan, J., dissenting)."). *See* Hunter, et al., *Government Employees* 45 n. 21.

Glover v. *Williamsburg Local School District Board of Education*
(local—school district/teacher)

"In *Glover* v. *Williamsburg Local School District Board of Education*, decided in 1998, an Ohio Federal district court ordered that the school reinstate a gay teacher who had been fired because of 'animus toward [the teacher] as a homosexual.'" Hunter, et al., *Government Employees* 39 (citing *Glover* v. *Williamsburg Local Sch. Dist. Bd. of Educ.*, 20 F. Supp. 2d 1160 (S.D. Ohio 1998)). *See* Hunter, et al., *Government Employees* 45 n. 25.

SOUTH CAROLINA

Dawson v. *State Law Enforcement Division*
(State—State law enforcement division/police officer)

"[I]n a 1992 case, a South Carolina police officer was fired for inappropriate sexual conduct with another man. The police officer had insisted that he was not homosexual and that the men had only been masturbating together in the same room. Nevertheless, the court ruled against him on the basis that, regardless of whether or not he was gay, the firing was permissible because the Supreme Court had held in *Bowers* v. *Hardwick* that there was no fundamental right of privacy to engage in homosexual sex." Hunter, et al., *Government Employees* 40–41 (citing *Dawson* v. *State Law Enforcement Div.*, 1992 WL 208967 (D.S.C. 1992)). *See* Hunter, et al., *Government Employees* 46 n. 35.

TEXAS

Childers v. *Dallas Police Department*
(local—city police department/prospective property room employee)

"The Dallas Police Department, in particular, has been the subject of repeated lawsuits. In 1981, the department refused to hire Steven Childers, an openly gay man, in its property room. When Childers sued, a Federal district court held that because many people openly despise and fear homosexuals, the police department could refuse to hire him. The court found, 'There [were] also legitimate doubts about a homosexual's ability to gain the trust and respect of the personnel with whom he works.'" Hunter, et al., *Government Employees* 41 (citing *Childers* v. *Dallas Police*

Dep't, 513 F. Supp. 134, 147 (N.D. Tex. 1981)). *See* Hunter, et al., *Government Employees* 46 n. 38–39). *See also* Esseks, at 9 ("a gay man was denied a non-officer job in a police department because of Texas's sodomy law").

City of Dallas v. *England*
(local—city/police officers)

"The Texas Court of Appeals reversed course in 1993, however, by ruling that Dallas could not prevent lesbians and gay men from serving as police officers based solely on disapproval of their private, consensual sexual activities." Hunter, et al., *Government Employees* 41 (citing *City of Dallas* v. *England*, 846 S.W.2d 957, 959 (Tex. Ct. App. 1993)). *See* Hunter, et al., *Government Employees* 46 n. 40.

Van Ooteghem v. *Gray*
(local—county/employee)

"In 1980, a county employee in Texas was fired when he told his boss that he was gay and planned on speaking to the county commissioner about gay and lesbian civil rights. The Federal appeals court reviewing his case required that he be rehired because the county violated his First Amendment rights." Hunter, et al., *Government Employees* 42 (citing *Van Ooteghem* v. *Gray*, 628 F.2d 488, 490 (5th Cir. 1980), aff'd en banc, 654 F.2d 304 (1981)). *See* Hunter, et al., *Government Employees* 46 n. 45.

UTAH

Weaver v. *Nebo School District*
(local—school district/teacher-coach)

"Also in 1998, a Federal court in Utah vindicated the rights of Wendy Weaver, a high school teacher who had lost her assignment as volleyball coach after the school learned that she was a lesbian. In a sweeping decision, the court held that the school district could not prevent the teacher from discussing her sexual orientation on the same terms that heterosexual teachers were permitted to do so. Nor could it prevent her from being out to students without violating her First Amendment rights. The court also held that bias against Weaver because she was a lesbian was not a rational reason to bar her from coaching the volleyball team." Hunter, et al., *Government Employees* 39–40 (citing *Weaver* v. *Nebo Sch. Dist.*, 29 F. Supp. 2d 1979 (D. Utah 1998); *see also Miller* v. *Weaver*, 66 P.3d 592 (Utah 2003) (rejecting attempt by citizens groups to force State board of education to fire Weaver)). *See* Hunter, et al., *Government Employees* 45 n. 27.

Citizens of Nebo School District v. *Weaver*

"In the latest chapter of an ongoing attempt to fire Wendy Weaver, a 23-year veteran teacher at Spanish Fork High School, because she is a lesbian, a group of parents is asking the State Supreme Court to strip the teacher of her teaching license. The parents claim that she should not be allowed to teach their children because she is a criminal for violating the State sodomy law. In 1998, the Nebo County School District barred Weaver from coaching a girls' volleyball team and required her to sign an order that prohibited her from discussing her sexual orientation in or outside of the classroom. With the ACLU's help, Weaver won a Federal court decision that said government employees cannot be singled out for disciplinary action because of their sexual orientation and that the prohibition on Weaver's ability to be out violated her free speech rights. Following the Federal court victory, the group of parents, Citizens of the Nebo School District for Morals and Legal Values, tried to get Weaver fired with a new case, this time in State court. In 1999, a State trial court judge threw out the key claims alleged by the group against Weaver, and the parents appealed to the Utah Supreme Court. The ACLU of Utah represents Weaver, claiming that the parents' lawsuit, if successful, would violate Weaver's free speech rights as well as her right to equal protection. Former ACLU of Utah Legal Director Stephen Clark will argue the case in October 2002. Cooperating attorney Richard Van Wagoner is assisting the ACLU of Utah with the case." ACLU, Annual Update 2003, at 59–60.

"After legal battle that dragged on for 5 years, the Supreme Court of Utah unanimously upheld the dismissal of a parents' group's claims that an openly lesbian teacher was unfit to be a role model and otherwise participate as a full citizen. The group had filed two lawsuits seeking to oust teacher Wendy Weaver. In 1998, Weaver was told by Nebo School District not to discuss her sexual orientation in or outside the classroom and was barred from teaching girls' volleyball. A Federal judge found that Weaver couldn't be singled out because of her sexual orientation and that the school violated her free speech rights. The parents then sued in State court, and the ACLU represented Weaver again. In *Citizens of Nebo School District* v. *Weaver*, the Supreme Court of Utah held that remedies already existed for rectifying any teacher misconduct, and that parents of students had no right to sue the school to

enforce requirements of public employees." *Docket: Discrimination, in* ACLU, Annual Update 2004, at 39, 46–47.

Etsitty v. *Utah Transit Authority*
(State—transit authority/bus driver)

"The ACLU of Utah and the Project filed a friend-of-the-court brief in Federal appeals court on behalf of Krystal Etsitty, a former Utah Transit Authority bus driver who was fired shortly after she revealed to her employers that she is transgender. Her employers had received no complaints about her, yet they informed her that she was being fired because they could not determine which restroom she should use while on the job. Etsitty, who identifies and lives as a woman, has legally changed her name from Michael to Krystal, and has changed her Utah driver's license designation from male to female. The transit authority told her that she would be eligible for rehire only after undergoing sex reassignment surgery. Etsitty's lawyers argued in Federal court that she was protected by Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on sex, including nonconformity to sex stereotypes. The trial court ruled against her, finding that titleVII did not protect transgender individuals from discrimination. *Etsitty* v. *Utah Transit Authority* is still pending in the Federal appeals court." *Transgender Docket*, in ACLU, Annual Update 2007, at 52, 54.

WASHINGTON

Gaylord v. *Tacoma Sch. District No. 10*
(local—school district/teacher)

"[T]he Supreme Court of Washington allowed a 'known homosexual' to be fired from his teaching position at a high school in Tacoma in 1977." Hunter, et al., *Government Employees* 39 (citing *Gaylord* v. *Tacoma Sch. Dist. No. 10*, 559 P.2d 1340 (Wash. 1977) (en banc). *See* Hunter, et al., *Government Employees* 45 n. 22. *See also* Esseks, at 9 ("a teacher in Washington State was fired because the State's criminal intimacy law made him 'immoral' and therefore unemployable").

Davis v. *Pullman Memorial Hospital*
(State—public hospital/sonographer)

"Mary Jo Davis experienced constant harassment during her job as a sonographer at Pullman Memorial Hospital, a public institution. Her boss, Dr. Charles Guess, regularly referred to Davis as a "fucking dyke" and a "fucking faggot." At one point, Guess told another doctor, "I don't think that fucking faggot should be doing vaginal exams, and I'm not working with her." When Davis complained, the hospital punished her rather than discipline Guess. They reduced her work hours to three quarters time so Guess would not have to work with her. Later, Davis was fired. The ACLU got involved in the lawsuit against the hospital and Dr. Guess in 1996. The lower court dismissed the case, but a Washington State appeals court unanimously ruled that anti-gay discrimination against a public employee violates the U.S. Constitution. The homophobic doctor is appealing the case to the State supreme court, but the hospital has not yet said whether or not it will join the appeal. Project attorney Ken Choe and cooperating attorney Richard Reed are handling the case." ACLU, Annual Update 2003, at 61.

"The Project secured a hefty settlement for Mary Jo Davis, a former sonographer at Pullman Memorial Hospital in Pullman, Washington, who was fired because she is gay. Davis worked in the radiology department at the hospital for about 2 years, during which time she was routinely harassed by Dr. Charles Guess, the chief radiologist. Guess constantly referred to Davis as a "fucking dyke" and "fucking faggot," and told another doctor, "I don't think that fucking faggot should be doing vaginal exams, and I'm not working with her." When Davis complained, Guess told hospital administrators that he didn't "agree with Mary Jo Davis's lesbian lifestyle." Rather than discipline Guess, the hospital punished Davis, reducing her work hours to three-quarters time so Guess wouldn't have to work with her. Finally, Davis was fired. After a loss in the trial court, the Project successfully appealed the case to the Washington Court of Appeals, helping to establish important law protecting lesbian and gay government employees from anti-gay discrimination. This was the first time that an appeals court interpreted the U.S. Constitution to protect government employees against anti-gay discrimination. *Davis* v. *Pullman Memorial Hospital*, which began in 1996, was finally settled this year with both the hospital and Dr. Guess agreeing to pay $75,000 in damages to Davis." *Docket: Discrimination, in* ACLU, Annual Update 2004, at 39, 39–40.

WISCONSIN

Safransky v. *State Personnel Board*
(State—State-run home/"houseparent")

"[T]he Wisconsin Supreme Court allowed the administrators of a State-run home for mentally retarded boys to fire a gay man who had served as houseparent, on the ground that he failed to project 'the orthodoxy of male heterosexuality.'" Hunter, et al., *Government Employees* 39 (citing *Safransky* v. *State Pers. Bd.*, 215 N.W.2d 379, 385 (Wis. 1974)). *See* Hunter, et al., *Government Employees* 45 n. 23.

BMC SOFTWARE INC.,
July 20, 2009.

Hon. EDWARD KENNEDY, *Chairman*,
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC 20510.

DEAR SENATOR KENNEDY: As one of America's leading businesses, BMC SOFTWARE Inc. would like to express our strong support of Federal workplace non-discrimination legislation that would extend basic job protections to lesbian, gay, bisexual and transgender (LGBT) Americans.

BMC SOFTWARE has implemented its own non-discrimination policy to make our workplace values of fairness clear and transparent to our 5,800 employees. In the years since its implementation, the policy has been accepted broadly, and we believe it has affected our bottom line for the better. And it has further re-inforced for all of our employees that fairness and non-discrimination remain fundamental in our workplace.

Enhancing our work environment to prohibit discrimination on the basis of sexual orientation and gender identity has not added any financial cost to our organization. Instead, we believe our philosophy and practice of valuing diversity bring financial benefits to the workplace by encouraging full and open participation by all employees.

Businesses that drive away talented and capable employees are certain to lose their competitive edge, an outcome that we must not accept in this competitive global marketplace. That's why a majority of FORTUNE 500 companies have already addressed these issues. After a thorough analysis of its provisions, we are convinced that the Employment Non-Discrimination Act is an appropriate measure that will have a positive impact on our country's ability to compete by extending protection in the majority of U.S. States where it remains legal to fire employees because they are LGBT.

In fact, the fairness and simplicity of this bill is one of its most compelling features. The bill does not mandate affirmative action or reporting requirements, and imposes no regulation. It does not compel employers to grant spousal benefits. The Employment Non-Discrimination Act merely embodies the principle of non-discrimination that already enjoys the wide support of the American people.

It has been the law of the land that employment discrimination is unacceptable based on race, gender, religion, ethnic origin or other non-performance-related considerations. It is time to include sexual orientation and gender identity.

BMC SOFTWARE strongly supports passage of the Employment Non-Discrimination Act. The principles it fosters are consistent with our corporate principles in treating all employees with fairness and respect. We encourage Congress to move quickly to enact this important legislation.

Sincerely,

ROBERT E. BEAUCHAMP,
CEO and Chairman of the Board.

BUSINESS COALITION ON WORKPLACE FAIRNESS,
November 5, 2009.

Hon. TOM HARKIN, *Chairman,*
Senate Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC 20510.

Hon. GEORGE MILLER, *Chairman,*
House Committee on Education and Labor,
2181 Rayburn House Office Building,
Washington, DC 20515.

DEAR CHAIRMAN HARKIN AND CHAIRMAN MILLER: As members of the Business Coalition for Workplace Fairness, we represent America's leading businesses that have already adopted non-discrimination policies to protect our gay, lesbian, bisexual and transgender employees. We firmly believe that protecting employees from discrimi-

nation on the basis of sexual orientation and gender identity is consistent with good business practice regarding treatment of employees, clients, stakeholders, and the general public. For this reason, we wish to express our strong support for the Employment Non-Discrimination Act (S. 1584/H.R. 3017).

To make our workplace values clear and transparent to our employees, customers and investors, each of our businesses have already implemented a non-discrimination policy which is inclusive of sexual orientation and gender identity. This policy has been accepted broadly and we believe it has positively affected our bottom-line. Our philosophy and practice of valuing diversity encourages full and open participation by all employees. By treating all employees with fairness and respect we have been able to recruit and retain the best and brightest workers, thereby bringing a multitude of diverse opinions and perspectives to our organizations.

Federal non-discrimination protections for lesbian, gay, bisexual and transgender workers will benefit American business. Businesses that drive away talented and capable employees are certain to lose their competitive edge. Excluding any one of our Nation's employees from the basic right to work in a safe and welcoming environment will, in the end, impede our Nation's ability to compete in a global marketplace.

Thank you for this opportunity to share our views with you.

Sincerely,

ACCENTURE LTD., NEW YORK, NY; ALBERTO-CULVER CO., MELROSE PARK, IL; AMERIPRISE FINANCIAL INC., MINNEAPOLIS, MN; AMGEN INC., THOUSAND OAKS, CA; AMR CORP. (AMERICAN AIRLINES), FORT WORTH, TX; BANK OF AMERICA CORP., CHARLOTTE, NC; THE BANK OF NEW YORK MELLON CORP., NEW YORK, NY; BASF CORP., FLORHAM PARK, NJ; BAUSCH & LOMB INC., ROCHESTER, NY; BEST BUY CO. INC., RICHFIELD, MN; BINGHAM MCCUTCHEN LLP, BOSTON, MA; BMC SOFTWARE INC., HOUSTON, TX; BOEHRINGER INGELHEIM PHARMACEUTICALS INC., RIDGEFIELD, CT; BP AMERICA INC., WARRENVILLE, IL; BRISTOL-MYERS SQUIBB CO., NEW YORK, NY; CAPITAL ONE FINANCIAL CORP., MCLEAN, VA; CHARLES SCHWAB & CO., SAN FRANCISCO, CA; CHEVRON CORP., SAN RAMON, CA; CHUBB CORP., WARREN, NJ; CISCO SYSTEMS INC., SAN JOSE, CA; CITIGROUP, NEW YORK, NY; CLEAR CHANNEL COMMUNICATIONS INC., SAN ANTONIO, TX; CLOROX CO., OAKLAND, CA; THE COCA-COLA CO., ATLANTA, GA; CORNING INC., CORNING, NY; DELL INC., ROUND ROCK, TX; DELOITTE LLP, NEW YORK, NY; DEUTSCHE BANK, NEW YORK, NY; DIAGEO NORTH AMERICA, NORWALK, CT; DOW CHEMICAL CO., MIDLAND, MI; EASTMAN KODAK CO., ROCHESTER, NY; ELECTRONIC ARTS INC., REDWOOD CITY, CA; ELI LILLY & CO., INDIANAPOLIS, IN; EMC CORP., HOPKINTON, MA; ERNST & YOUNG LLP, NEW YORK, NY; GAP INC., SAN FRANCISCO, CA; GENERAL MILLS INC., MINNEAPOLIS, MN; GENERAL MOTORS CORP., DETROIT, MI; GLAXOSMITHKLINE, PHILADELPHIA, PA; GOLDMAN SACHS GROUP INC., NEW YORK, NY; GOOGLE INC., MOUNTAIN VIEW, CA; HANOVER DIRECT INC., WEEHAWKEN, NJ; HARRAH'S ENTERTAINMENT INC., LAS VEGAS, NV; HERMAN MILLER INC., ZEELAND, MI; HEWLETT-PACKARD CO., PALO ALTO, CA; HOSPIRA INC., LAKE FOREST, IL; HSBC—NORTH AMERICA, PROSPECT HEIGHTS, IL; INTEGRITY STAFFING SOLUTIONS INC., WILMINGTON, DE; INTERNATIONAL BUSINESS MACHINES CORP., ARMONK, NY; J.P. MORGAN CHASE & CO., NEW YORK, NY; KAISER PERMANENTE, OAKLAND, CA; KEYCORP, CLEVELAND, OH; KIMPTON HOTEL & RESTAURANT GROUP, SAN FRANCISCO, CA; KPMG LLP, NEW YORK, NY; LEVI STRAUSS & CO., SAN FRANCISCO, CA; MARRIOTT INTERNATIONAL INC., BETHESDA, MD; MERCK & CO. INC., WHITEHOUSE STATION, NJ; MERRILL LYNCH & CO. INC., NEW YORK, NY; MICROSOFT CORP., REDMOND, WA; MILLERCOORS BREWING CO., CHICAGO, IL; MORGAN STANLEY, NEW YORK, NY; MOTOROLA INC., SCHAUMBURG, IL; NATIONWIDE, COLUMBUS, OH; NCR CORP., DAYTON, OH; THE NIELSEN CO., SCHAUMBURG, IL; NIKE INC., BEAVERTON, OR; PFIZER INC., NEW YORK, NY; PRICEWATERHOUSECOOPERS LLP, NEWYORK, NY; QUALCOMM INC., SAN DIEGO, CA; RBC DAIN RAUSCHER INC., MINNEAPOLIS, MN; REPLACEMENTS LTD., MCLEANSVILLE, NC; ROBINS, KAPLAN, MILLER & CIRESI LLP, MINNEAPOLIS, MN; SUN MICROSYSTEMS INC., SANTA CLARA, CA; SUPERVALU INC., EDEN PRAIRIE, MN; TEACHERS INSURANCE AND ANNUITY ASSOCIATION—COLLEGE RETIREMENT EQUITIES FUND, NEW YORK, NY; TEXAS INSTRUMENTS INC., DALLAS, TX; TIME WARNER INC., NEW YORK, NY; TRAVELERS COMPANIES INC., ST. PAUL, MN; XEROX CORP., STAMFORD, CT; AND YAHOO! INC., SUNNYVALE, CA.

CENTER FOR AMERICAN PROGRESS ACTION FUND,
WASHINGTON, DC 20005,
November 2, 2009.

Hon. TOM HARKIN, *Chairman,*
Committee on Health, Education, Labor, and Pensions,
731 Hart Senate Office Building,
Washington, DC 20510.

Hon. MICHAEL B. ENZI, *Ranking Member,*
Committee on Health, Education, Labor, and Pensions,
379A Russell Senate Office Building,
Washington, DC 20510.

Re: Employment Non-Discrimination Act of 2009, S. 1584

DEAR CHAIRMAN HARKIN AND RANKING MEMBER ENZI: On behalf of the Center for American Progress Action Fund, I write to express strong support for S. 1584, the "Employment Non-Discrimination Act of 2009" (ENDA). ENDA will provide important and needed protections against workplace discrimination based on a person's real or perceived sexual orientation or gender identity. For too long, members of our Nation's workforce have lived with the fear that their sexual orientation or gender identity, rather than their job performance, would decide their employment fate. ENDA will significantly ease these fears and also provide a strong legal remedy to any such instances of employment discrimination.

A person's job is critical to his or her well-being. Most Americans rely on their jobs to support themselves and their families, and to access healthcare coverage and other benefits. Further, people make large psychic investments in their jobs and workplaces and many spend most of their days working. It is important that people not live a large part of their lives in constant fear of being fired or harassed or not being promoted or hired simply because of their real or perceived sexual orientation or gender identity. ENDA will put employers on notice that such behavior will not be tolerated and could come with financial costs if they do not treat all employees fairly.

Data and experience show that ENDA is needed. For example, Lambda Legal reports that most calls to its Help Desk are related to employment discrimination, receiving about 1,000 calls each year from 2004 to 2007 about instances of sexual orientation or gender identity workplace bias. The organization also found that in 2005, 39 percent of lesbians and gay men reported some form of workplace harassment or discrimination in the previous 5 years. Other research shows that transgender workers likely face even higher instances of discrimination.

Given that people are likely to not report cases of sexual orientation or gender identity discrimination or harassment (for fear of "outing" themselves), we can say with confidence that this problem impacts many thousands of Americans and disrupts countless lives each year. Congress should act expeditiously to pass ENDA and help stop these disruptive, unfair, and detrimental practices.

We note that State governments have made rapid progress in providing sexual orientation and gender identity employment protections to workers in their States. Currently, 21 States offer sexual orientation protections and 12 cover gender identity discrimination, respectively covering 44 percent and 29 percent of the U.S. population. These numbers are up drastically from just 10 years ago, when only 24 percent of the population was covered under sexual orientation laws and 2 percent under gender identity laws. Although we applaud this progress, most of the States currently lacking these laws are not likely to pass them anytime soon. It is up to the U.S. Congress to put all workers on equal footing.

Many of the Nation's leading corporations understand the importance of these non-discrimination policies, not just because they are the right thing to do, but because they also make good business sense, ensuring a more stable and productive workforce. The Human Rights Campaign, for example, reports that 423 of Fortune 500 companies (85 percent) have non-discrimination policies that include sexual orientation, while 175 (35 percent) include gender identity protection.

Beyond the specific legal remedies that ENDA will provide workers who have been wrongly discriminated against, Congress's support of this bill will send a strong signal that in American workplaces, people are judged based on their skills, abilities, and accomplishments. Treating all workers fairly regardless of their real or perceived sexual orientation or gender identity is key to making sure this important value is upheld and put into practice.

Given high rates of sexual orientation and gender identity harassment and discrimination in American workplaces, and the patchwork nature of existing State

laws, I strongly urge you to support the Employment Non-Discrimination Act of 2009. Please contact me if I can be of assistance as you consider this legislation.

Respectfully,

WINNIE STACHELBERG,
Senior Vice President for External Affairs.

THE COMMONWEALTH OF MASSACHUSETTS,
OFFICE OF THE ATTORNEY GENERAL,
BOSTON, MASSACHUSETTS 02108,
November 9, 2009.

Hon. TOM HARKIN, *Chairman,*
Committee on Health, Education, Labor, and Pensions,
428 Senate Dirksen Office Building,
Washington, DC 20510.

Hon. MICHAEL B. ENZI, *Ranking Member,*
Committee on Health, Education, Labor, and Pensions,
379A Senate Russell Office Building,
Washington, DC 20510.

Re: S. 1584, The Employment Non-Discrimination Act of 2009

Dear CHAIRMAN HARKIN and SENATOR ENZI: I am writing to you to state my strong support for Senate 1584, the Employment Non-Discrimination Act of 2009 ("ENDA"). This legislation expands the protections granted under Federal civil rights laws to ensure that workplace discrimination on the basis of sexual orientation and gender identity is expressly and uniformly prohibited nationwide. The amendments to our Federal antidiscrimination laws contemplated by ENDA represent great strides forward in our prevention of discrimination and violence faced by vulnerable members of our population.

Our workforce is stronger when every person may work and contribute without being discriminated against, harassed, threatened or assaulted. The protections that are expanded under ENDA are intended to ensure that workplaces are safe, productive environments where all individuals may work and earn a living, free from fear of mistreatment on the basis of characteristics unique to them.

Moreover, the expansion of employment antidiscrimination protections benefits not only workers who fall into the proposed protected classes, but also their co-workers and their employers. More than 150 Fortune 500 companies nationwide realize this and have adopted policies protecting their workers from discrimination on the basis of sexual orientation or gender identity. The reason: it just makes good business sense. Companies with expansive antidiscrimination policies are in a position to attract and retain the most qualified people; save money on retraining; and motivate their workforces to maximize productivity. When discrimination is taken off the table as a barrier to success, workers and companies are in a better position to thrive.

As Massachusetts' Attorney General, I am committed to protecting the civil rights of all individuals who live in, work in and visit our Commonwealth. I am proud that Massachusetts is one of 13 States and the District of Columbia to protect individuals on the basis of sexual orientation. In addition, the Massachusetts Legislature is currently contemplating the addition of gender identity as a protected class within our antidiscrimination and hate crime laws. However, waiting for States to amend their laws means only a patchwork of protection is available. Individuals who face discrimination and harassment on the basis of sexual orientation and gender identity deserve more than piecemeal protections. The Employment Non-Discrimination Act of 2009 has the potential to improve the lives of individuals in every State, and I hope that it is passed. Thank you for the opportunity to submit these comments. Please do not hesitate to contact me with any questions or to discuss this matter further.

Cordially,

MARTHA COAKLEY,
Massachusetts Attorney General.

EXPORT-IMPORT BANK OF THE UNITED STATES,
August 5, 2009.

Hon. JEFF MERKLEY,
107 Russell Senate Office Building,
Washington, DC 20510.

DEAR SENATOR MERKLEY: I am pleased to inform you that during the month of May and June, the Export-Import Bank of the United States (Ex-Im Bank) supported 10 companies with total exports of $9,388,160.00 in your State. The attached list provides details of Ex-Im's financing.

In these difficult economic times, our job at Ex-Irn is to help sustain and increase U.S. jobs—these exports do exactly that. We are committed to working with U.S. exporters and ensuring that they have the necessary financing to help our economy grow.

At any time we can be of help please feel free to call me at (202) 565–3500.

Thank you for your strong work on ENDA.

Sincerely,

FRED P. HOCHBERG.

Companies Receiving Ex-Im Bank Support in May/June 2009

Oregro Seeds, Inc.	Albany	$239,816.00	Small Business
Stahlbush Island Farms, Inc.	Corvallis	$30,000.00	Small Business
Advanced Relay Corp.	Eugene	$33,870.00	Small Business
Superior Tape & Label, Inc.	Gresham	$36,284.00	Small Business
Phoseon Technology, Inc.	Hillsboro	$3,000,000.00	
Meco Environmental, LLC	Portland	$5,000,000.00	
Rogers Machinery Company, Inc.	Portland	$190,813.00	
Turf Merchants, Inc.	Tangent	$333,697.00	Small Business
Wadeco, Inc.	Tualatin	$78,409.00	Small Business
Warm Springs Composite Product	Warm Springs	$445,271.00	Small Business

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GAY & LESBIAN ADVOCATES & DEFENDERS (GLAD),
BOSTON, MA,
November 2, 2009.

Hon. TOM HARKIN, *Chairman,*
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
731 Hart Senate Office Building,
Washington, DC 20510.

Hon. MIKE ENZI, *Ranking Member,*
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
379A Senate Russell Office Building,
Washington, DC 20510.

DEAR CHAIRMAN HARKIN AND RANKING MEMBER ENZI: I am the Executive Director of Gay & Lesbian Advocates & Defenders (GLAD). GLAD is New England's leading legal rights organization dedicated to ending discrimination on the basis of sexual orientation, HIV status, and gender identity and expression. Since 1978, GLAD has engaged in legal advocacy representing individuals throughout the six New England States who have faced discrimination in a broad range of contexts including in State and private employment. GLAD's geographic focus includes Massachusetts, Connecticut, Rhode Island, Maine, Vermont, and New Hampshire.

As part of the organization's public education efforts, GLAD also staffs a legal information helpline to provide information and legal referrals to persons facing discrimination. Since 1995, GLAD has received nearly 16,000 inquiries reflecting some matter of lesbian, gay, bisexual, or transgender concern. Of those calls, between 10 percent–11 percent focused on some employment-related matter.

Both through our public presence as the longest established legal advocacy organization in our region and through the legal information helpline, GLAD has received scores of reports of discrimination faced by public employees in the workplace. The data received by GLAD through the legal helpline and other mechanisms demonstrates a widespread pattern of unconstitutional employment discrimination against lesbian, gay, bisexual and transgender employees.

As the committee members are well aware, discrimination against State employees on the basis of their sexual orientation and gender identity violates guarantees of Equal Protection and Due Process and can also, depending on the facts, violate an employee's expressive rights protected by the First Amendment. Neither an employee's sexual orientation nor his/her gender identity or expression bears any relationship to a person's ability to do the job. Therefore, an employer's reliance on these characteristics to make any job-related decisions must not be based on rational decisionmaking.

GLAD supports the passage of the Employment Non-Discrimination Act that would add the categories of sexual orientation and gender identity to our Nation's employment antidiscrimination laws. Moreover, based on the reported incidents of discrimination, GLAD strenuously believes that the law must extend to State employees and can do so constitutionally given the widespread and pervasive discrimination that has existed historically and that yet currently exists.

Since 2000, GLAD has received over 50 reports of employment discrimination by State employees. This number is particularly notable given that the States where these reported incidents occurred already have statewide non-discrimination protections for sexual orientation. Only 3 of those States currently have protections against discrimination on the basis of gender identity (Vermont, Rhode Island, and Maine). I have attached a compilation of these reported incidents that provides detailed, alleged facts about the reported incidents as well as the State and government agency that employed the individual.

The complaints of discrimination received by GLAD vary in type but range from outright adverse employment decisions because of an employee's sexual orientation or gender identity to harassment by supervisors to harassment by co-workers which many times remains unaddressed by superiors despite multiple incidents of reporting by the victim.

The following reflects a small sample of the calls we have received. A caller reported that she was one of seven lesbians terminated by a State social service agency. Another reported that she was one of two lesbian public school teachers whose contract was not renewed because of the principal's difference with her (and the other teacher's) "philosophies." In one case that received a fair bit of public attention, GLAD represented a transgender police officer in Vermont who was run off the force by supervisors and coworkers after they learned (from an intense search) that he was transgender. On several occasions, he was given faulty equipment, inaccurate directions, and denied training opportunities without explanation. The officer had been a highly decorated police officer in another State before moving to Vermont and joining a local police force. He was eventually told by the town's former police chief that the reason for the discriminatory treatment was the fact of his being transgender.

I have no doubt that this compilation represents just a fraction of the incidents of discrimination that State employees face in the six New England States in which GLAD focuses its advocacy. This underreporting exists for numerous reasons including the risks that employees take in bringing a complaint which would necessarily disclose the person's sexual orientation and/or gender identity to an even broader range of co-workers and decisionmakers. In addition, even when employees are willing to expose themselves to such risk, they often face hostile or uninformed State agencies and courts.

For example, an openly gay staff member at a Massachusetts State agency was repeatedly harassed by one of his co-workers. The co-worker posted and distributed anti-gay news articles and made anti-gay remarks in front of the gay employee. The gay staff member complained to his supervisor about the harassment. The supervisor took no steps to address the offending conduct. In a similar type of case, a gay janitor in a Massachusetts public school district faced severe and repeated harassment including a physical assault that was captured on videotape. Despite complaints filed by the employee, the school district took no steps to terminate the harassment. In yet another case, a gay public school teacher reported multiple incidents of harassment, including being called "faggot," and having his e-mail address posted to lewd Web sites, to school administrators. Shortly after reporting the harassment, the school superintendent told the teacher that his position was being restructured and he was being terminated.

The absence of explicit Federal protections and remedies seriously impacts the willingness of employees to pursue available remedies and results in widespread underreporting of incidents of workplace discrimination.

For all of the reasons stated above, GLAD urges support and passage of ENDA. The need for explicit protections for lesbian, gay, bisexual, and transgender employees under Federal law is great, particularly in these challenging economic times. Based on the calls and contacts GLAD receives, it is apparent that employment dis-

crimination is widespread and rampant and needs to be addressed by clear statutory prohibitions and remedies to ensure appropriate enforcement,

Sincerely,

LEE SWISLOW,
Executive Director.

Calls to GLAD Regarding Cases of Public Employment Discrimination

State	State or Local Government Employer?	Employer	Year	Occupation	Summary
CT	Local	Public School	2009	Teacher	A Connecticut public school teacher with excellent evaluations was dismissed shortly after mentioning in class when Connecticut began to allow same-sex couples to marry that Spain also allowed this. Although the school said the dismissal was based on poor performance, the teacher felt it was sexual orientation discrimination. The teacher filed a complaint with the Connecticut Commission of Human Rights & Opportunities.
CT	State	State of Connecticut.	2008	Staff	The employee has worked for the State of Connecticut for just over 1 year. During this time, the employee reports having experienced discrimination and harassment based upon sexual orientation. The employee filed a complaint, and based upon the investigation, the State of Connecticut Department of Developmental Services Equal Employment Opportunity Division has found sufficient evidence of harassment and discrimination to move forward.
CT	Local	School District	2008	Teacher	A gay teacher in the Connecticut public schools was one of three gay teachers to be ''treated badly'' by her coworkers. She was singled out through selective enforcement of rules, such as taking down decorations in her classroom. The principal of the school told the teacher that she would only provide her with a letter of recommendation if she resigned.
CT	Local	Hartford Police Department.	2003	Police Officer	A transgender woman, working as a police officer in Hartford, suffered harassment as a result of her gender identity. She was denied career advancement, despite being qualified. She approached her chief regarding the situation, but was ''brushed off.''

Calls to GLAD Regarding Cases of Public Employment Discrimination—Continued

State	State or Local Government Employer?	Employer	Year	Occupation	Summary
CT	State	Connecticut State Maintenance Department.	2008	Staff	A gay man, working in the Connecticut State Maintenance Department, was harassed by his coworkers for being gay. He was tied by his hands and feet and locked in a closet. He filed a complaint, and the department is looking into this incident as a hate crime. His assaulters were placed on administrative leave.
CT	State	Police Training Academy.	2008	Staff	A transgender woman working for a Connecticut Police Training Academy was interrogated by her supervisor. He called her into a dorm room, laid down on a bed, and then asked her personal questions about her family, their approval, and what she does in her free time. This lasted for more than 2 hours. At a later date, her supervisor cited her for taking too long to change ceiling tiles and stripping the floors, despite having accomplished the task and receiving praise from others for doing a good job. She was also instructed to use the men's restroom. She filed a complaint, in which she disclosed her status as transgender. She noted that she felt afraid to be alone with her supervisor. After submitting this complaint, she was fired.

Calls to GLAD Regarding Cases of Public Employment Discrimination—Continued

State	State or Local Government Employer?	Employer	Year	Occupation	Summary
CT	State	Connecticut State Department of Developmental Disabilities.	2008	Staff	While working for 16 years in the State of Connecticut Department of Developmental Disabilities, a gay man reported several incidents of harassment and discrimination based upon his sexual orientation. In 1996, he was given a promotion. Upon telling his new Program Supervisor that he was gay, he was immediately notified that the promotion was going to be given to another staff person instead. The same day as placing a rainbow sticker on his car, the employee overheard many inappropriate comments about his sexual orientation, such as ''They put those on their cars so they can spot each other to have sex.'' In 2007, the employee was promoted and moved to a new group home. As part of his job responsibilities, the employee was asked to shave a total care client. However, he was told that it was inappropriate for him to shave another male client because he was gay, and that if he were to do that, he would be turned in for abuse. Other staff members, who are heterosexual, were not prohibited from shaving clients of a different-sex. The employee feels ''totally isolated and helpless'' and is having trouble sleeping as a result of this work environment. His attempts to work with supervisors and human resource personnel have resulted in no difference in climate, and I was told to ''keep my personal business to myself.''
MA	Local	Public School	2007	Teacher	A public school teacher reported homophobic graffiti and harassment to her supervisor and then was harassed and terminated by the supervisor.
MA	Local	Public School	2009	Teacher	A public school teacher has been suspended four times since 2003, and she feels that the reason is that she is the only out teacher in the district.
MA	State	State University	2009	Staff	A worker who has worked at a State university for 26 years has been isolated from his fellow workers and he feels that his requests to remedy this have not been addressed because he is gay.

Calls to GLAD Regarding Cases of Public Employment Discrimination—Continued

State	State or Local Government Employer?	Employer	Year	Occupation	Summary
MA	State	State University	2008	Professor	A mathematics professor at a Massachusetts State university reported that he and his husband, also a mathematics professor, were discriminated against based upon their sexual orientation. Both the caller and his spouse were chosen to serve on a search committee for a new faculty member. They were notified, however, that one of them would need to step down because there was a university policy that family members could not serve together on a search committee. The caller was not able to find any such policy, and he believes that he and his husband are being discriminated against based upon their sexual orientation.
MA	State	State Trial Court	2008	Staff	A married lesbian working for the Massachusetts State Trial Court reported that she was demoted and her pay was cut as a result of her recent marriage to a woman. The employee took time off of work for an illness with a doctor's note, but she was called by her union steward to notify her that she had been suspended and that proceedings were under way to fire her.
MA	State	Massachusetts Department of Transitional Assistance.	2007	Staff	A lesbian staff member with the Massachusetts Department of Transitional Assistance has four times applied for a promotion and four times been denied, despite having obtained additional training. The employee has also received good evaluations and received the Governor's Award for Outstanding Performance. She believes that she has been denied advancement due to her sexual orientation. Another employee is currently suing the department for discrimination based upon sexual orientation as well. The employee has filed paperwork to start the complaint process.

Calls to GLAD Regarding Cases of Public Employment Discrimination—Continued

State	State or Local Government Employer?	Employer	Year	Occupation	Summary
MA	State	Massachusetts Department of Revenue.	2004	Staff	An openly gay staff member at the Massachusetts Department of Revenue was harassed by one of his co-workers. This co-worker posted and distributed anti-gay news articles and made anti-gay remarks. The gay staff member complained to his supervisor about the harassment, but his supervisor has taken no steps to stop the harassment.
MA	State	Massachusetts Department of Social Services.	2003	Direct Care Worker.	A lesbian direct care worker for the Massachusetts Department of Social Services reported that she was one of seven lesbians fired at the same time. The employee filed a complaint with the Massachusetts Commission Against Discrimination.
MA	Local	School District	2003	Janitor	A gay janitor in a Massachusetts public school district experienced regular harassment by his co-workers. He reported that his co-workers drank on the job and then threatened him physically. One coworker pushed him. This incident was caught on video, but the school district now claims that they can't locate the tape. Another coworker called the janitor a ''faggot.'' He has started having panic attacks as a result of the harassment and is currently on leave from work. He filed a complaint with the school district and his union, but neither have taken steps to stop the harassment.
MA	Local	School District	2003	Teacher	A gay teacher working in a Massachusetts public school was forced to resign because of his sexual orientation. He was the target of several anti-gay remarks and vandalism. Someone keyed ''Gay Faggot'' into the paint of his car. The teacher brought these incidents to the attention of the school administration, which did nothing. The union representing the teacher was also made aware of these incidents but did nothing. Even after leaving his job, the teacher continues to receive harassing phone calls.

Calls to GLAD Regarding Cases of Public Employment Discrimination—Continued

State	State or Local Government Employer?	Employer	Year	Occupation	Summary
MA	Local	School District	2004	Teacher	A lesbian teacher working in a Massachusetts public school reported that her contract was not renewed. The other lesbian teacher working at the school also did not have her contract renewed. When approached, the principal said that there were ''differences in philosophies'' and ''overarching differences.'' The teacher also claimed that several teachers had tried to start a gay-straight alliance at the school and had wanted to put up ''safe zone'' stickers, but they were told by the administration that they could not.
MA	Local	School District	2004	School Psychologist.	A gay school psychologist working in a Massachusetts public school reported that despite positive performance reviews, his responsibilities were restricted as a result of his being gay. His office was moved and he no longer has any interactions with students. Administrators at the school told the psychologist that he should not tell students he is gay nor should he say that he is married (to a man). The principal also asked everyone to disclose their sexual orientations during a staff meeting. His union representative did not take any action and advised the psychologist to not take any further steps to address these issues.

Calls to GLAD Regarding Cases of Public Employment Discrimination—Continued

State	State or Local Government Employer?	Employer	Year	Occupation	Summary
MA	Local	School District	2005	Teacher	An openly gay English teacher reported that he had been harassed almost on a daily basis by a group of students at the high school where he teaches. The students have called him derogatory names, such as ''faggot,'' left lewd notes, drawings, and pictures on his desk or bulletin board, and signed the teacher up for gay pornographic Web sites using his school e-mail address. The teacher complained to the principal, who indicated that she would ''handle it.'' However, after she had not addressed these issues, the teacher then sent a letter to the District Superintendent. Shortly thereafter, the teacher was notified that his position had been changed and that he was being terminated. The Superintendent told the teacher that in exchange for a signed agreement to not continue with any harassment complaints, she would offer him 3 weeks severance and allow him to collect unemployment benefits.
MA	Local	Boston Police Department.	2005	Police Officer	A Boston police officer, who is a lesbian, overheard and has been the target of harassing comments and slurs. After verbally complaining to her supervisors about these comments, no action was taken.
MA	Local	County Sheriff Department.	2005	Deputy Sheriff	A Massachusetts deputy sheriff, who is gay, has worked for more than 13 years in law enforcement. His coworkers began targeting him with ''usual locker room homo talk.'' He was then excluded from meetings and his responsibilities were slowly taken away until finally, he was transferred to an inferior, non-supervisory position. He was then terminated. He also reported that one other openly gay person, a lesbian, in the department was also forced out after her sexual orientation was disclosed. He reports that he was in settlement negotiations with the Sheriff Department, but those have broken down.

Calls to GLAD Regarding Cases of Public Employment Discrimination—Continued

State	State or Local Government Employer?	Employer	Year	Occupation	Summary
MA	Local	Town	2007	Clerk	A lesbian staff person working in a Massachusetts town's clerk office was fired after she and her partner filed a birth certificate, listing themselves as the parents of their child. She was made to feel incompetent and overworked, which resulted in her suffering a breakdown while at work. She was forced to sign a document indicating that she would not sue the town upon her termination.
MA	Local	County Sheriff Department.	2007	Deputy Sheriff	A Massachusetts deputy sheriff, who is gay, experienced 2 years of harassment by his chief. The chief threatened to suspend him if he continued ''to see two guys at one time'' because it looked bad for the department. The chief also outted him to his coworkers. Due to the harassment he suffered, the deputy sheriff suffered a mild heart attack, and was placed on sick leave. During this time, he was fired for abandonment of post.
MA	Local	City Government	2000	Staff	A lesbian working for a city department for 16 years was harassed by one of her coworkers. He treated her differently than her coworkers and made comments, including ''You just want to give me a hard time; you want a man; you want the forbidden fruit.'' She filed a grievance with her union and with the Massachusetts Commission Against Discrimination.
MA	Local	Town	2008	Truck Driver	A Massachusetts truck driver, working for a town, experienced harassment based upon her being a lesbian. People at work displayed pornographic images near her locker. She filed suit against the town for sexual orientation harassment and won at $2.1 million lawsuit.

Calls to GLAD Regarding Cases of Public Employment Discrimination—Continued

State	State or Local Government Employer?	Employer	Year	Occupation	Summary
MA	Local	County Sheriff Department.	2005	Nurse	A gay nurse working for a Massachusetts Sheriff Department worked in a hostile work environment. His coworkers gave him a Christmas present, which included fishnet stockings and obscene gay sex cards. He was given a bag of peanuts by a coworker and told to ''Eat my nuts.'' When he complained, he was told that ''this was the way prisons work'' and that he shouldn't complain. He filed a complaint with the Massachusetts Commission Against Discrimination.
MA	State	Massachusetts Highway Department.	2002	Staff	A 16-year veteran of the Massachusetts Highway Department was harassed by his immediate supervisor, his boss, and several coworkers. They asked him several questions, including ''Are you gay?,'' ''Do you swing both ways?,'' and ''If a girl strapped on a dildo, would that get you excited?'' He was offered a lateral transfer, however the harassment continued. As a result of the harassment, he was diagnosed with high blood pressure. He feels that he can't file a complaint with the union because his steward is one of the harassers.
MA	State	Massachusetts Department of Social Services.	2005	Staff	While working at the Massachusetts Department of Social Services, a transgender man experienced discrimination in his workplace. He met with his superiors and a civil rights officer to assist in his transition (from female to male) while at work. Despite discussing a plan for his transition, such as training sessions with fellow employees and name changing—procedures, no action has been taken by his workplace. His request to formally change his name has been put on hold, and he was not invited to participate in weekly meetings.

Calls to GLAD Regarding Cases of Public Employment Discrimination—Continued

State	State or Local Government Employer?	Employer	Year	Occupation	Summary
MA	State	Massachusetts Department of Revenue.	2003	Tax Auditor	A gay man, who has worked for the Massachusetts Department of Revenue for 19 years, reported that he had been sexually harassed at work. A supervisor called him ''a loser'' and a ''f***ing faggot'' behind his back. After telling internal affairs that he did not wish to work in the same space as this particular supervisor, he was asked to move to another location. He filed a formal complaint with internal affairs.
ME	State	University of Maine, Augusta.	2008	Staff	The employee, a black gay man, was called a ''fagball'' and ''niggerball'' by his boss, as well as addressed in other demeaning ways. The employee filed a grievance with his supervisor, but is concerned that it was not followed up upon because the supervisor is friendly with his boss.
ME	State	Maine Department of Corrections.	2007		The employee, a gay man, has worked for the Maine Department of Corrections for 7 years. As a result of discrimination and harassment, the employee is on medical leave. The employee is currently under investigation, but his supervisors will not tell him what the cause of the investigations are. The employee reports that inmates treat him badly because of his perceived sexual orientation and that his supervisors do nothing to address this harassment. The employee filed a complaint with the Maine Human Rights Commission and was successful in his case.
ME	Local	Police Department	2002	Police Officer	A gay man, working as a police officer in Maine, has been called a ''fudgepacker'' and a ''faggot'' by his coworkers.
ME	Local	County Recycling	2007	Staff	A staff member at a county recycling center was denied bereavement leave when her partner's father passed away. She knows that other coworkers, whose unmarried partner's relatives have passed away, have been able to use bereavement time. For example, a coworker was permitted to take bereavement leave for the death of his girlfriend's father. The department policy states that in the case of an immediate family member's death, including a spouse's parent, staff may take bereavement time.

Calls to GLAD Regarding Cases of Public Employment Discrimination—Continued

State	State or Local Government Employer?	Employer	Year	Occupation	Summary
ME	Local	City Government	2008	Firefighter	A Maine city firefighter, who is gay, was harassed by his coworkers. He was maliciously ''outted' and then his coworkers made offensive and hostile comments. He has met with department heads and expressed his discomfort several times, but nothing has changed.
NH	Local	Public School	2009	Teacher	A transgender public school teacher who began to transition was fired because the principal said that ''things were not working out.'' She had received no complaints or warnings prior to being let go.
NH	Local	Public School	2009	Teacher	A teacher who had been at the school for 19 years was terminated when a new superintendent and principal were hired who said disparaging things about his being gay.
NH	Local	Public School	2008	Teacher	A teacher was being considered for tenure at a public school. He had favorable reviews and compliments from his co-workers. The principal said it wasn't the ''right fit'' and he was denied tenure.
NH	Local	School District	2007	School Nurse	A lesbian school nurse at a public school in New Hampshire was harassed by the principal at her school. The principal asked several coworkers about the nurse and her partner, who is a special education teacher at the school. Specifically, the principal asked about their sexual orientation and the nature of their relationship. The principal told a coworker that if they were lesbians, they must be doing something inappropriate behind closed doors. The principal also noted that she didn't understand why they ''had to hire'' lesbians. The nurse complained to her union and to the human resource staff at the school, but she was told to ''make nice.''

Calls to GLAD Regarding Cases of Public Employment Discrimination—Continued

State	State or Local Government Employer?	Employer	Year	Occupation	Summary
NH	Local	County Corrections Department.	2007	Corrections Officer.	A transgender woman worked as a corrections officer in New Hampshire for 3 years. Her immediate supervisor harassed her, saying ''Your tits are growing'' and ''You look gay when you walk.'' Other coworkers then began physically assaulting her - kicking her, snapping her in the breasts, and threatening to handcuff her to a flagpole and take off her clothes. One officer grabbed her and slammed her into a concrete wall while her coworkers watched. No one reported this event. She was placed on a shift with this officer, however. She resigned as a result of the harassment she faced.
NH	Unknown	Corrections Department.	2002	Staff	In applying for a position with a corrections department in New Hampshire, a woman was required to take a polygraph test. During the test, she was asked twice about her marital status, through which she disclosed that she was a lesbian. She was then not hired for the job.
RI	Local	Public School	2002	Teacher	A science teacher came out to his colleagues and his principal began to harass him. As the harassment continued, the teacher became more depressed and anxious and began to stay out of school and then was fired.
RI	State	Rhode Island State Trooper.	2004	State Trooper	A Rhode Island State Trooper, who is a lesbian, reported that she was harassed and ultimately fired because of her sexual orientation. The trooper is concerned that if she files a complaint, she will not be able to get another job in law enforcement in the State.

Calls to GLAD Regarding Cases of Public Employment Discrimination—Continued

State	State or Local Government Employer?	Employer	Year	Occupation	Summary
RI	Local	School District	2002	Teacher	A teacher, who is gay, working in the Rhode Island public school district reported that several of his coworkers made anti-gay comments to him, such as ''What, are you a homo?'' ''Where are your wife and kids?'' and ''We can't deal with this gay and lesbian s**t.'' In response to his complaints, the teacher's classroom and teaching schedule was changed without notice, he has been screamed at, and he was warned to ''not get into a pi**ing match'' with them. The teacher reports that he feels intimidated and that he is treated differently as well, as that he has been passed over for other work opportunities because of his sexual orientation. After filing a complaint with his union and the school district, union officials and the principal wrote the teacher up for insubordination. The teacher spoke to someone in the Rhode Island Department of Education, but he feared that if he filed an official complaint, the Department of Education would take the school's side.
RI	State	Department of Corrections.	2007	Staff	A gay man working for the State of Rhode Island Department of Corrections reports having problems at work because of his sexual orientation. He has been called ''gay cop,'' ''c** swallowing pig,'' and other derogatory names in front of inmates by his coworkers.
RI	State	State of Rhode Island.	2003	Staff	A woman working for the State of Rhode Island overheard a conversation in the cafeteria at work in which an employee made derogatory comments about gay people, such as ''homosexuals are pedophiles.'' She complained to her supervisor, who scheduled a mediation session. However, the person who made the comment refused to participate, and the matter was dropped. She fears retaliation if she files another complaint.
VT	Local	Public School	2008	Teacher	A public school teacher who works with autistic children was harassed and ultimately terminated because he was gay. He filed a complaint with the attorney general's office

Calls to GLAD Regarding Cases of Public Employment Discrimination—Continued

State	State or Local Government Employer?	Employer	Year	Occupation	Summary
VT	Local	Public School	2008	Teacher	A teacher came out to a colleague and after this perceived a hostile work environment. The teacher tried to get the union to intercede on his behalf, but the union refused to.
VT	State	Vermont State Department of Corrections.	2003		The employee, a lesbian, works for the Vermont State Department of Corrections. A coworker used derogatory language about her and another coworker in regards to their sexual orientation. The employee filed a formal complaint, however there has been no investigation.
VT	Local	Police Department	2002	Police Officer	A transgender police officer working for a Vermont police department was told that the police chief was being pressured to run him off the force because he was transgender.

September 25, 2009.

Hon. JEFF MERKLEY,
U.S. Senate,
107 Russell Senate Office Building,
Washington, DC 20510.

DEAR SENATOR MERKLEY: Sun Microsystems would like to thank you for sponsoring S. 1584, the Employment Non-Discrimination Act of 2009 (ENDA). Sun supports this legislation and the belief that all American workers are entitled to fair employment standards.

At Sun, equality is central to our business philosophy. Our company was founded on the ideals of openness and sharing and we continue to promote those ideals 27 years later. As a technology company we are committed to increase innovation and economic progress; but we are also committed to furthering social progress worldwide. Our commitment to equality and fairness is not only reflected in our Equal Employment Opportunity and Anti-Discrimination and Harassment policies, but also in our employees. We believe that respect for fellow workers is a key ingredient to a productive work environment. This year Sun was awarded a perfect 100 percent, for the 5th year in a row, on the Human Rights Campaign's Corporate Equality Index, which assesses companies' policies regarding gay, lesbian, bisexual, and transgender employees.

We support ENDA so that discrimination on the basis of sexual orientation and/or gender identity will be unacceptable, as discrimination based on several other non-performance related concerns is already considered to be.

Thank you for sponsoring this important legislation.

Sincerely,

CHRISTOPHER G. HANKIN,
Senior Director of Federal Affairs.

HUMAN RIGHTS CAMPAIGN (HRC),
September 23, 2009.

DEAR MEMBER OF CONGRESS: On behalf of the Human Rights Campaign (HRC) and our grassroots force of more than 750,000 members and supporters nationwide, I ask you to support the Employment Non-Discrimination Act (ENDA). It is simply unacceptable that lesbian, gay, bisexual and transgender people can still be fired or refused a job based on characteristics wholly unrelated to job performance. ENDA would end this injustice against our community and let these hardworking Americans support their families and be a part of our national economy without fear of

arbitrary discrimination. We hope you will support this legislation in the 111th Congress.

The American people believe in fairness and understand that employees should be judged on the merits, not on sexual orientation or gender identity. A January 2007 Hart Research poll found that 6 out of 10 Americans support Federal legislation to address workplace discrimination against lesbian, gay, bisexual and transgender people. Yet today, it remains perfectly legal in 29 States to fire someone based simply on sexual orientation, and in 38 States to do so based on gender identity. ENDA would prohibit this discrimination against lesbian, gay, bisexual and transgender people in most workplaces.

Corporate America supports ENDA's fair-minded approach. Eighty-seven percent of Fortune 500 companies have included sexual orientation in their workplace policies and more than 40 percent of them also prohibit discrimination based on gender identity. ENDA is also supported by a broad coalition of civil rights, labor, and religious organizations, including the Leadership Conference on Civil Rights.

We hope you will join us in supporting this historic piece of legislation. Please feel free to contact Allison Herwitt, Legislative Director, at (202) 216–1515 or David Stacy, Senior Public Policy Advocate, at (202) 572–8959 if you have any questions.

Sincerely,

JOE SOLMONESE,
HRC President.

INTERFAITH ALLIANCE,
November 3, 2009.

Senator TOM HARKIN,
731 Hart Senate Office Building,
Washington, DC 20510.

Senator MIKE ENZI,
379A Russell Senate Office Building,
Washington, DC 20510.

Cc: Senator JEFF MERKLEY

DEAR SENATORS HARKIN AND ENZI: I write to you as the President of Interfaith Alliance, a national organization that celebrates religious freedom by championing individual rights, promoting policies that protect both religion and democracy and uniting diverse voices to challenge extremism and build common ground. I wish to express my strong support of the Employment Non-Discrimination Act (ENDA) (H.R. 3017/S. 1584) in anticipation of the hearing your committee will be holding this week.

Interfaith Alliance's support of ENDA is twofold. First, we believe a vibrant democracy guarantees the protection of civil rights for everybody with no exception for sexual orientation or gender identity. Second, defending the religious freedom of all Americans is of our utmost concern. It is for these reasons Interfaith Alliance has worked hard to ensure that ENDA is both fully inclusive *and* contains a religious exemption provision to protect religious employers' constitutional rights.

Despite what opponents may contend, the truth is that ENDA would not create new or special rights. Modeled after existing laws such as the Civil Rights Act of 1964 and the Americans with Disabilities Act, ENDA simply ensures that all Americans can enjoy the rights guaranteed to them by the Constitution. These rights are also reflected in the shared values of all of our Nation's diverse faith traditions—values of compassion, human dignity, fairness and equality. This legislation will ensure all employees are treated with the respect that is mandated by the teachings of our faiths and the American values of justice and equality.

As our Nation continues to face daily challenges that divide the American public, there is an increasing need to work together on issues of mutual concern. The Employment Non-Discrimination Act ensures liberty and it ensures equality. It abides by the values taught by the diverse faith traditions in this great Nation; and, perhaps most importantly, it ensures justice by guaranteeing the human dignity due to all Americans and provided for by the Constitution of the United States of America. Passage of a fully inclusive ENDA with an appropriate religious exemption, will be a victory for democracy and cause for celebration among all who value religious freedom.

Thank you for your consideration.

Sincerely,

REV. DR. C. WELTON GADDY,
President.

LAMBDA LEGAL,
November 5, 2009.

Hon. TOM HARKIN, *Chairman,*
Committee on Health, Education, Labor, and Pensions,
U.S. Senate.

Hon. MIKE ENZI, *Ranking Member,*
Committee on Health, Education, Labor, and Pensions,
U.S. Senate.

Re: The Employment Non-Discrimination Act, S. 1584

DEAR CHAIRMAN HARKIN AND RANKING MEMBER ENZI: I write on behalf of Lambda Legal Defense and Education Fund ("Lambda Legal") and our more than 32,000 active members to urge you to support S. 1584, the "Employment Non-Discrimination Act" ("ENDA"), in order to provide protections against workplace discrimination based on sexual orientation and gender identity that are critically important and long overdue. Lambda Legal is the Nation's oldest and largest legal organization dedicated to achieving recognition of the civil rights of lesbian, gay, bisexual and transgender ("LGBT") individuals. We were counsel in *Lawrence* v. *Texas*, 539 U.S. 558 (2003), and co-counsel in *Romer* v. *Evans*, 517 U.S. 620 (1996), the two most important cases ever decided by the U.S. Supreme Court addressing sexual orientation and the law.

It is difficult to overstate the importance of obtaining recourse for the widespread discrimination faced by LGBT workers or the extent to which the only realistic solution to ending such discrimination in the foreseeable future is for Congress to enact ENDA. By passing ENDA, Congress not only would provide a legal remedy for discrimination, but also would make a powerful statement of principle regarding fair treatment of all employees who work hard and perform well.

THE URGENT NEED

Lambda Legal operates a legal help desk, through which we respond directly to members of the communities we serve who are seeking legal information about and assistance regarding discrimination related to sexual orientation and gender identity. While Lambda Legal has always received such requests throughout its 36-year history, we now have the equivalent of six full-time staff handling the thousands of calls we receive each year. For each year from 2004 to 2007, we received more calls regarding LGBT workplace discrimination than any other single issue. In each of those years, we received between 900 and 1,100 employment discrimination calls. Based on our experience with our legal help desk, we can say with confidence that these remarkable figures certainly understate the prevalence of the problem. Over the years, we have learned many reasons why employees choose not to pursue legal action, including that many people know how few legal remedies exist in most jurisdictions, and many others are afraid to come out publicly and therefore refrain from even considering pursuit of legal action.

But this issue's resonance goes far beyond numbers. People define themselves in large part by the work they do, spend significant portions of their time in the workplace, and depend on their jobs to support themselves and their families and to gain access to health care and other benefits. The emotional investment people have in their jobs means that it not only is devastating when one loses a job, is denied a promotion or otherwise subjected to adverse job actions due to discrimination, but it also takes a significant toll simply to know that one can face harassment or discrimination at any moment and have no redress. ENDA also would strengthen the workforce of tomorrow by establishing that everyone has the ability to pursue the career of their choosing and be judged on the basis of their performance and that alone.

WHY CONGRESS MUST ACT

It also is clear that, for the foreseeable future, Congress alone can provide a national solution to the problem. Even courts that have agreed strongly with employees about the unfairness of discrimination against LGBT employees have held that *only* Congress can add sexual orientation to title VII.[1] Given that most, if not nearly

[1] See *Bibby* v. *Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001) ("Harassment on the basis of sexual orientation has no place in our society."); *Simonton* v. *Runyon*, 232 F.3d 33, 35 (2d Cir. 2000) (describing the alleged sexual orientation discrimination suffered by the plaintiff to be "morally reprehensible whenever and in whatever context it occurs, particularly in the modern workplace."); *Higgins* v. *New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cit. 1999) (". . . harassment because of sexual orientation . . . is a noxious practice, de-

all, of the States that do not protect LGBT employees under State law are also strong employment at-will States,[2] there generally are few, if any, legal avenues to remedy such harassment and discrimination, and even fewer lawyers willing to assume representation in such cases.

Although great progress has been made with the passage of many State nondiscrimination laws, it could take years, or even decades, to protect all LGBT Americans without congressional action. While 21 States now provide express statutory protection against sexual orientation discrimination and 12 expressly cover discrimination based on gender identity as well, in some of those States the remedies provided are limited.[3] In others, progress has been very slow. For example, Delaware, which in July 2009 became the most recent State expressly to ban sexual orientation employment discrimination, did so after similar bills had been introduced every year since the late 1990's.[4] In many of the 29 States without nondiscrimination statutes expressly covering either sexual orientation or gender identity, such legislation has never even been introduced.

A national solution is imperative not only because the right to pursue one's livelihood free from discrimination is and should be a shared American value, but also because the current gaps in discrimination protection most severely affect the most vulnerable. While approximately half of the overall population lives in jurisdictions covered by State sexual orientation nondiscrimination statutes, fewer than 35 percent of African-Americans do.[5] This is problematic not only because of the historically high degree of discrimination against African-Americans, but especially because, in many of the title VII cases rejecting a man's claims of discrimination based on gender stereotypes or claims attempted to be brought based on actual or perceived sexual orientation, the employee was an African-American man.[6] The residents of States without nondiscrimination statutes also have significantly lower levels of education attainment, reducing their employment options when discrimination occurs.

The need for Congress to act goes beyond creating a remedy for sexual orientation and gender identity discrimination. Unfortunately, some courts have ruled against claims brought by LGBT workers for discrimination they experience based on sex or religion (both of which title VII already covers) by attributing the discrimination to sexual orientation or gender identity rather than these other grounds. Moreover, in denying an LGBT person the right to pursue the same theory of relief for sex or religious discrimination enjoyed by everyone else, courts have acknowledged that existing title VII principles support the claim, but ruled against LGBT employees because they viewed Congressional inaction on sexual orientation nondiscrimination bills as proof that Congress wanted to deny LGBT employees any recourse for sex or religious discrimination that might be related to the employee's sexual orientation or gender identity.

The most common example of this problem are cases holding sex discrimination claims by LGBT employees to a different standard. For at least the last 20 years, it has been the law that the "because of sex" language in title VII precludes an employer from discriminating against an employee because he or she failed to conform

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serving of censure and opprobrium."); (the alleged harassment "reflects conduct that is socially unacceptable and repugnant to workplace standards of proper treatment and civility."); *Vickers* v. *Fairfield Medical Center*, 453 F.3d 757, 764–65 (6th Cir. 2006); *Valencia* v. *Department of Interior*, No. 3:08–CV–69–WKW, 2008 WL 4495694, *14 n.8; (M.D. Ala. Oct. 7, 2008); *Lankford* v. *Borg Warner Diversified Transmission Products, Inc.*, No. 1:02CV1876–SEB–VSS, 2004 WL 540983, *3 (S.D. Ind. Mar. 12, 2004) ("Thus, harassment and discrimination based on sexual orientation, though morally reprehensible, are not actionable under title VII." [collecting citations]).

[2] This appears to be the case in every State except Montana. Mont. Code Ann. 39–2–904; see Robinson, Donald C., "The First Decade of Judicial Interpretation of the Montana Wrongful Discharge from Employment Act (WDEA)", 57 Mont. L. Rev. 375, 376 (1996); Just Cause in Montana: Did the Big Sky Fall? Source: Barry D. Roseman, Advance: The Journal of the ACS Issue Groups, Volt. 3 no. 1 (Spring 2009).

[3] See, e.g., *Herman* v. *United Broth. of Carpenters and Joiners of America, Local*, 60 F.3d 1375, 1386 (9th Cir. 1995) (". . . we have construed Nevada law as precluding emotional distress claims in the employment context."); Wisconsin Department of Workforce Development, "Remedies at a Glance" (neither compensatory damages for emotional harm nor punitive damages are available under the Wisconsin Fair Employment Law); available at *http://dwd.wisconsin.gov/er/discriminationcivilrightspublicationerd11055p.htm#3*.

[4] See Delaware Employment Law Blog, published by Young, Conaway, Stargatt & Taylor LLP, at *http://www.delawareemploymentlawblog.com /2009/06/delawaresettobandiscrimina.html*.

[5] See *http://www.census.gov/compendia/statab/ranks/rank12.html*.

[6] See Mary Anne C. Case, Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence, 105 Yale L.J. 1, 50–51 and n.166 (1995); *Dillon* v. *Frank*, 90–2290, 952 F.2d 403 (Table), 1992 WL 5436 (6th Cir. Jan. 15, 1992); *Spearman* v. *Ford Motor Co.*, 231 F.3d 1080 (7th Cir. 2000).

to the employer's sex-based stereotypes. *See Price-Waterhouse* v. *Hopkins*, 490 U.S. 228, 251 (1989) (title VII was violated where a woman was denied partnership "on the basis of a belief that a woman cannot be aggressive, or that she must not be."). Thus, an employer cannot fire or refuse to hire a woman because it believes her to be insufficiently feminine—or a man because he is deemed insufficiently masculine[7] When this claim, known as sex stereotyping,[8] is brought by an LGBT employee, most courts have followed the correct approach that the employee's sexual orientation is irrelevant, *i.e.*, that title VII protects both an effeminate heterosexual man and an effeminate gay man from sex discrimination.[9] However, some courts have taken a dramatically different approach to sex stereotyping claims brought by LGBT employees. These courts incorrectly have refused to allow LGBT employees to proceed with their claims based on an argument that Congress supposedly wanted to exclude employment discrimination protections for LGBT people from title VII. In the process, they ignore the fact that an LGBT person has the same right to be free from sex discrimination that all other employees enjoy.

For example, one court obsessed over "sexual orientation (or other unprotected) allegations masquerading as gender stereotyping claims," and about employees' "crafting the [sexual orientation] claim as arising from discrimination based upon gender stereotypes."[10] Another court simply imagined a "clear warning" from a higher court that the gender stereotyping theory "not bootstrap protection for sexual orientation into title VII."[11]

Instead of simply evaluating whether the gender stereotyping allegations, in and of themselves, make out a case, these courts have followed the incorrect approach of weighing the gender stereotyping harassment suffered by the employee against facts also showing that sexual orientation harassment also was occurring, and have concluded that, if the latter was more prevalent, there is no claim.[12] This approach

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[7] *Doe* v. *City of Belleville*, 119 F.3d 563, 581 (7th Cir. 1998) ("[A] man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers' idea of how men are to appear and behave, is harassed 'because of' his sex."), judgment vacated and remanded, 523 U.S. 1001 (1999) (held still to constitute valid precedent on this point in *Bibby* v. *Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 263 n.5 (3rd Cir. 2001)); *Higgins* v. *New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 261 n.4 (1st Cit. 1999) ("Just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity, a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotyped expectations of masculinity."); *Bibby*, 260 F.3d at 262–63; *Nichols* v. *Azteca Rest. Enters.*, 256 F.3d 864, 874–75 (9th Cit. 2001).

[8] *Price-Waterhouse*, 490 U.S. at 250–51.

[9] *Bibby*, 260 F.3d at 265 ("once it has been shown that the harassment was motivated by the victim's sex, it is no defense that the harassment may have also been partially motivated by anti-gay or anti-lesbian animus. For example, had the plaintiff in *Price Waterhouse* been a lesbian, that fact would have provided the employer with no excuse for its decision to discriminate against her because she failed to conform to traditional feminine stereotypes."); *Doe*, 119 F.3d at 594; *Centola* v. *Potter*, 183 F. Supp. 2d 403, 409–10 D. Mass. 2002) ("Centola does not need to allege that he suffered discrimination on the basis of his sex alone. . . . [T]he fact that he was also discriminated against on the basis of his sexual orientation has no legal significance under title VII.").

[10] *Dawson* v. *Bumble & Bumble*, 398 F.3d 211, 219 (2d Cir. 2005) (citations omitted). Indeed, the approach of Dawson to criticize lawyers who "counsel[] gay plaintiffs bringing claims under title VII [to] emphasize the gender stereotyping theory and de-emphasize any connection the discrimination has to homosexuality" is a self-fulfilling prophecy, as shown by Lambda Legal's legal help desk experience. Callers who have reported dealing with agencies and human relations departments about harassment based both on sex stereotypes and sexual orientation have reported that their grievances are treated primarily or exclusively as based on sexual orientation. Given this history, and the approach of *Dawson, Trigg* (*infra*), and *Kay* (*infra*), it is hardly surprising that employees would be counseled about how to avoid having their grievances summarily—and incorrectly—ignored.

[11] *Trigg* v. *New York City Transit Auth.*, No. 99–CV–4730 (ILG), 2001 WL 868336 (E.D.N.Y. July 26, 2001), quoting *Simonton* v. *Runyon*, 232 F.3d 33, 38 (2d Cir. 2000). In fact, the *Simonton* court expressed support for the notion that a gay or lesbian employee can bring a title VII sex discrimination claim if the employee presents the theory and facts to the EEOC and district court. The passage misunderstood by the *Trigg* court makes the point that allowing a sex stereotyping claim by a gay man or lesbian is **not** equivalent to engrafting sexual orientation onto title VII; rather, the *Simonton* court pointed out that a sex stereotyping theory "would not bootstrap protection for sexual orientation into title VII because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine" 232 F,3d at 38.

[12] In *Kay* v. *Independence Blue Cross*, No. CIV.A. 02–3157, 2003 WL 21197289 (E.D. Pa. May 16, 2003), the District Court held that two instances of the employee's being told he was "not a real man" were not pervasive enough to sustain a title VII claim. On appeal, although all three judges agreed with the District Court, two of the three felt compelled to articulate a "differ[ent] . . . approach" by incorrectly focusing on the antigay harassment. The court held

sends the message that one can escape liability for his (or her) sex discrimination simply by engaging in more flagrant or frequent sexual orientation discrimination.

Another example of improper exclusion of LGBT employees from title VII's protections is in the context of a religious discrimination claim. It is widely recognized that title VII covers an employee who is fired "simply because he did not hold the same religious beliefs as his supervisors." *Shapolia* v. *Los Alamos Nat. Laboratory*, 992 F.2d 1033, 1037 (10th Cir. 1993); *Venters* v. *City of Delphi*, 123 F.3d 956, 972 (7th Cir. 1997) ("Venters need only show that her perceived religious shortcomings [her unwillingness to strive for salvation as Ives understood it, for example] played a motivating role in her discharge.").[13] Under this standard, an employee who gets a divorce, has an extramarital affair, or simply fails to accept or adhere generally to the employer's religious precepts, could invoke title VII if the employer fired him or her on that basis.[14] Thus, lesbian or gay men fired solely for failing to comply with the employer's religious beliefs should be able to invoke title VII, but in August, the Third Circuit rejected exactly that claim,[15] not for any logical reason, but based solely on Congress' supposed intent to prevent employment discrimination claims based on sexual orientation or gender identity.[16]

Just as it was unfair to these LGBT litigants to be treated differently than other employees claiming sex or religious discrimination, it was wrong for these courts to attribute to Congress an intent to exclude LGBT employees from the current scope of title VII. Indeed, Lambda Legal consistently has insisted to courts that Congress intended, in passing title VII, to "'strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.' *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 251 (1989)."[17] But fair or unfair, it is now apparent that, if Congress fails to pass ENDA, not only will all courts deny protection against sexual orientation and gender identity discrimination under title VII, but some courts incorrectly will refuse to entertain a title VII sex or religious discrimination case brought by an LGBT employee, simply because of inaction on ENDA.

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that the two instances, "viewed in the broader context of the harassment alleged by Kay . . . demonstrates that the harassment was based on perceived sexual orientation, rather than gender." *Kay* v. *Independence Blue Cross*, 142 Fed. Appx. 48, 50 (3d Cir. 2005). In *Trigg*, *supra*, the court dismissed allegations that Trigg was called a 'sissy,' told "he would have to learn how to carry bags of nickels 'more manly'" told he "wasn't going to make it in the job if [he were] not more manly, and was told that he was working like a woman," because "In contrast to Trigg's assertion that he is a victim of gender stereotype discrimination, his Amended Complaint is rife with references to sexual orientation, homophobia, and accusations of discrimination based on homosexuality." 2001 WL 868336 at *6. The Second Circuit also ruled against Trigg, but corrected the District Court's approach of weighing the sexual orientation discrimination against the sex discrimination. *Trigg* v. *New York Transit Auth.*, 50 Fed. Appx. 458, 459–60 (2d Cir. 2002).

[13] *Accord Noyes* v. *Kelly Services*, 488 F.3d 1163, 1166, 1168–69 (9th Cir. 2007); *Panchoosingh* v. *General Labor Staffing Services, Inc.*, No. 07–80818–CI, 2009 WL 961148, *6 (S.D. Fla. Apr. 8, 2009); *Tillery* v. *Asti, Inc.*, 247 F. Supp. 2d 1051, 1062–63 (N.D. Ala. 2003), *aff'd without opinion*, 97 Fed. Appx. 906 (Table) (11th Cir. 2004) (unpublished); *Backus* v. *Mena Newspapers, Inc.*, 224 F. Supp. 2d 1228, 1233 (W.D. Ark. 2002); *Henegar* v. *Sears, Roebuck and Co.*, 965 F. Supp. 833, 837 (N.D. W.Va. 1997); *Yancey* v. *National Center on Institutions and Alternatives*, 986 F. Supp. 945, 955 (D. Md. 1997); *Sarenpa* v. *Express Images Inc.*, Civ.04–1538(JRT/JSM), 2005 WL 3299455, *3 (D. Minn Dec. 1, 2005); *Kaminsky* v. *Saint Louis University School of Medicine*, No. 4:05CV1112 CDP, 2006 WL 2376232, *5 (E.D. Mo. Aug. 16, 2006).

[14] See *Kaminsky*, 2006 WL 2376232 at *5 (getting a divorce); *Sarenpa* v. *Express Images Inc.*, 2005 WL 3299455 at *3 (extramarital affair); *Henegar*, 965 F. Supp. at 834 (living with a man while going through divorce proceedings against her husband); *Noyes*, 488 F.3d at 1166, 1168–69 (failure to live up generally to employer's religious beliefs); *Venters*, 123 F.3d at 972 (same).

[15] *Prowel* v. *Wise Business Forms, Inc.*, 575 F.3d 285, 293 (3d Cir. 2009) ("Given Congress's repeated rejection of legislation that would have extended title VII to cover sexual orientation, *see Bibby*, 260 F.3d at 261, we cannot accept Prowel's de facto invitation to hold that he was discriminated against 'because of religion' merely by virtue of his homosexuality.").

[16] Whether or not one agrees that the conduct in *Prowel* should be considered religious discrimination, ENDA provides the optimal result of making clear that discrimination against LGBT employees, whether based on religious or secular grounds, is prohibited.

[17] Brief of Amici Curiae Lambda Legal Defense and Education Fund, Inc. and the National Employment Lawyers Association in Support of Appellant and of Reversal of the Judgment Below, 2002 WL 32625900, *7, *Trigg* v. *New York City Trans. Auth.*, 2d Cir.; Brief of Amici Curiae American Civil Liberties Union, American Civil Liberties Union of Utah, Lambda Legal Defense & Education Fund, Inc., and National Center for Lesbian Rights in Support of Appellant Krystal Etsitty and Reversal of the District Court, 2005 WL 3516739, *3, *Etsitty* v. *Utah Transit Auth.*, 10th Cir.; *see also* 1997 WL 471805, *8, *Oncale* v. *Sundower Offshore Servs.*, U.S. S. Ct., Brief of Lambda Legal Defense Fund, Inc., et al., as Amici Curiae in Support of Petitioner ("'Congress' intent' in enacting title VII was 'to forbid employers to take gender into account in making employment decisions[.]'") (quoting Price-Waterhouse, 490 U.S. at 239).

As you are no doubt aware, in enacting a remedy that abrogates the sovereign immunity of the States, Congress should have evidence of discriminatory practice in the public sector. However, evidence of discrimination in the private sector is relevant to this inquiry where the congressional record reflects that the problem is similar in the private and public sector.[18] Unfortunately, it is the case that the public employment discrimination problem is similar, or even worse, given that it occurs against a backdrop of clear unlawfulness nationwide.

A review of nondiscrimination policies and directives illustrates the ongoing problem in public employment. According to Equality Forum, 473 of the Fortune 500 companies have policies against sexual orientation discrimination.[19] Of the 473 companies, 252 are headquartered in States with nondiscrimination statutes, but these companies' policies cover all employees, including those in States with no protection. More impressively, 221 of the companies are headquartered in States that do not ban sexual orientation discrimination.

By contrast, of the 29 States that do not have sexual orientation discrimination statutes, only 11 have issued executive orders providing a clear State-law directive not to discriminate in public employment based on sexual orientation, and thus not to potentially incur liability for such conduct, and only 5 of these include gender identity in such executive orders.[20] This is despite the fact that it is well-established, according to numerous courts, that the government violates equal protection guarantees when it discriminates against employees based on sexual orientation[21] or on gender identity and expression.[22]

A government employer's discrimination may violate other constitutional rights of the affected employee. For example, courts have recognized that a public employer violates an employee's First Amendment rights by taking action against the employee for being openly gay or supportive of others who are.[23] Additionally, in ruling

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[18] *Tennessee* v. *Lane*, 541 U.S. 509, 528 (2004); *Nevada Dept. of Human Resources* v. *Hibbs*, 538 U.S. 721, 728–733 (2003).

[19] *http://www.equalityforum.com/fortune500/listing.cfm?Status=1&Order=3*. Equality Forum is a national and international nonprofit 501(c)(3) GLBT civil rights organization with an educational focus. Through its Fortune 500 Project, Equality Forum lobbies the Nation's largest corporations for sexual orientation discrimination protection by making the business case to CEOs, Human Resources Directors, Boards of Directors and large institutional investors at noncompliant companies. While Equality Forum's report of Fortune 500 companies with sexual orientation nondiscrimination policies differs somewhat from that of the Human Rights Campaign, the HRC report that 85 percent of Fortune 500 companies had such policies in 2008 also places the largest private sector companies well ahead of the States in instructing managers not to discriminate. See *http://www.hrc.org/issues/workplace/equal_opportunity/about_equal_opportunity asp*.

[20] Alaska (Admin. Order No. 195 (2002)); Arizona (Executive Order 2003–22); Indiana (2004 Policy Statement—see *http://www.in.gov/spd/files/eehandbook.pdf at p.13*) (includes gender identity): Kansas (Executive Order 07–24) (includes gender identity); Kentucky (Executive Order 2008–473) (includes gender identity); Louisiana (Executive Order No. KBB 2004–54); Michigan (Executive Directive 2003–24); Montana (EEO Rules, 2.21.4001 *et seq*.); Ohio (Executive Order 2007–10S) (includes gender identity); Pennsylvania (Executive Order 2003–10) (includes gender identity); Virginia (Executive Order No. 1).

[21] *See, e.g., Miguel* v. *Guess*, 112 Wash. App. 536, 554, 51 P.3d 89, 97 (2002) ("we hold that a State actor violates a homosexual employee's right of equal protection when it treats that person differently than it treats heterosexual employees, based solely upon the employee's sexual orientation."); *Quinn* v. *Nassau County Police Dept.*, 53 F. Supp. 2d 347, 357 (E.D.N.Y. 1999) ("a hostile work environment directed against homosexuals [employed by the government] based on their sexual orientation constitute[s] an Equal Protection violation."); *Emblen* v. *Port Authority of New York/New Jersey*, 2002 No. 00 Civ. 8877(AGS), 2002 WL 498634, 7 (S.D.N.Y. Mar. 29, 2002); *Lovell* v. *Comsewogue School Dist.*, 214 F. Supp. 2d 319, 323 (E.D.N.Y. 2002); *Snetsinger* v. *Montana University System*, 325 Mont. 148, 157, 104 P.3d 445, 452 (2004); *Glover* v. *Williamsburg Local School Dist. Bd. of Educ.*, 20 F. Supp. 2d 1160, 1169 (S.D. Ohio 1998); *Weaver* v. *Nebo School Dist.*, 29 F. Supp. 2d 1279, 1289 (D. Utah 1998); *Beall* v. *London City Sch. Dist. Bd of Educ.*, No. 2:04–cv–290, 2006 WL 1582447, at *15 (S.D. Ohio June 8, 2006); *Marcisz* v. *City of New Haven*, No. Civ. 3:04–CV–01239WW, 2005 WL 1475329, at *2 (D. Conn. June 22, 2005); *O.H.* v. *Oakland Unified Sch. Dist.*, No. C–99–5123, 2000 WL 33376299, at *9–10 (N.D. Cal. Apr. 17, 2000); *Tester* v. *City of New York*, No. 95 Civ. 7972, 1997 WL 81662, at *5–*6 (S.D.N.Y. Feb. 25, 1997).

[22] *Smith* v. *City of Salem, Ohio*, 378 F.3d 566, 577 (6th Cir. 2004) (allegation of discrimination against transitioning employee stated a claim for sex discrimination under the Equal Protection Clause); *Glenn* v. *Brumby*, 632 F. Supp. 2d 1308, 1316 (N.D. Ga. 2009) (same); *Doe* v. *U.S. Postal Service*, No. 84–3296, 1985 WL 9446 (D.D.C. June 12, 1985) (same).

[23] E.g., *Weaver, supra*, 29 F. Supp. 2d at 1289; *Ancafora* v. *Board of Educ.*, 491 F.2d 498 (4th Cir. 1974); *Van Ooteghem* v. *Gray*, 654 F.2d 304 (5th Cir. 1981) (en banc). An example of public sector discrimination violating both equal protection and First Amendment rights is Lambda

that sodomy laws violated the Due Process Clause, the Supreme Court in *Lawrence* v. *Texas* specifically noted that sodomy laws "legally sanction[] discrimination . . . including in the area[] of employment.[24] *Lawrence* solved this legal problem for public employees.

Given that a primary purpose of executive orders is to ensure the faithful execution of the law,[25] it is notable that so many States have not mandated compliance with constitutionally mandated principles of equal protection.[26] This is especially so, given that, in these States, the absence of any statutory provision, coupled with typically rigorous adherence to the at-will doctrine, suggests a greater risk that an official might neglect the government's constitutional obligation not to discriminate.[27]

Moreover, even some of the few orders that have been issued have become political footballs. In Kentucky, Governor Paul Patton issued an order prohibiting sexual orientation and gender identity discrimination in State employment in 2003. In 2006, Governor Ernie Fletcher rescinded that order. After Steven Beshear soundly defeated Fletcher in 2007 to become governor, Beshear re-instated the executive order in 2008. In 2004, Louisiana Governor Kathleen Blanco issued an executive order preventing sexual orientation discrimination in State employment; the current governor, Bobby Jindal, let that provision lapse in 2008. In 2005, Virginia Governor Mark Warner issued a nondiscrimination executive order that was re-issued by his successor, Tim Kaine, in 2006. The Virginia Attorney General, despite acknowledging the governor's duty to execute the law faithfully, held that the order was unconstitutional because the Virginia legislature had not enacted such a protection. Va. Op. Atty Gen. 05–094 (Feb. 24, 2006). The opinion did acknowledge that previous executive orders regarding nondiscrimination included categories that had not been covered by Virginia law but were covered by Federal law, but then stated that "I need not opine, however, on the impact of Federal law and reliance thereon for an executive order as it is not relevant to the current inquiry," apparently not regarding the U.S. Constitution as part of Federal law. *See id.* In sum, due to various actions and inactions, most supervisors in the public sector are not provided with guidance as to their clear obligation not to discriminate, while supervisors in the private sector are given that instruction, whether or not a legal obligation exists.

Moreover, an individual government official can be held personally liable for discrimination, unlike title VII.[28] The threat of having to pay out of pocket is very real, because courts have found the right to be free from LGBT discrimination in the public workplace so well-established that an official cannot claim qualified immunity.[29] Given that Section 1983 not only provides a clear remedy for discrimination in public employment, regardless of the jurisdiction's local laws, and given that an individual government official can be held personally liable, one might expect instances of discrimination and harassment in public employment to be rare. Sadly, that is

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Legal's case, *Plymouth-Canton Education Association* v. *Plymouth-Canton Board of Education*, discussed below.

[24] *Lawrence* v. *Texas*, 539 U.S. 558, 582 (2003) (citation omitted). An example of how sodomy laws violated public employees' Due Process rights is *Shahar* v. *Bowers*, 114 F.3d 1097, 1104–05 (11th Cir. 1997) (en banc), discussed below.

[25] E.g., *Morris* v. *Governor*, 214 Mich. App. 604, 610, 543 N.W.2d 363, 365 (1995); *Communications Workers of America, AFL–CIO* v. *Florio*, 130 N.J. 439, 455, 617 A.2d 223, 231 (1992); Va. Op. Atty Gen. 05–094 (Feb. 24, 2006).

[26] While a State government would not be ordered to pay damages in a section 1983 discrimination suit, *see Will* v. *Michigan Dep't of State Police*, 491 U.S. 58 (1989), it has many financial incentives to prevent such lawsuits. It well may have to defend such a suit for nonmonetary relief (such as re-instatement), and may have assumed responsibility for paying an award that could be ordered against an individual State official. *See Luder* v. *Endicott*, 253 F.3d 1020, 1023 (7th Cir. 2001) ("These examples show that the Eleventh Amendment does not protect the States against every expense or inconvenience . . . especially but not only expenses and inconveniences that a State could largely avoid by being hardhearted about claims against its employees [*i.e.*, not pay them!]."); *see also id.* (citing cases holding that a State cannot extend its own immunity to its employees by agreeing to indemnify them for damage awards).

[27] The recent examples of anti-LGBT discrimination in public employment set forth below and in the appendix are especially relevant, coming after Federal courts have made it clear that such action is unlawful. *See Tennessee* v. *Lane*, 541 U.S. 509, 528 (2004) ("This pattern of disability discrimination persisted despite several Federal and State legislative efforts to address it"); *cf Board of Trustees of University of Alabama* v. *Garrett*, 531 U.S. 356, 370 n.6 (2001) ("But there is no indication that any State had persisted in [such discrimination against the mentally disabled] as of 1990 when the ADA was adopted.").

[28] *See, e.g., Smith* v. *Lomax*, 45 F.3d 402, 407 (11th Cir. 1995).

[29] *Beall*, 2006 WL 1582447 at *15 (anti-gay discrimination was both objectively unreasonable and clearly proscribed so as to defeat qualified immunity); *see also Lovell*, 214 F. Supp. 2d at 325 (no qualified immunity); *Emblem*, 2002 WL 498634 at *11 (same); *Miguel*, 51 P.3d at 99 (same).

not the case. Below are a few examples of Lambda Legal's work to combat LGBT discrimination at the State and local levels:

• *Grobeson* v. *City of Los Angeles*.—Lambda Legal client Mitchell Grobeson was the first openly gay officer in the Los Angeles Police Department. In 1993, Grobeson settled a sexual orientation employment discrimination lawsuit he had filed against the city of Los Angeles after suffering harassment and discrimination when he was a sergeant. A settlement reached in the case resulted in his re-instatement to the force, but Grobeson soon had no option but to file a second lawsuit, charging the city and numerous police staff with violating the settlement agreement, as well as his Federal and State constitutional and State statutory rights. Grobeson also challenged the LAPD's decision to suspend him for his "unauthorized recruiting" of lesbians and gay men to join the force, and for allegedly wearing his uniform without permission in a photo in a gay weekly, and at gay pride and AIDS-awareness events. This second lawsuit prompted the city to make widespread improvements in its sexual orientation employment policies.

• *Plymouth-Canton Education Association* v. *Plymouth-Canton Board of Education*.—Openly gay teachers Mike Chiumento and Tom Salbenblatt, who were Lambda Legal clients, challenged their school district's order that they dismantle school displays that commemorated the historical role of lesbians and gay men, and addressed anti-gay harassment. The displays were in keeping with the school's theme of respect and dignity for all. In contrast to when similar, prior lesbian and gay history month displays were created by a non-gay staff member, Chiumento and Salbenblatt were attacked by the interim superintendent and members of the Board of Education for supposedly "promoting" their personal "lifestyles." The arbitrator who decided the case found the district had violated one teacher's constitutional right of free speech and had wrongfully discriminated against both teachers.

• *Glenn* v. *Brumby et al*.—Vandy Beth Glenn worked for 2 years in the General Assembly's Office of Legislative Counsel as an editor and proofreader of bill language. After she was diagnosed with Gender Identity Disorder (GID), Glenn informed her immediate supervisor that she planned to proceed with her transition from male to female. Subsequently, Sewell Brumby, who is the head of the office in which Glenn worked, summoned Glenn to his office. After confirming that Glenn intended to transition, Brumby fired her on the spot. On July 22, 2008, Lambda Legal brought a Federal lawsuit on behalf of Glenn, which included a claim that her firing violated the Constitution's equal protection guarantee because it treated her differently due to her female gender identity and her nonconformity with gender stereotypes. In June 2009, a Federal court denied a motion to dismiss the case, ruling that "Defendants do not claim that Glenn's transition would have rendered her unable to do her job nor do they present any government purpose whatsoever for their termination of Plaintiff's employment. . . . Anticipated reactions of others are not a sufficient basis for discrimination."

• *Shahar* v. *Bowers*.—After graduating at the top of her class from Emory Law, Robin Shahar was offered a position in the Georgia Attorney General's Office. Before she began the job, State Attorney General Michael Bowers learned of her plans to hold a commitment ceremony with her same-sex partner and rescinded the job offer. Bowers claimed that Shahar's sexual orientation would prevent her from enforcing the sodomy law then on the State's books, and a Georgia district court upheld his decision. Appealing the decision, Shahar cited violations of her First Amendment rights to free association and Fourteenth Amendment rights to equal treatment. Shahar initially won on appeal; however, the Eleventh Circuit decided to rehear the case before the entire court, which then decided for Bowers.[30]

• *Mitchell* v. *Bremen Community High School District No. 228 and Gleason, et al*.—In 2004, Richard Mitchell interviewed for the position of superintendent of Bremen Community High School District No. 228 in Chicago. Following his interview, school board member Evelyn Gleason encouraged the board not to hire him because he is gay. But the board chose to hire Mitchell and in 2005 extended his 3-year contract. Soon after, Gleason became president of the school board and was able to do what she'd always wanted: get rid of Mitchell. When Mitchell notified the board that he intended to pursue his rights under local laws prohibiting sexual orientation discrimination, Gleason retaliated by trumping up false allegations against Mitchell in the media. He was suspended and later fired. Lambda Legal filed a complaint charging that Gleason's and the school board's actions are illegal under the Cook County Human Rights Ordinance, which is currently pending.

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[30] Lambda Legal submitted a friend-of-the-court brief to the 11th Circuit on Shahar's behalf and assisted with the petition to the Supreme Court. Lead counsel in the case, Ruth Harlow was working for the ACLU during Shahar's case. She subsequently became Legal Director of Lambda Legal and lead counsel in *Lawrence* v. *Texas*.

• *Etsitty* v. *Utah Transit Authority*.—Utah Transit Authority (UTA) hired Krystal Etsitty as a bus driver in 2001. Her work record was spotless. After telling her supervisor that she was undergoing gender transition and would be appearing more feminine at work, Etsitty gradually began to wear makeup and jewelry. Soon after, her supervisors decided that Etsitty's transition created an "image issue" for UTA, and they terminated her. Although UTA acknowledged that no one had complained about her performance or appearance, it claimed that the public would see Etsitty as "inappropriate." The U.S. District Court for the district of Utah ruled against Etsitty, holding that title VII does not protect transgender employees.[31] Lambda Legal joined other groups in filing a friend-of-the-court brief in the Tenth Circuit Court of Appeals in Etsitty's support.[32] While the court ruled against Etsitty, it did, as urged by our brief, reject the district court's approach of excluding all transgender employees from the sex stereotyping discrimination protections of title VII.[33]

• *Kastl* v. *Maricopa County Community College Dist*.—During her gender transition, Rebecca Kastl worked as an instructor for the Maricopa County Community College District ("MCCCD") while attending classes there. MCCCD banned Kastl from using the women's restroom until she could prove completion of sex reassignment surgery and then later refused to renew her teaching contract. The trial court ruled against Kastl on a novel theory potentially very damaging to the transgender community: that Kastl had failed to state a prima facie case because she had not provided "evidence that she was a biological female."[34] While the Ninth Circuit also ruled for Kastl, it did reject, as urged in Lambda Legal's amicus brief, the trial court's holding that Kastl failed to state a prima facie case of gender stereotyping discrimination under title VII.[35]

Additionally, attached as an appendix is a brief synopsis of instances of public sector discrimination described by callers to Lambda Legal's help desk. Confidentiality concerns preclude our providing names or other identifying information or discussions of legal strategy. However, we wanted to provide these stories of discrimination, so that this committee could have a fuller understanding of the problem of public sector discrimination against LGBT employees, even if any attempt to capture this problem necessarily understates the problem.

Again, we strongly urge you to support ENDA and would be happy to answer any questions you may have or provide any other assistance you may request.

Respectfully yours,

HAYLEY GORENBERG,
Acting Legal Director.

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[31] *Etstity* v. *Utah Transit Auth.*, 2:04CV616 DS, 2005 WL, 1505610 *4 (D. Utah, June 24, 2005).

[32] See n.17, *supra*.

[33] *Etstio* v. *Utah Transit Auth.*, 502 F.3d 1215, 1222 n.2 (10th Cir. 2007).

[34] *Kastl* v. *Maricopa County Community College Dist.*, No. CV–02–1531–PHX–SRB, 2006 WL 2460636 *6 (D. Ariz. Aug. 22, 2006).

[35] *Kastl* v. *Maricopa County Community College Dist.*, 325 Fed. Appx. 492, 493 (9th Cir. 2009) ("it is unlawful to discriminate against a transgender (or any other) person because he or she does not behave in accordance with an employer's expectations for men or women. [citing *Smith* v. *Salem*]. Thus, Kastl states a prima facie case of gender discrimination under Title VII on the theory that impermissible gender stereotypes were a motivating factor in MCCCD's actions against her.").

Appendix

Examples of Public Sector Discrimination Based on Sexual Orientation or Gender Identity and Expression

Caller	Employer	State	Year	Description
Caller A	Municipality	NY	2009	***Adverse employment action; demotion:*** Caller A is a long-time seasonal employee for a local board of education. After disclosing to the director that she and her lesbian partner were going to move in together, her director replied negatively, and the contract she had had renewed for 10 years was not renewed again. Her director called her and instead offered her a job that paid $9 an hour instead of her usual $18 an hour, and employed her for only 3 hours a day instead of the full time she previously worked.
Caller B	Municipality	VA	2009	***Harassment; discrimination in terms and conditions of employment:*** Caller B is not a gay man but he is perceived as such by his coworkers and was subjected to relentless harassment. His supervisor talked incessantly about having anal sex with Caller B and would tell Caller B sexually-charged stories about the supervisor's time in jail. Caller B also has been forced by this supervisor to perform far more demanding work than his colleagues, despite his being physically smaller than they are.
Caller C	County School District	MO	2008	***Non-renewal of contract:*** Gym teacher in a public school did not have her contract renewed and believes this was due to her sexual orientation. She overheard one of the school board members say that, had he known Caller C was a ''dyke,'' he would never have hired her in the first place.
Caller D	Municipal Fire Department	CA	2008	***Failure to promote; harassment:*** Deputy fire marshal passed test for the position of battalion chief but was not promoted. He subsequently learned that the fire chief told another employee that he believed Caller D was not promotable because he is gay. After Caller D filed an internal complaint, the work environment became progressively more hostile.
Caller E	Municipal Police Department.	OK	2008	***Harassment; discrimination in terms and conditions of employment:*** Police officer transitioned on the job from male to female. She thereafter experienced severe harassment based on her gender identity. After her transition, the police department also insisted that she undergo psychological evaluations and transferred her to an unfavorable position.

Examples of Public Sector Discrimination Based on Sexual Orientation or Gender Identity and Expression—Continued

Caller	Employer	State	Year	Description
Caller F	Public High School	IL	2008	***Harassment:*** Teacher was repeatedly harassed by students, who, among other things, wrote on the tables in his classroom that ''[Caller F] is a fag'' and included similar derogatory phrases in textbooks in his class. Caller F made complaints to the administration about this harassment but received no response. Caller F is perceived to be gay but in fact he is a married heterosexual man.
Caller G	Municipality	AL	2007	***Harassment; discrimination in terms and conditions of employment:*** City communication technician began to experience workplace harassment based on her gender identity when a new supervisor was hired. In addition, Caller M's new supervisor assigned her to work with coworkers who did not want to work with her because she is transgender and gave her unfavorable work assignments, which entailed more difficult tasks than those required of other employees.
Caller H	Municipal Code Enforcement Office.	TX	2007	***Harassment; failure to promote:*** After a code compliance inspector designated her same-sex partner as a beneficiary for certain employment benefits, the officer administrator told everyone that Caller H is a lesbian. Coworkers made repeated derogatory comments about ''faggots'' and one female religious employee told Caller H that, because she did not have a boyfriend, she ''wasn't whole . . . that's your problem.'' A picture of Janet Jackson's breast was placed on Caller H's computer. Complaints to her manager were rejected. When a new supervisor was hired, he would ignore Caller H and avoid eye contact with her at meetings. He also required caller H to train three replacements for a management position that she was qualified for and that she had been told she would receive prior to his arrival.
Caller I	Municipal Police Department.	SC	2007	***Failure to hire:*** Caller I had quit the State police academy in another State to move to South Carolina. She received a good reference from her former employer and, according to Caller I, she also has a ''good background and a degree.'' Caller I applied to a police department in South Carolina and, during a routine polygraph test, she was asked if she is a lesbian. She responded truthfully that the answer was ''yes.'' She thereafter was not selected for the position. She learned from references she had given that they had not been contacted.

Examples of Public Sector Discrimination Based on Sexual Orientation or Gender Identity and Expression—Continued

Caller	Employer	State	Year	Description
Caller J	Municipal Fire Department	OK	2007	***Harassment:*** Caller J has been an electronic technician who repairs city traffic lights and works out of a city firehouse. After another employee learned that Caller J is gay, Caller J began to experience mounting harassment from coworkers, including being called a ''c**ks***er,'' being whistled at, being told that ''Queers are just s**t; people like you float,'' and being lectured that homosexuality is ''against the Bible'' and that gay people are ''an abomination to God.'' When a new employee complained about having to clean the showers at the firehouse, Caller J commented that they were so filthy that he wouldn't take a shower with his male coworkers. The new employee replied that, according to what he had heard from others, he had thought that ''you'd like that.'' Most serious is that a coworker repeatedly screamed at Caller J, physically intimidated him, and twice threatened to kill him. When Caller J complained, his shift was changed against his wishes so that he would not work the same time as that coworker. The department administrator has refused to give Caller J a copy of the employee policies on sexual harassment and nondiscrimination.
Caller K	County Sheriff Department	IL	2007	***Harassment; failure to promote:*** Caller K is a corrections officer. A fellow officer repeatedly referred to Caller K as a ''motherf****n' faggot'' in front of other officers and inmates. The officer who did this was not suspended, even though two employees who had used the ''N-word'' around the same time had been immediately terminated. After Caller K commenced a union grievance, shift commanders told Caller K to ''leave it alone'' and warned him that he was ''playing with fire.'' Thereafter, even though Caller K was qualified for a promotion, the position was awarded to a heterosexual candidate from ''off the street'' with much less experience than Caller K. Caller K eventually resigned over his treatment.

Examples of Public Sector Discrimination Based on Sexual Orientation or Gender Identity and Expression—Continued

Caller	Employer	State	Year	Description
Caller L	State University	CO	2007	***Harassment; discrimination in terms and conditions of employment:*** Professor at State university for more than two decades, who has long been open about his being gay, began to experience problems when the former provost of the university retired. The dean thereafter began making derogatory comments about Caller L in meetings, including referring to him as a girl. Caller L was then passed over as chair of his department in favor of a heterosexual woman with much less tenure, even though Caller L previously had been the chair of a related department. Caller L has also been stripped of graduate courses that he has taught for years and has been given only undergraduate courses to teach, based on a false claim that he did not turn in his lesson plans on time.

LEADERSHIP CONFERENCE ON CIVIL RIGHTS,
WASHINGTON, DC 20006,
November 3, 2009.

DEAR MEMBER OF CONGRESS: On behalf of the Leadership Conference on Civil Rights (LCCR), the Nation's oldest, largest, and most diverse civil and human rights coalition, we urge you to become a cosponsor of H.R. 3017/S. 1584, the Employment Non-Discrimination Act (ENDA). It is time for Congress to act on this crucial civil rights legislation.

Our organizations are dedicated to the principle that every worker should be judged solely on his or her merits. Hardworking Americans should not be kept from supporting their families and making a positive contribution to the economic life of our Nation because of characteristics that have no bearing whatsoever on their ability to do a job. Yet it remains legal in 29 States to fire or refuse to hire someone simply because of his or her sexual orientation, and in 38 States it is legal to do so solely based on an individual's gender identity. ENDA prohibits discrimination based on sexual orientation and gender identity in most workplaces. The time has long since come to end this injustice for gay, lesbian, bisexual and transgender Americans and pass ENDA.

America's corporate leaders support ENDA's fair-minded approach. Eighty-five percent of Fortune 500 companies have included sexual orientation protections in their workplace policies and more than a third of them also prohibit discrimination based on gender identity. Corporate America is leading the way in workplace fairness.

Public support for ENDA is strong. A May 2008 poll conducted by Gallup found that 89 percent of Americans believe gay men and lesbians should have equal rights in the workplace. It is clear that Americans know that ENDA represents a measured and pragmatic response to unjust prejudice and discrimination.

We hope you will cosponsor and support this historic legislation. Please feel free to contact Rob Randhava, LCCR Counsel, at 202–466–6058 if you have any questions.

Sincerely,

A. PHILIP RANDOLPH INSTITUTE; ALLIANCE FOR RETIRED AMERICANS; AMERICAN ASSOCIATION FOR AFFIRMATIVE ACTION; AMERICAN ASSOCIATION OF PEOPLE WITH DISABILITIES; AMERICAN ASSOCIATION OF UNIVERSITY WOMEN; AMERICAN CIVIL LIBERTIES UNION; AMERICAN FEDERATION OF LABOR & CONGRESS OF INDUSTRIAL ORGANIZATIONS (AFL–CIO;) AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES; AMERICAN FEDERATION OF TEACHERS; AMERICAN JEWISH COMMITTEE; AMERICAN SPEECH-LANGUAGE-HEARING ASSOCIATION; AMERICANS FOR DEMOCRATIC ACTON, INC.; ANTI-DEFAMATION LEAGUE; ASIAN AMERICAN JUSTICE CENTER; ASSOCIATION OF FLIGHT ATTENDANTS—CWA; B'NAI B'RITH INTERNATIONAL; CENTER FOR WOMEN POLICY STUDIES; CENTERLINK: THE COMMUNITY OF LGBT CENTERS; COMMUNICATIONS WORKERS OF AMERICA; DISCIPLES JUSTICE ACTION NETWORK; GAY, LESBIAN AND STRAIGHT EDUCATION NETWORK; HUMAN RIGHTS CAMPAIGN; INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW); JAPANESE AMERICAN CITIZENS LEAGUE; JEWISH COUNCIL FOR PUBLIC AFFAIRS; LAMBDA LEGAL; LEADERSHIP CONFERENCE ON CIVIL RIGHTS; LEGAL AID SOCIETY-EMPLOYMENT LAW CENTER; LEGAL MOMENTUM; NAACP; NATIONAL ASIAN PACIFIC AMERICAN BAR ASSOCIATION; NATIONAL ASSOCIATION OF HUMAN RIGHTS WORKERS; NATIONAL ASSOCIATION OF SOCIAL WORKERS; NATIONAL CENTER FOR LESBIAN RIGHTS; NATIONAL CENTER FOR TRANSGENDER EQUALITY; NATIONAL COUNCIL OF JEWISH WOMEN; NATIONAL DISABILITY RIGHTS NETWORK; NATIONAL EDUCATION ASSOCIATION; NATIONAL EMPLOYMENT LAW PROJECT; NATIONAL EMPLOYMENT LAWYERS ASSOCIATION; NATIONAL FAIR HOUSING ALLIANCE; NATIONAL GAY AND LESBIAN TASK FORCE ACTION FUND; NATIONAL STONEWALL DEMOCRATS; PARENTS, FAMILIES AND FRIENDS OF LESBIANS AND GAYS (PFLAG) NATIONAL; PEOPLE FOR THE AMERICAN WAY; PRIDE AT WORK, AFL–CIO; SEXUALITY INFORMATION AND EDUCATION COUNCIL OF THE U.S. (SIECUS); UNION FOR REFORM JUDAISM; UNITARIAN UNIVERSALIST ASSOCIATION OF CONGREGATIONS; UNITED CHURCH OF CHRIST, JUSTICE AND WITNESS MINISTRIES; UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION; UNITED METHODIST CHURCH, GENERAL BOARD OF CHURCH AND SOCIETY; WOODHULL FREEDOM FOUNDATION; AND WOMEN EMPLOYED.

MARRIOTT INTERNATIONAL, INC.,
WASHINGON, DC 20058,
November 3, 2009.

Hon. MICHAEL B. ENZI, *Ranking Member,*
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
Washington, DC 20510.

DEAR SENATOR ENZI: As a lodging industry leader, Marriott International, Inc. would like to express our support of the Employment Non-discrimination Act (S. 1584) which would extend fair employment practices under Federal law to gay, lesbian, bisexual and transgender employees.

Marriott has implemented its own non-discrimination policy to make our workplace values of fairness clear and transparent to our employees. In the years since its implementation, the policy has been accepted broadly, and we believe it has affected our bottom-line for the better. Our gay, lesbian, bisexual and transgender employees feel that they are equally protected and valued by the company. And it has further reinforced for all of our employees that fairness and non-discrimination remain fundamental in our workplace.

Businesses that drive away talented and capable employees are certain to lose their competitive edge, an outcome that we must not accept in this competitive global marketplace. That is why a majority of FORTUNE 500 companies have already addressed these issues. We believe that the Employment Non-Discrimination Act is an appropriate, no-cost measure that will have a positive impact on our country's ability to compete, by extending protection in the majority of U.S. States where it remains legal to fire gay, lesbian, bisexual and transgender employees.

Marriott strongly supports passage of the Employment Non-Discrimination Act. The principles it fosters are consistent with our company principles in treating all

employees with fairness and respect. We encourage Congress to move quickly and enact this important legislation.

Sincerely,

DAVID A. RODRIGUEZ, PH.D.
Executive Vice President, Global Human Resources.

NATIONAL CENTER FOR LESBIAN RIGHTS (NCLR),
September 23, 2009.

Hon. TOM HARKIN, *Chairman,*
Committee on Health, Education, Labor, and Pensions,
U.S. Senate.

Hon. MIKE ENZI, *Ranking Member,*
Committee on Health, Education, Labor, and Pensions,
U.S. Senate.

Re: Crucial Protections For State And Local Government Employees under ENDA

DEAR CHAIRMAN HARKIN AND RANKING MEMBER ENZI: On behalf of the National Center for Lesbian Rights (NCLR), we are writing to provide you with concrete information showing why it is critically important that the Senate Committee on Health, Education, Labor, and Pensions support the Employment Non-Discrimination Act (ENDA).

NCLR is a national legal organization committed to advancing the civil and human rights of lesbian, gay, bisexual, and transgender (LGBT) people and their families through litigation, public policy advocacy, and public education. We provide assistance to LGBT and gender non-conforming workers through our legal information helpline and represent clients in employment matters at the claims and appeals levels. We also provide technical advice and assistance to private attorneys representing LGBT and gender non-conforming workers in employment discrimination and harassment matters. NCLR was founded in 1977. Each year, through litigation, public policy advocacy and public education, NCLR helps more than 5,000 LGBT people and their families nationwide. Through this work, NCLR has acquired extensive knowledge of the widespread pattern of discrimination against American workers who are LGBT.

This letter will focus on one issue that ENDA would address: discrimination by State and local governments against their employees on the basis of sexual orientation and gender identity. The protection that ENDA would provide is crucial to securing these employees' constitutional rights and their ability to work in an environment that is safe and respects their professional dignity as workers.

THERE IS A WIDESPREAD PATTERN OF UNCONSTITUTIONAL EMPLOYMENT DISCRIMINATION AGAINST LGBT AND GENDER NON-CONFORMING EMPLOYEES

NCLR has observed a clear and widespread pattern of unconstitutional employment discrimination against LGBT and gender non-conforming employees. This pattern is not limited to any one State or region, to any particular level of government, or to any type of government agency. Our litigation docket has included cases against the Utah Transport Authority, a Texas school district, and a California public university. In recent years, we have also received dozens of calls from State and local employees who were facing discrimination and harassment in their workplace based on their sexual orientation and/or gender identity and expression. We have received requests for help from the western United States, New England, the South, including Florida, and the Midwest. State and local agencies engaging in discrimination have included a State department of health, a State department of child support enforcement, county agencies, city government, and local and county sheriff's and police departments.

The discrimination and harassment faced by State and local government workers who have called NCLR has been severe and blatant. For example, one transgender woman worker in Florida was called a "thing" by her co-workers, and continuously harassed when she tried to use the bathroom. Her supervisor was aware of the problem, but refused to intervene. A lesbian worker in Georgia was humiliatingly interrogated for 4 hours by her employer about her sexual preferences, family life and personal acquaintances, then told not to speak about what had been asked during the interview. She was subsequently terminated.

DISCRIMINATION AGAINST LGBT AND GENDER NON-CONFORMING STATE AND LOCAL EMPLOYEES PERPETUATES GENDER STEREOTYPES

Homophobic and transphobic harassment and discrimination against employees has the clear effect, if not the intent, of reinforcing gender stereotypes. In NCLR's experience, victims of discrimination and harassment are often targeted as much for failing to conform to gender stereotypes as for their actual sexual orientation or gender identity. This goes against the basic and long-recognized principle that the U.S. Constitution's guarantee of Equal Protection prohibits State governments from acting in such a way as to perpetuate stereotypes about how men and women are expected to behave. *Craig* v. *Boren*, 429 U.S. 190 (1976).

The relationship between gender stereotypes and discrimination based on sexual orientation or gender identity is also clear from the case law. For example, in *Hamm* v. *Weyauwega Milk Prods., Inc.*, the plaintiff's co-workers called him "girl scout," "faggot," and "bisexual" and circulated a rumor that he and a male supervisor were having a romantic relationship, despite the fact that he was in fact heterosexual. 332 F.3d 1058, 1060 (7th Cir. 2003). The non-transgender plaintiff in *Doe by Doe* v. *City of Belleville, IL* was harassed by co-workers asking him if he was a "boy or girl" because he failed to conform to gender stereotypes, in part by wearing an earring. 119 F.3d 563 (7th Cir. 1997).

DISCRIMINATION AGAINST LGBT AND GENDER NON-CONFORMING STATE AND LOCAL EMPLOYEES IS UNDER-REPORTED

In NCLR's experience, LGBT and gender non-conforming State and local employees face numerous barriers to reporting discrimination and harassment in the workplace.

First, without explicit Federal protections, State and local employees are not only vulnerable to discrimination, but are also less likely to speak out about it or make complaints, out of fear of retaliation by the employer and a lack of administrative or legal recourse for such discrimination or retaliation. For example, a lesbian worker in Arizona was repeatedly called a "dyke" and told she smelled of "s*** and p***" by co-workers, with no intervention by her supervisor. When she made a complaint to the EEOC, she was told this was not considered sexual harassment and therefore that she had no basis for a complaint. A gay male employee in Florida faced virulent anti-gay comments from a colleague. When he complained to a supervisor, he was reprimanded for making the complaint and subsequently terminated.

In addition, the nature of the discrimination and harassment against LGBT employees frequently includes an aspect of malicious "outing" or making public of their sexual orientation or transgender status, and other private information. For such employees, making a legal or administrative claim may lead to further unwanted publicity. Many rightly fear that it would expose them to more, rather than less, discrimination based on their sexual orientation or gender identity in their community or at a subsequent employer. In one situation that NCLR was contacted about, a police captain intentionally told a lesbian worker's potential employer about her sexual orientation in an attempt to prevent the worker from finding alternative employment, relying on homophobic discrimination in the community generally.

PROTECTIONS AGAINST DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY ARE ESPECIALLY IMPORTANT RIGHT NOW

In these difficult economic times, protecting LGBT and gender non-conforming workers at State and local agencies from unfair treatment on the job is more crucial than ever. Even in economically prosperous times, transgender people in particular find it difficult to find dignified work in a safe environment. In 2003, we conducted a joint study with the Transgender Law Center and found that 79 percent of San Francisco's transgender community made less than $50,000 a year, and over 40 percent lacked health insurance. *Trans Realities: A Legal Needs Assessment of San Francisco's Transgender Communities*, available at *http://transgenderlawcenter.org/trans/pdfs/Trans%20Realities%20Final%20Final.pdf*. Under the American Recovery And Reinvestment Act, an estimated $49 billion in funds has been provided to State and local governments. It is critical that LGBT and gender non-conforming workers have an equal shot at getting and retaining the new jobs created by this funding.

For all of these reasons and others, we urge approval and passage of ENDA. LGBT and gender non-conforming State and local employees must have explicit and clear Federal statutory protections from and remedies for workplace discrimination. Thank you for your time and for your attention to the serious discrimination facing

tens of thousands of workers in the United States that passage of ENDA would address.

Sincerely,

KATHRYN KENDELL, ESQ.,
Executive Director, National Center for Lesbian Rights.

SHANNON MINTER, ESQ.,
Legal Director, National Center for Lesbian Rights.

ATTACHMENT 1.—EXAMPLES OF ANTI-LGBT DISCRIMINATION: STATE & LOCAL EMPLOYERS

CALIFORNIA

Sulpizio and Bass v. San Diego Mesa College (local—community college district/coach)

"Lorri Sulpizio was the Head Women's Basketball Coach at San Diego Mesa College (Mesa), and her domestic partner, Cathy Bass, assisted the team and served as the team's Director of Basketball Operations for over 8 years. Despite Sulpizio's and Bass's dedication and demonstrated track record of success leading the women's basketball program at the community college, Mesa officials unlawfully fired both coaches at the end of the 2007 academic year after Coach Sulpizio repeatedly advocated for equal treatment of female student-athletes and women coaches, and following publication in a local paper of an article identifying Sulpizio and Bass as domestic partners." See NCLR, *Employment Case Docket: Sulpizio and Bass* v. *San Diego Mesa College, http://www.nclrights.org/site/PageServer?pagename=issue__caseDocket__sulpizio*.

Bay Area School District (local—school district/teacher)

"One woman in particular stands out. She is a teacher who transitioned in the Bay Area in the late 1990s. Since transitioning, she has not been able to secure a full-time teaching contract in any of the several school districts to which she has applied. Needing work, she recently applied to an entry-level Federal job. After two days and multiple hours of interviews and screening, she was turned down for the position immediately after she disclosed her transgender status on a comprehensive medical questionnaire." Shannon Minter & Christopher Daley, *Trans Realities: A Legal Needs Assessment of San Francisco's Transgender Communities at 15 (National Center for Lesbian Rights & Transgender Law Center, 2003), available at http://transgenderlawcenter.org/trans/pdfs/Trans%20Realities%20Final%20Final.pdf*. [hereinafter Trans Realities].

CONNECTICUT

Conway v. *City of Hartford (local—city/employee)*

The plaintiff, a transgender man, was terminated by his city employer after transitioning from female to male, and was not rehired for another position although other city employees who had been terminated around the same time were all rehired. *Conway* v. *City of Hartford*, 1997 WL 78585 (Conn. Super. Ct.), 19 Conn. L. Rptr. 109 (Feb. 4, 1997), cited in Shannon Minter, Legal Dir., National Center for Lesbian Rights, *Representing Transsexual Clients: Selected Legal Issues* at 4 n.22 (2003), *available at http://www.hawaii.edu/hivandaids/Representing__Transsexual__Clients__Selected__Legal__Issues.pdf* [hereinafter Minter, *Representing*].

FLORIDA

Smith v. *City of Jacksonville Correctional Inst., (local—city jail/sergeant)*

A transgender corrections officer with a stellar employment record was terminated after the fact that she was transgender was made public and a report mentioning her transgender status was circulated throughout the city jail where she worked. *Smith* v. *City of Jacksonville Corr. Inst.*, 1991 WL 833882 (Fla. Div. Admin. Hrgs. 1991), cited in Minter, *Representing* at 3 n.11.

Fishbaugh v. *Brevard County Sheriff's Dep't (local—country sheriff's dep't/employee)*

A transgender deputy sheriff was forced to leave her job due to unlawful employment practices by the sheriff's department. *Fishbaugh* v. *Brevard County Sheriff's Dep't*, Order No. 04-103 (Fla. Comm'n on Human Relations 2004), *available at http://fchr.state.fl.us/fchr/layout/set/print/content/view/full/2263*), cited in NCLR, *Cases Recognizing Protection for Transgender People Under State Sex and Disability Discrimination Laws* (2008), *available at http://www.nclrights.org/site/*

DocServer/state__cases091004.pdf?docID=1203 [hereinafter NCLR, *State Sex & Disability*].

Mowery v. *Escambia County Utilities Authority (local—county utilities authority/utility service technician)*

Employee suffered harassment based on the perception that he was gay due to sex stereotyping (i.e. that Mowery "was 40 years old, owned a house, had a truck paid for, did not have a woman, and never publicized his sexual escapades with women to his coworkers") and his supervisor retaliated against him when he complained. *Mowery* v. *Escambia County Utilities Authority*, 2006 FL 327965, at *6 (N.D. Fla. 2006), cited in NCLR, *Federal Cases Recognizing That Discrimination on the Basis of Gender Non-Conformity and/or Transgender Status Is a Form of Discrimination on the Basis of Sex* at 3 (2006), *available at http://www.nclrights.org/site/DocServer/fed__gender__nonconformity.pdf?docID=1202* [hereinafter NCLR, *Federal Sex Discrimination*].

NEW JERSEY

DePiano v. *Atlantic County (local—county/corrections officer)*

A prison guard who cross-dressed in his private life was subject to severe and pervasive harassment at work after the fact that he sometimes cross-dressed was publicized, possibly by his supervisor, to his coworkers as well as the inmates of the prison where he worked. *DePiano* v. *Atlantic County*, 2005 WL 2143972 (D.N.J. 2005), cited in NCLR, *State Sex & Disability* at 2.

NEW YORK

Martin v. *New York State Dep't of Corr. Servs., (State—State department of corrections/corrections officer)*

Co-workers of gay corrections officer constantly directed offensive and degrading sexual comments toward him, such as "pervert," "f***ing faggot," "c***-sucker," "fudge-packer," and "you gay bastard," and left sexually explicit pictures in his work area and written statements and pictures on the restroom walls, yard booths, his time card and his interoffice mail. The officer was retaliated against for filing complaints. *Martin* v. *New York State Dep't of Corr. Servs.*, 224 F. Supp. 2d 434 (N.D.N.Y. 2002) (noting that discrimination based on a failure to conform to gender norms might be cognizable under title VII), cited in NCLR, *Federal Sex Discrimination* at 4.

OHIO

Barnes v. *City of Cincinnati (local—city/police officer)*

Officer who had passed the examination required to be promoted to sergeant and who was transitioning from male to female was singled out and "targeted for failure" during probationary period for promotion to sergeant because the officer was not masculine enough in behavior or appearance. *Barnes* v. *City of Cincinnati*, 401 F.3d 729, 737 (6th Cir. 2005), cited in NCLR, *Federal Sex Discrimination* at 2.

Smith v. *City of Salem, (local—city/firefighter)*

After firefighter was criticized for appearing too feminine, he informed his direct supervisor that he had gender identity disorder and would be transitioning from male to female. Upper-level city management devised a plan to terminate him for pre-textual reasons. After the firefighter learned of the plan to terminate him, he retained counsel and was retaliated against through selective enforcement of fire department policies. *Smith* v. *City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004), cited in NCLR, *Federal Sex Discrimination* at 2.

PENNSYLVANIA

Bianchi v. *City of Philadelphia (local—city/firefighter)*

Lieutenant firefighter experienced severe harassment from co-workers based on the perception that he was gay, including having feces smeared on his belongings and receiving anonymous letters that threatened him as well as his twin brother. After he complained, the firefighter was placed in a desk job, told that he could not return to firehouse duties until he had passed mental and physical exams, and was never re-instated even after he was cleared to return to work. *Bianchi* v. *City of Philadelphia*, 183 F. Supp. 2d 726, 735 (E.D. Pa. 2002), cited in NCLR, *Federal Sex Discrimination* at 5.

TEXAS

Stephens v. *Bloomburg School District (local—school district/teacher)*

"NCLR and attorney Michael Shirk from the National Education Association/Texas State Teacher's Association negotiated a settlement on behalf of Merry Stephens, an award-winning teacher and basketball coach with Bloomburg Independent School District in the small rural community of Bloomburg, TX. Coach Stephens was honored as a "Teacher of the Year" in 2004 and named "Coach of the Year" in 3 of her 5 years as head coach of the Lady Wildcats basketball team. During her award-winning tenure, Coach Stephens led the team to district, regional, and semi-State championships, breaking several school district coaching records in the process. Stephens also received excellent teaching evaluations throughout her tenure with the Bloomburg Independent School District. In December 2004, the School Board initiated proceedings to terminate Coach Stephens. The school board president testified under oath that the board's decision to terminate Coach Stephens was based on the personal anti-gay animosity of several school board members. In exchange for Coach Stephens' agreement not to pursue further legal action, the district agreed to pay Coach Stephens a monetary settlement." NCLR, *Employment Case Docket: Stephens* v. *Bloomburg School District, http://www.nclrights.org/site/PageServer?pagename=issue__caseDocket__stephens.*

UTAH

Etsitty v. *Utah Transit Authority (State—transit authority/bus driver)*

"Despite her spotless employment record, Krystal Etsitty, a transgender woman, was fired from her job as a public bus driver by the Utah Transit Authority (UTA), solely because the UTA feared that members of the public might be offended by Etsitty's transgender identity. A Federal district court in Utah dismissed Etsitty's case, holding that Federal laws prohibiting sex discrimination do not protect transgender people. Etsitty appealed this decision to the Tenth Circuit Court of Appeals, which ruled against her. NCLR, Lambda Legal, and the ACLU filed an amicus brief supporting Etsitty's claim." NCLR, *Employment Case Docket: Etsitty* v. *Utah Transit Authority, http://www.nclrights.org/site/PageServer?pagename=issue__caseDocket__etsitty__v__utah__transit.*

ATTACHMENT 2.—NCLR LITIGATION INVOLVING EMPLOYMENT DISCRIMINATION AGAINST STATE/LOCAL GOVERNMENT EMPLOYEES

SULPIZIO AND BASS v. *san diego mesa college*

Lorri Sulpizio was the Head Women's Basketball Coach at San Diego Mesa College (Mesa), and her domestic partner, Cathy Bass, assisted the team and served as the team's Director of Basketball Operations for over 8 years. Despite Sulpizio's and Bass's dedication and demonstrated track record of success leading the women's basketball program at the community college, Mesa officials unlawfully fired both coaches at the end of the 2007 academic year after Coach Sulpizio repeatedly advocated for equal treatment of female student-athletes and women coaches, and following publication in a local paper of an article identifying Sulpizio and Bass as domestic partners. NCLR and the law firms of Boxer & Gerson, LLP and Stock Stephens, LLP are representing Coach Sulpizio and Coach Bass in their lawsuit against San Diego Mesa College, and the San Diego Community College District. Recent high profile title IX jury verdicts and settlements at Penn State, California State University, Fresno, and University of California, Berkeley have raised awareness about systemic gender inequities and homophobia at major colleges and universities. This case is a powerful illustration that similar problems pervade the athletic departments of community colleges as well.

ETSITTY v. *utah transit authority*

Despite her spotless employment record, Krystal Etsitty, a transgender woman, was fired from her job as a public bus driver by the Utah Transit Authority (UTA), solely because the UTA feared that members of the public might be offended by Etsitty's transgender identity. A Federal district court in Utah dismissed Etsitty's case, holding that Federal laws prohibiting sex discrimination do not protect transgender people. Etsitty appealed this decision to the Tenth Circuit Court of Appeals, which ruled against her. NCLR, Lambda Legal, and the ACLU filed an amicus brief supporting Etsitty's claim.

STEPHENS V. BLOOMBURG SCHOOL DISTRICT

NCLR and attorney Michael Shirk from the National Education Association/Texas State Teacher's Association negotiated a settlement on behalf of Merry Stephens, an award-winning teacher and basketball coach with Bloomburg Independent School District in the small rural community of Bloomburg, TX. Coach Stephens was honored as a "Teacher of the Year" in 2004 and named "Coach of the Year" in 3 of her 5 years as head coach of the Lady Wildcats basketball team. During her award-winning tenure, Coach Stephens led the team to district, regional, and semi-State championships, breaking several school district coaching records in the process. Stephens also received excellent teaching evaluations throughout her tenure with the Bloomburg Independent School District. In December 2004, the School Board initiated proceedings to terminate Coach Stephens. The school board president testified under oath that the board's decision to terminate Coach Stephens was based on the personal anti-gay animosity of several school board members.

ATTACHMENT 3.—NCLR HELPLINE CONTACTS INVOLVING EMPLOYMENT DISCRIMINATION AGAINST STATE/LOCAL GOVERNMENT EMPLOYEES, 2001–9

Year	State	Employer	Description
2007	California	School District	School District fired two openly gay women claiming they violated the dress code, but they believe it was because they were openly gay.
2006	Georgia	DFCS	After other employees complained about working with her because she was a lesbian, caller was subjected to a humiliating and invasive 4-hour interrogation during which she was asked if she was a lesbian, who looked after her children, who she lived with and who her friends were. She was then told not to tell anybody else about what happened during the interview. Two weeks later they suspended her for ''alleged misconduct''.
2001	Florida	City government	City government employee told to resign or he would be outted as a cross-dresser (he cross-dressed in his own time, outside of work hours).
2004	California	Unknown State Agency	Employee tried to persuade agency to provide DP benefits in 2002 (before comprehensive statewide RDP). This caused conflict with his boss and he was put on administrative leave and eventually terminated.
2007	Tennessee	Women and Children's Center.	Caller came out to colleagues as lesbian after she witnessed them ridiculing a lesbian client. They then started harassing her, including questioning her religious beliefs. She was later terminated.
2004	Florida	Police Department	Police officer faced harassment and was terminated when he came out as gay. He was also arrested for lewd and lascivious conduct for telling a street youth about safer sex.
2001	Florida	State Dept of Agriculture	Caller faced repeated virulently anti-gay comments from a colleague. When he complained, he was told off for complaining, and a superior told him to drop the complaint. He refused and was terminated shortly after.

Year	State	Employer	Description
2001	Florida	Florida Dept. of Health	Caller's supervisor said he would try to rid the department of gays. When caller complained, he was reprimanded for complaining, and eventually terminated after a long period of harassment at work.
2004	Florida	Department of Corrections	Caller cross-dressed outside of work. When supervisors found out they confronted him about it and forced him to resign.
2005	Florida	Pinellas County Water Quality.	Neighbor ousted him to his supervisor. He was eventually fired.
2001	Florida	School District	Teacher got good evaluations until school found out his partner was a man, then evaluations took a downturn and his contract was not renewed.
2002	Florida	Fire Department	Openly lesbian firefighter was repeatedly passed over for promotion while less qualified employees were promoted. She was eventually fired for low test scores, even though her scores were in fact consistently high.
2004	California	County Employee	Gay man faced harassment and isolation at work causing him stress-related health problems. Although California law had sexual orientation protections, he was afraid that the county and union would not enforce the law.
2005	California	University of California at Davis.	Supervisor drew up dress code specifically targeting one gay male employee, prohibiting him from wearing mid-length pants. Supervisor also forbade him from bringing gay and lesbian yellow pages into the office.
2003	Florida	Sheriff's Office	Caller is MTF. Co-workers kept using the wrong pronoun when she was out on patrol (hence outing her to anyone who could hear). She complained, but nothing changed. When co-workers started a rumor that she was posing topless on the Internet, she resigned.
2008	Virginia	Police Department	Caller was harassed by her captain and made to work long shifts without breaks. When she applied to another job, captain accosted her future employer in a restaurant and announced that caller was a lesbian.
2002	Florida	School District	Caller is MTF, was called a ''thing'' by co-worker, harassed about which bathroom she should use. Supervisor did not respect her either.
2008	Rhode Island	Unknown State Agency	Caller faced discrimination at work, wanted attorney information from us. Not many details.
2002	Florida	Fire Department	Caller is gay. Colleagues found his personal on the Internet and circulated in the office. His supervisor wrote him up for various frivolous things and when confronted admitted they were made up.
2008	Ohio	State of Ohio	Faced daily harassment including threats and intimidation because of her sexual orientation.

Year	State	Employer	Description
2007	Florida	Unknown Agency	Social worker had worked there for about 10 years. When she came out, supervisor started giving her bad reviews, and also stood in the bathroom with her while she urinated for a drug test (not standard procedure).
2004	Florida	School District	Teacher who agreed to let students use her room for GSA meetings was harassed by other teachers to the point where she felt she had to leave. School then refused to give her a good recommendation.
2004	Louisiana	School District	Bus Driver faced harassment for gender non-conformity and sexual orientation. Her grievance was deemed invalid.
2007	Arizona	Department of Child Support Enforcement.	When she came out as a lesbian, co-workers started calling her a ''faggot'' and ''dyke'' and saying she smelled of ''sh** and pi**'' and saying that she had STDs and was mentally ill. Supervisor did nothing. Harassing co-workers were transferred to another department, but no other disciplinary action was taken. Harassment continues. She filed with EEOC, but was told that this was not sexual harassment.
2004	California	School District	Lesbian who did not fit traditional gender norms was repeatedly transferred from site to site and once thrown against the wall by a principal. School district and union refuse to intervene.
2007	California	Police Department	Chief decided not to promote caller to a position she was qualified for, and for which no other qualified person was found, and instead eliminated the position, because caller was MTF.
2002	Florida	Board of Nursing (not employer).	Denied a nursing license because he was gay, though they gave other reasons (which had not precluded others from getting a license). He had already gotten licensed in Indiana.
2007	Florida	Sheriff's Office	Caller was offered positions at two Sheriff's offices which were then rescinded because they found out he was living with a man whom they assumed was his partner.
2006	Florida	Police Department	When police department found out she was MTF, they decided not to hire her, claiming she had been dishonest.
2002	Florida	Fire Department	Before coming out, got excellent assessments and was promoted. After he came out, he was told to either resign or accept a demotion. He took the demotion to keep his retirement benefits.
2006	New Jersey	State of NJ	She was demoted and made to do menial tasks below her skill level because she was a lesbian.
2005	North Carolina	Medical Board (not an employer).	Transgender woman faced uncertainty about whether she had to declare that she was trans in order to proceed with application.
2004	New York	New York State Department of Law.	Employee won at the trial level, sought help from us for an appeal.

NATIONWIDE MUTUAL INSURANCE COMPANY,
COLUMBUS, OH 43215,
November 5, 2009.

Hon. TOM HARKIN, *Chairman,*
Senate Health, Education, Labor, and Pensions Committee,
428 Dirksen Senate Office Building,
Washington, DC 20510.

Hon. GEORGE MILLER, *Chairman,*
House Education and Labor Committee,
2181 Rayburn House Office Building,
Washington, DC 20515.

DEAR CHAIRMAN HARKIN AND CHAIRMAN MILLER: I am writing on behalf of Nationwide Mutual Insurance Company and our 36,000 associates to express our proud support of Federal workplace non-discrimination legislation, H.R. 3017/S. 1584, the "Employment Non-Discrimination Act."

Nationwide is committed to fostering a workplace environment of inclusiveness, respect, and non-discrimination. The Employment Non-Discrimination Act (ENDA) would extend Federal protections against job discrimination to gay, lesbian, bisexual, and transgender Americans. This legislation would simply and fairly extend the fundamental right to be judged on one's own merits, and without placing excessive burdens on employers.

To help create a welcoming work environment for our associates, Nationwide has implemented our own non-discrimination and harassment policies that specifically state that we will not tolerate discrimination or harassment of any associate based on sexual orientation or gender identity. These policies are an important part of our business objectives, including having a culture that embraces diversity, recruiting the best talent, and competing in the global marketplace.

The principles of ENDA are consistent with Nationwide's corporate values of treating all of our associates with fairness and respect, and we believe our policies of valuing diversity also bring financial benefits to the workplace by encouraging full and open participation by all of our associates.

On behalf of Nationwide and our associates, we thank you for your leadership on the Employment Non-Discrimination Act. If we can answer any questions or be of any help on this issue, please do not hesitate to contact us or Meredith Mull of our Washington office at (202) 347–5915.

Sincerely,

STEPHEN KEYES,
Vice President, Associate Relations & Human Resources Policy.

CANDICE BARNHARDT,
Vice President, Diversity and Inclusion.

PARENTS, FAMILIES AND FRIENDS OF
LESBIANS AND GAYS (PFLAG) NATIONAL,
WASHINGTON, DC 20036,
November 5, 2009.

Mr. Chairman and members of the committee: On behalf of Parents, Families and Friends of Lesbians and Gays (PFLAG) National's more than 200,000 members and supporters, I am pleased to submit written testimony expressing our support for the *Employment Non-Discrimination Act of 2009* and urge the Congress to support workplace fairness for all Americans by addressing the issue of widespread employment discrimination. I would like to especially thank Chairman Harkin along with Ranking Member Enzi for convening the hearing, *Employment Non-Discrimination Act: Ensuring Opportunity for All Americans*, before the U.S. Senate Committee on Health, Education, Labor, and Pensions. It is imperative that the committee explore employment discrimination as a critical barrier to workplace fairness, and support the passage of ENDA in an effort to guarantee workplace fairness for all Americans.

PROBLEM STATEMENT AND BACKGROUND INFORMATION

Every year, qualified, hard-working Americans are denied job opportunities, terminated, or experience on-the-job discrimination just because they are lesbian, gay, bisexual or transgender (LGBT). This occurs in both public and private sector workplaces, both large and small. Although all arbitrary discrimination is reprehensible, workplace discrimination is especially egregious because it threatens the well-being and economic survival of American workers and their families. Often, LGBT employ-

ees attempt to protect themselves against discrimination by hiding their sexual orientation or gender identity. This requires carefully self-policing of even the most casual conversations, and banishes almost all acknowledgment of family and friends from the workplace. In addition to being difficult to do, hiding one's sexual orientation or gender identity takes a terrible psychological toll, and often results in co-workers building walls between each other. In addition to the emotional stress inflicted on LGBT employees, the necessary subterfuge and dishonesty works to distance co-workers from one another, harming the workplace environment and overall work products.

The threat of discrimination based on sexual orientation and gender identity has a very real presence in American workplaces. I have met countless parents, families and friends of LGBT people and have heard too many tragic stories of LGBT employees being harassed, fired, not hired, and passed over for advancement without regard to their merit. That treatment would not be permissible if ENDA were law. A 2007 report of more than 50 studies compiled by the Williams Institute indicates that 16 to 68 percent of LGBT people reported experiencing employment discrimination. In a separate survey, 15 to 57 percent of transgender individuals reported experiencing employment discrimination. In addition, many heterosexual coworkers reported witnessing sexual orientation discrimination in the workplace. In another 2007 nationwide survey, 28 percent of LGBT workers reported that they have experienced discrimination or unfair treatment in the workplace; one-in-four said they experience it on a weekly basis.

Studies also show that discrimination robs LGBT employees of the ability to earn incomes equal to those of their heterosexual counterparts. The 2007 Williams Institute report documented that gay men earn 10 to 32 percent less than similarly-qualified heterosexual men. A 2002 study showed that gay men earn from 11 to 27 percent less and lesbians earn 5 to 14 percent less than the national average. And, while no detailed wage and income analyses of transgender employees have been conducted to date, the Williams study documented that transgender people report high rates of unemployment and very low earnings.

These wage studies confirm that LGBT discrimination is not benign. Lower incomes and difficulty in getting and keeping a job create direct and immediate financial disadvantages for LGBT employees, just as they do for other American workers who are lucky enough to be protected by Federal law. The National Commission on Employment Policies calculated that discrimination against LGBT employees translated into a $47 million loss in profits attributable to training expenditures and unemployment benefits alone. Not including outright terminations, it has been proposed that hostile work environments cost companies $1.4 billion in lost output each year because of a reduction in LGBT workers' productivity.

EMPLOYMENT PROTECTIONS SUPPORTING WORKPLACE FAIRNESS FOR ALL

ENDA is a Federal bill that would prohibit discrimination in the workplace based on a person's sexual orientation or gender identity. It would address discrimination in the workplace by making it illegal to fire, refuse to hire, or refuse to promote an employee based solely on that person's sexual orientation or gender identity. ENDA would make it illegal for employers to discriminate on those bases, including, for example, refusing to hire an applicant or firing an employee who is lesbian, gay, bisexual, transgender, or heterosexual.

This legislation closely follows the model of existing Federal civil rights laws, including Title VII of the Civil Rights Act of 1964, and, therefore, would affect private employers with 15 or more employees, as well as Federal, State, and local governments, unions, and employment agencies. The U.S. military and certain religious organizations would be exempt, as would employment issues such as quotas, disparate impact claims and domestic partner benefits. The bill defines sexual orientation as "homosexuality, heterosexuality, or bisexuality" and gender identity 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."

Why Is ENDA Needed?

In 29 States it is legal to discriminate based on sexual orientation, and in 38 States discrimination based on gender identity is legal. The lack of State and local protections exacerbate the widespread discrimination that LGBT workers experience by all types of employers, including private employers, local governments, State governments, and companies large and small. These affected employees have no adequate remedy in Federal law. ENDA would provide critically needed job protections for the entire community—including those most vulnerable to discrimination.

Only 12 States and the District of Columbia currently have laws that specifically ban workplace discrimination based on sexual orientation and gender identity. An-

other nine States have laws that ban discrimination based on sexual orientation, but don't include gender identity. This patchwork of laws is inadequate to prevent and remedy the serious discrimination against LGBT employees that takes place across the country.

ENDA is a comprehensive remedy to address the lack of protection afforded to American LGBT workers. This legislation does not create special rights; rather, it reflects a bedrock American principle that working men and women should be judged solely on the basis of their job performance. Specifically, ENDA:

• **Prohibits Employment Discrimination.** Prohibits public and private sector employers from making decisions about hiring, firing, promotion or compensation based on sexual orientation or gender identity. It applies only to discrimination in employment and only to employers with 15 or more employees.

• **Prohibits Preferential Treatment.** Strictly prohibits preferential treatment based on quotas, and mandates that no claims will be permitted based on statistics.

• **Includes Broad Exemptions.** Exempts members of the Armed Forces and veteran preference organizations, as well as religious organizations or religious schools.

• **Excludes Domestic Partnership Benefits.** Does not require employers to provide benefits to domestic partners.

Who Supports ENDA?

In addition to significant bipartisan support in both the House and Senate, most of America's leading businesses have adopted anti-discrimination policies similar to ENDA. Business leaders understand that a person's sexual orientation or gender identity has nothing to do with their job performance. That is why 423 (85 percent) of Fortune 500 firms have extended protections based on sexual orientation and 176 (more than one-third) extended protections based on gender identity, according to the Human Rights Campaign Foundation's 2009 Corporate Equality Index (CEI). Moreover, 98 percent of the Fortune 50 prohibits discrimination based on sexual orientation, and nearly 50 percent prohibit discrimination based on gender identity.

The Business Coalition for Workplace Fairness, made up of some of the largest corporations in America, has endorsed ENDA. Some of those coalition members include: The Coca-Cola Company, General Motors Corporation, Dow Chemicals, General Mills Inc., J.P. Morgan Chase & Co., Marriott International, Microsoft Corporation, Morgan Stanley, and Nike Inc. More than 30 major U.S. businesses joined this coalition during the first 5 months of 2007.

Federal law has also been outpaced by the actions of State and local leaders. Thirty-seven percent of the country—21 States and the District of Columbia—have laws protecting lesbian, gay and bisexual people from employment discrimination; 12 States and the District of Columbia, along with more than 100 localities, have laws that also protect transgender people. Without ENDA, employers are able to discriminate against a segment of their workforce with impunity, unless those workers are lucky enough to live in one of the few States or localities that make such behavior illegal.

Not only does the Federal Government lag behind corporate America and State and local policies, but it is also lags behind public support for ENDA. A 2007 Gallup poll found that 89 percent of Americans believe that lesbian and gay employees should have equal rights in the workplace, and a 2007 Peter D. Hart Research Associates survey indicated that 58 percent of respondents believe workplace protections should also extend to transgender employees.

PFLAG'S UNIQUE ROLE

PFLAG promotes the health and well-being of lesbian, gay, bisexual and transgender persons, their families and friends through: support, to cope with an adverse society; education, to enlighten an ill-informed public; and advocacy, to end discrimination and to secure equal civil rights. PFLAG provides opportunities for dialogue about sexual orientation and gender identity, and acts to create a society that is healthy and respectful of human diversity.

As part of PFLAG's commitment to the health and well-being of LGBT individuals, PFLAG supports efforts to eliminate barriers to workplace equality, such as those that create employment discrimination. PFLAG parents, families and friends, whose own loved ones endure workplace discrimination, are striving to secure support for LGBT equality in their local communities and workplaces through workplace trainings and panel presentations. Working with corporate and community leaders, volunteers, and diversity groups, PFLAG connects straight allies with the mission and vision of LGBT equality by encouraging them to speak up, educate other allies, and engage in the pursuit of equality. ENDA represents a significant

opportunity for the Congress to participate as allies of all workers in ensuring an end to workplace discrimination.

In the past, Congress has had the vision and courage to enact laws that ban employment discrimination based on other protected classes. We now have a historic opportunity to expand the law to ensure that everyone can enter and succeed in the workplace without regard to sexual orientation or gender identity. We would again like to thank Chairman Harkin and Ranking Member Enzi again for bringing much-needed visibility to the problems of employment discrimination and the terrible consequences that often result when left unchecked. We encourage and welcome the committee to meet with PFLAG members and supporters and staff in our national office who are committed to supporting LGBT Americans who experience employment discrimination. I believe their personal stories will be enormously helpful in your efforts to make a difference in the lives of those who experience employment discrimination.

Again, I thank you for holding this important and historic hearing for the Employment Non-Discrimination Act of 2009. On behalf of all of our members and supporters, I am grateful for your dedicated work in helping foster workplace fairness for all Americans, including efforts to address employment discrimination for LGBT employees. I urge the Senate to take action and pass a fully inclusive ENDA, opposing any motion to weaken this legislation. Should you have any questions related to our support for this legislation, please be sure to contact our Policy Manager, Rhodes Perry at (202) 467–8180 x 221 or *rperry@pflag.org*.

Sincerely,

JODY M. HUCKABY,
Executive Director, PFLAG National.

RAYTHEON COMPANY,
WALTHAM, MA 02451,
November 5, 2009.

Hon. TOM HARKIN, *Chairman,*
Senate Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
Washington, DC 20510.

cc: Hon. MICHAEL ENZI, *Ranking Member*; Hon. JEFF MERKLEY

DEAR MR. CHAIRMAN: Thank you for the opportunity to contribute to the dialogue regarding nondiscrimination policy related to transgendered people. It is important to first understand the context for this specific policy issue within Raytheon Company business. Raytheon's fundamental and deeply held values are that of human respect, diversity and inclusion. The company has strong and purposeful senior leadership support for these issues. While Raytheon has indeed received public recognition for its policies related to GLBT issues, the underlying beliefs and resulting operating practices cover the spectrum of human differences because this is driven by company values and business mandate.

DIVERSITY AND INCLUSION JOURNEY AT RAYTHEON

With over 73,000 employees, Raytheon represents nearly every demographic. Over the last decade the company has continued to grow the business and increase its understanding of its people. During this period, Raytheon has supported a number of employees who have transitioned both their gender identity and sex. These valued and highly contributing employees faced many challenges and we have found that providing consistent support has led to increasingly dedicated employees. We have also seen a genuine spirit of caring from fellow employees resulting in increased company pride. In 2005, senior management approved changes to enhance Raytheon's nondiscrimination policy (namely gender identity and expression) to codify and prescribe in writing what had hereto been practiced for a number of years prior. Raytheon became the first major defense supplier to be awarded a 100 percent score by the Human Rights Campaign (HRC) on their Corporate Equality Index (CEI). That recognition marked another milestone on Raytheon's continuing journey of inclusion and strengthened our resolve to nurture an environment where every employee can contribute to their maximum for our customers.

THE BUSINESS CASE FOR ACTION

The most clear, relevant, and compelling business driver for Raytheon's diversity and inclusion efforts, including GLBT issues, relates to the impeding crisis of dimin-

ished talent availability, especially in the Science, Technology, Engineering, and Math (STEM) professions. Raytheon's business is highly technical and requires a steady, significant supply of talented engineers to both sustain existing business and to exploit the many available growth opportunities. Hence, it is a competitive imperative that Raytheon have unlimited access to every talent pool in order to survive as an organization. Our business strategy requires us to retain our talented workforce and enjoy disproportional success in attracting new talent. Policies and practices that support the life realities of our people are not only the "right thing to do," but create an environment that allows people to thrive. Ultimately, Raytheon's inclusive practices result in employees that passionately work to ensure our customers' success and support our country's war fighters.

Again, Raytheon's policy of inclusion for transgendered employees is but a part of a larger picture. For example, Raytheon has recently been named one of the "Top 25 Best Places to Start a Career" by Business Week magazine. In 2007, Raytheon was awarded the Secretary of Labor award for our compliance to fair and equitable treatment practices. These and a number of other unsolicited accolades strengthen Raytheon's brand image and, in conjunction with our innovative technology and quality products and services, give our customers and other stakeholders confidence and reassurance in our enterprise. This is indeed a key element of Raytheon's sustainability.

PUTTING POLICY INTO PRACTICE

With senior management direction in place, the challenge became operationalizing the policy direction and establishing consistent practices across the large and complex Raytheon organization. To facilitate this process we provided a set of broad guidelines and frequently asked questions and answers to our managers and supervisors. We leveraged the actual experiences of a number of our HR managers and diversity leaders who had previously handled transitioning employees to provide coaching to managers and employees facing these issues. Again, Raytheon views this process as a journey of continuous learning and improvement. We encourage our people to deal with each situation based on the facts and circumstances at hand using the guidelines as a starting point. Equally important, we encourage open dialogue with the departments of employees who are in transition.

I trust this information is helpful to your deliberations.

Sincerely,

HAYWARD L. BELL,
Chief Diversity Officer.

November 5, 2009.

Re: Religious Organizations Letter in Support of the Employment Non-Discrimination Act (S. 1584)

DEAR SENATOR: On behalf of our organizations, representing a diverse group of faith traditions and religious beliefs, we urge you to support S. 1584, the Employment Non-Discrimination Act (ENDA). As a nation, we cannot tolerate arbitrary discrimination against millions of Americans just because of who they are. Lesbian, gay, bisexual and transgender (LGBT) people should be able to earn a living, provide for their families and contribute to our society without fear. ENDA is a measured, common sense solution that will ensure workers are judged on their merits, not sexual orientation or gender identity. We call on you to pass this important legislation without delay.

Many of our sacred texts speak to the importance and sacred nature of work—an opportunity to be co-creators with God—and demand in the strongest possible terms the protection of all workers as a matter of justice. Our faith leaders and congregations grapple with the difficulties of lost jobs every day, particularly in these difficult economic times. It is indefensible that, while sharing every American's concerns about the health of our economy, LGBT workers must also fear job security because of prejudice.

At the same time, as religious denominations and faith groups, we deeply value our guarantee to the freedoms of faith and conscience under the First Amendment. ENDA broadly exempts from its scope any religious organization, thereby ensuring that religious institutions will not be compelled to violate the religious precepts on which they are founded, whether or not we may agree with those precepts. In so doing, ENDA respects the protections for religious institutions afforded by the First Amendment and Title VII of the Civil Rights Act of 1964 while ensuring that les-

bian, gay, bisexual and transgender people are protected from baseless discrimination in the workplace.

We urge the Senate to pass the Employment Non-Discrimination Act (S. 1584) and ensure that lesbian, gay, bisexual and transgender Americans have an equal opportunity to earn a living and provide for themselves and their families.

Sincerely,

African-American Ministers in Action, Alliance of Baptists, American Friends Service Committee, American Jewish Committee, Anti-Defamation League, B'nai B'rith International, Catholics in Alliance for the Common Good, Clergy and Laity United for Economic Justice (CLUE-LA), DignityUSA, Disciples Justice Action Network (Disciples of Christ), Friends Committee on National Legislation, Fortunate Families, Interfaith Alliance, Islamic Shura Council of Southern California, Jewish Council for Public Affairs, Jewish Reconstructionist Federation, Jewish Women International, Metropolitan Community Churches, Muslim Advocates, Muslims for Progressive Values, National Council of Jewish Women, National Council of the Churches of Christ in the U.S.A, Presbyterian Church (U.S.A.) Washington Office, Sikh Council on Religion and Education, SCORE, Sisters of Mercy of the Americas, Institute Justice Team, The Central Conference of American Rabbis, The Episcopal Church, The Rabbinical Assembly, The United Synagogue of Conservative Judaism, Union for Reform Judaism, Unitarian Universalist Association, United Church of Christ Coalition for Lesbian, Gay, Bisexual and Transgender Concerns, United Church of Christ, Justice and Witness Ministries, United Church of Christ, Wider Church Ministries, United Methodist Church, General Board of Church and Society, Women of Reform Judaism.

UNITARIAN UNIVERSALIST ASSOCIATION OF CONGREGATIONS,
Washington, DC 20005.

DEAR SENATOR: On behalf of the 1,050 member congregations in the Unitarian Universalist Association, I urge you to support S. 1584, the Employment Non-Discrimination Act (ENDA) of 2009. ENDA is a necessary and important step towards protecting people from unfair job discrimination and will, if passed, make a profound difference in the lives of many individuals and families. No one should have to endure discrimination in the workplace because of their real or perceived sexual orientation or gender identity.

In June 2007, our General Assembly—the highest policymaking body in our Association—issued a statement calling us to support legislation that prohibits employment discrimination based on sexual orientation or gender identity. Our history of ministry to and with bisexual, gay, lesbian and transgender persons has brought many blessings to our community, but it has also brought a painful awareness of how the unfair loss of jobs and benefits hurts individuals, families and communities. Respect for the inherent worth and dignity of every person is a core tenet of our faith, and we believe, as do most Americans, that all people have the basic human right to perform their chosen work and to be evaluated based on what they do, not based on who they are or who they love.

Over 350 organizations from the civil rights, religious, and most importantly the bisexual, gay, lesbian, and transgender communities support S. 1584. An overwhelming majority of the most successful American businesses also support ENDA by recognizing that even where anti-discrimination policies exist, a strong Federal standard that protects bisexual, gay, lesbian and transgender workers is absolutely critical. Workplace security is particularly important for people who do not conform to gender norms due to the widespread levels of under and unemployment stemming from prejudice in hiring and retaining transgender workers.

Please support S. 1584, the gender-identity inclusive Employment Non-Discrimination Act and show your constituents that you stand for fairness and equality for all.

Thank you.

In Faith,

ROB C. KEITHAN,
Director.

UNIVERSITY OF CALIFORNIA, LOS ANGELES (UCLA),
LOS ANGELES, CA 90095–1476,
November 5, 2009.

Hon. TOM HARKIN, *Chairman,*
Committee on Health, Education, Labor, & Pensions,
U.S. Senate.

Hon. MIKE ENZI, *Ranking Member,*
Committee on Health, Education, Labor, & Pensions,
U.S. Senate.

DEAR CHAIRMAN HARKIN AND RANKING MEMBER ENZI: I write to you as a longtime member of the faculty at both the UCLA Graduate School of Education & Information Studies and the UCLA School of Law, specializing primarily in Education Law and Policy. I am speaking only on my own behalf, and nothing that I say should be viewed as representing the university's position on these issues.

Throughout my years at UCLA, I have maintained ongoing contact with the K–12 public schools. I served as Director of Teacher Education (1993–1995), Special Counsel for the California Department of Education (1988–1996), and the on-site Federal court monitor for the San Francisco public schools (1997–2005). I also train future principals in UCLA's Principal Leadership Institute (since 2000).

On the academic front, I am the author of the West casebook *Education and the Law*, Second Edition (2009), and *Beyond Our Control? Confronting the Limits of Our Legal System in the Age of Cyberspace*, MIT Press (2001). I developed and taught the first and only course in UCLA's education school devoted entirely to lesbian, gay, bisexual, and transgender (LGBT) issues, and I have recently completed *The Right to Be Out in the K–12 Public Schools* [hereinafter *The Right to Be Out*], a book focusing entirely on LGBT-related legal and public policy issues in education. It is scheduled to be published by the University of Minnesota Press in 2010.

A WIDESPREAD PATTERN OF UNCONSTITUTIONAL EMPLOYMENT DISCRIMINATION

Although great progress is evident across a wide variety of fronts, LGBT persons continue to face complex circumstances and significant impediments, particularly in the legal and public policy arenas. Nowhere is the situation more complex and more challenging than in the K–12 public schools.

Indeed, disclosure of a person's sexual orientation or gender identity in many K–12 institutions can still lead to the loss of employment opportunities and the discrediting of one's professional and personal standing in the same way that it did for most people in the 1950s and 1960s. All too often, LGBT educators today are confronted with the message that they had better remain as closeted as possible. If they do not heed this message, they can be made to feel so uncomfortable by administrators, parents, or other members of the school community that they choose to leave K–12 education.

Such mistreatment of employees by State and local governments clearly violates the rights of LGBT educators under the U.S. Constitution. As discussed further below, and as documented in the attached excerpt from my forthcoming book, there continues to be a widespread pattern of unconstitutional employment discrimination in this context.

For example, a principled reading of current legal doctrine reveals that—in our pluralistic society—all persons have a right to be open regarding fundamental aspects of identity, personhood, and group affiliation. Contextualizing this right to be "out" and reviewing its development in the public sector today, it is evident that it reflects a classic combination of First Amendment and Fourteenth Amendment principles. It is both a right to express an identity and a right to be treated equally as a result of expressing this identity. Stuart Biegel, "Conceptualizing the Parameters of the Right to Be Out," *Education and the Law, Second Edition*, American Casebook Series (St. Paul, Minn.: West, 2009), 169–186.

Yet in research conducted for *The Right to Be Out* over the past 7 years, I have found that K–12 educators still face "a combination of subtle pressure and express admonition that together limit their ability to be open about who they are. And too often such limitations continue to be reflected in job placement and promotion decisions that favor educators whose sexual orientations and gender identities appear to conform to mainstream norms. Public school educators may have the right to be out under the law, but in day-to-day educational practice—and particularly in certain communities—that right may be severely curtailed."

Since there is overwhelming consensus today in both the research literature and in reported judicial decisions that sexual orientation and gender identity are not related in any way to job performance in K–12 schools, adverse employment action

based on actual or perceived LGBT status is nothing less than *irrational* under Fourteenth Amendment jurisprudence.

In addition, it must be noted that there is much more employment discrimination against LGBT education employees than the reported cases and administrative complaints would indicate, because so many still fear the consequences of disclosing their identities, seek to cover their identities, and/or have faced administrative agencies and courts that have been hostile to their claims.

MULTIPLE AND INTERRELATED LEVELS OF DISCRIMINATION OVER TIME

Discrimination against LGBT education employees continues to occur at every level of government, local, State, and Federal. It is linked inextricably to a history of purges of actual and perceived LGBT public employees, a history of State laws specifically prohibiting LGBT persons from teaching, State licensing requirements that included morality fitness tests that were interpreted to exclude LGBT employees, State laws criminalizing consensual same-sex relations, and judicial decisions contemptuous of LGBT persons and cruelly dismissive of their core human characteristics.

The public record over the past 50–75 years is filled with examples of local discriminatory treatment of gay and gender non-conforming teachers that is grounded not only in a history of State discrimination but in individual State laws themselves. See generally E. Edmund Reutter, Jr., *The Law of Public Education, Fourth Edition* (New York: Foundation Press, 1994) at Page 657.

These realities are documented in three widely reported and highly publicized decisions focusing on teacher licensing at the State level: the *Acanfora* case out of Maryland, the *Morrison* case out of California, and the *National Gay Task Force* case out of Oklahoma.

• *Acanfora* v. *Bd. of Educ. of Montgomery County*, 491 F. 2d 498 (1974). In *Acanfora*, State law impacted the plaintiff teacher's career on three interrelated levels, his ability to complete his education in the teacher training program after it was learned that he was the treasurer of a gay student organization at Penn State, his ability to get a license to teach because of his openness regarding his sexual orientation, and his ability to retain his job once Montgomery County school officials learned of his gay identity.

Acanfora was removed from his classroom and assigned to an administrative job after the District discovered his former membership in the Penn State student organization. He sued for re-instatement, but in the subsequent trial, the judge accepted the school board's argument that Acanfora was terminated not because of his homosexuality but because he had not included his membership in the gay organization on his employment application. Moreover, while the Court found the school board's policy of not knowingly employing LGBTs objectionable, it determined that the publicity about Acanfora's homosexuality, including his vigorous self-defense, was "likely to produce imminent effects deleterious to the educational process" and thus justified the school board's dismissal. The Fourth Circuit Court of Appeals affirmed the lower court decision on behalf of the District.

• *Morrison* v. *State Bd. of Educ.*, 461 P.2d 375 (Cal. 1969). As discussed in more detail below in the attached chapter, Marc Morrison was a fully credentialed educator in southern California with an unblemished record. During one week in early 1963, he and a fellow male colleague "engaged in a limited, non-criminal physical relationship." After this fact was discovered, Morrison was apparently pressured to resign from the District, and the State Board of Education followed by revoking his teaching credential, a revocation that Morrison chose to contest openly. He lost in the lower court, but finally prevailed in the California Supreme Court, 5 years after his life had been completely torn apart by the loss of his job and the stigma accompanying the resulting series of events.

Morrison never claimed to be gay, never asserted any rights under either the 1st or Fourteenth Amendments, and never argued that he was being discriminated against in any way. His entire argument, which ultimately carried the day, was that what he had done did not warrant revocation of his teaching credential because it had nothing to do with his fitness to teach.

• *Nat'l Gay Task Force* v. *Bd. of Educ.*, 729 F.2d 1270 (10th Cir. 1984). Immediately after Proposition 6—the 1978 Briggs Initiative documented in the recent film *Milk*—failed to pass in California. Oklahoma State Senator Mary Helm introduced a bill with similar wording that passed overwhelmingly. The Oklahoma law provided that K–12 public school teachers could be fired or suspended for "public homosexual activity," broadly defined as including "advocating . . . homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employers." The law remained on the books for

years, disrupting the lives of LGBT educators in dramatic and draconian ways. In 1982, in fact, it was upheld in its entirety by the lower court in the Western District of Oklahoma.

Finally, in 1984, the Tenth Circuit Court of Appeals struck down portions of the law relating to "advocacy" as overbroad and violative of the First Amendment. But by that time, for many people in a variety of troubling circumstances, lives had been transformed, outstanding teachers had left the State, and things would never be the same.

It should be noted that even as the Oklahoma case was reaching the Tenth Circuit in 1983, the West Virginia Attorney General issued an opinion for his State holding that gay and lesbian teachers could be fired by their districts under a State law that authorized school officials to fire teachers for "immorality." 60 W. Va. Op. Atty. Gen. 46, 1983 WL 180826 (W.Va.A.G.), Office of the Attorney General State of West Virginia, *1, February 24, 1983. He stated that homosexuality was immoral in West Virginia even though the State had decriminalized consensual same-sex relations in 1976, and while he wrote that homosexuality must be shown to affect the person's fitness to teach, he concluded that this could be shown if the teacher was "publicly known to be homosexual". Ibid.

HOSTILITY OF THE COURTS

The pervasive level of discrimination and indeed contempt documented in the previous pages is reflected not only in the statutory schemes of the past five decades and in the attendant statements by public officials but also in the writings of judges at every level of the judicial system. See, e.g., Jack M. Balkin, "The Constitution of Status," 106 *Yale Law Journal* 2313, 2316–2320 (1997) (seeking to provide both an historical and a cultural context for the various opinions in *Romer* v. *Evans*, 517 U.S. 620 (1996)). See also Robert G. Bagnall, "Burdens on Gay Litigants and Bias in the Court System: Homosexual Panic, Child Custody, and Anonymous Parties," 19 *Harvard Civil Rights—Civil Liberties Law Review* 497, 515–46 (1984) (focusing primarily on State court rulings in its analysis of the challenges faced by gay and lesbian parents who wished to maintain custody of their children during the decades following World War II); Barbara Ponse, *Identities in the Lesbian World: The Social Construction of Self* (Westport, Conn.: Greenwood Press, 1978) (analyzing the extent to which a lesbian identity during this era could be seen as shaped by the widely prevalent stigma that so many faced).

An opinion written by former Chief Justice Warren Burger, while serving on the U.S. Court of Appeals for the D.C. Circuit in 1965, exemplifies the legal and public policy terrain of the era.

Rejecting the argument of a gay plaintiff that his sexual orientation should not disqualify him for employment, Burger dismissed "homosexuals" as "sex deviates" who suffer from infirmities analogous to those of chronic alcoholics and former felons. *Scott* v. *Macy*, 349 F.2d 182, 190 (D.C. Cir. 1965) (Burger, J., dissenting).

See also Laura S. Fitzgerald, "Towards A Modern Art of Law," 96 *Yale Law Journal* 2051 (1987), written in the aftermath of *Bowers* v. *Hardwick*, 478 U.S. 1039, the 1986 U.S. Supreme Court decision that upheld the constitutionality of a Georgia statute criminalizing consensual sodomy between adults. In the article, Fitzgerald documents the legal terrain faced by LGBT persons in the post-World War II era, and highlights decisions that exemplified the State of the law during that 40-year period.

In addition to the decisions referenced above, examples of consistent and ongoing hostility toward LGBT litigants—and particularly toward gay and gender nonconforming teachers at the State court level—include the following cases out of Washington and New Jersey.

• *Gaylord* v. *Tacoma School Dist. No. 10*, 88 Wash.2d 286, 559 P.2d 1340 (en banc) (1977). Among the State court opinions cited by Professor Fitzgerald was the Washington State Supreme Court decision in *Gaylord*, which upheld the dismissal of a veteran public school teacher from his position when his openly gay identity became known in 1972. 96 *Yale Law Journal* at 2055, n. 19. The lower court had concluded that despite an impeccable 12-year teaching record, James Gaylord was "properly discharged for immorality because he was homosexual, and as a known homosexual, his ability and fitness to teach was impaired with resulting injury to the school." The State supreme court, in a lengthy discussion of immorality, found that homosexuality was indeed immoral, relying in part on a definition from the 1967 edition of the New Catholic Encyclopedia. The Court concluded that for this reason alone, public knowledge of his gay identity impaired his ability to teach and thus he could indeed be discharged.

Over 30 years later, this case is still on the books, and although it may come to be viewed as having been repealed by the State's 2006 law prohibiting discrimination on the basis of LGBT status, it has not been expressly overruled. Indeed, it is still included in a major textbook written by legal experts that has been used by education schools and future school site administrators across the country. See Kern Alexander & M. David Alexander, *American Public School Law*, Sixth Edition (2005) at Pages 703–706 (identifying the *Gaylord* decision as an example of the assertion that "[the] homosexuality of [a] teacher is immorality justifying dismissal").

• *Gish* v. *Bd. Of Educ.*, 145 N.J. Super. 96 (1976). A similarly notorious case from the same era involved the horrific treatment of New Jersey high school English teacher John Gish, who was ordered by the school board to undergo a psychiatric examination when they learned about his activism on behalf of gay and lesbian communities. Gish had played a key role in organizing the Gay Teachers Caucus of the National Education Association (NEA) in 1972, and he was also active in the Gay Activists Alliance, staging public events to increase awareness of discrimination.

When Gish refused, the board removed him from his teaching duties and prohibited him from having any contact with students or graduates. In 1976, the Superior Court of New Jersey upheld the school district's order that Gish undergo a psychiatric examination, ruling that the teacher's "actions in support of 'gay' rights displayed evidence of deviation from normal mental health."

RECENT DEVELOPMENTS AND PROGNOSIS

Over the past 15–20 years, LGBT persons have won major victories both in the courtroom and in State legislatures. Yet it is still the case that employment discrimination directed against them is widely prevalent.

With regard to litigation, it is important to recognize that while the courtroom victories have increased, not every LGBT educator has been victorious in this context. See, e.g., *Schroeder* v. *Hamilton School District*, 282 F.3d 946 (7th Cir. 2002) (a devastating defeat for a veteran Ohio teacher with an impeccable record who was badly mistreated by students, parents, and school officials after he came out as gay); *Milligan-Hitt* v. *Board of Trustees of Sheridan County School Dist. No. 2*, 523 F.3d 1219 (10th Cir. 2008) (concluding that a rural Wyoming school district's demotion of two principals who were living together as a lesbian couple was not discriminatory under the law that existed at the time, even in light of the acknowledged anti-gay animus presented into evidence). And it cannot be emphasized strongly enough that even when plaintiffs do prevail in the courtroom, the process is inevitably accompanied by massive disruptions in people's lives, loss of jobs, loss of stature in the community, the development of physical and/or psychological maladies, and changes in circumstance that cannot simply or easily be rectified by the legal victories.

With regard to legislation, it certainly must be acknowledged that a growing number of States and municipalities have begun the process of expressly prohibiting LGBT-related employment discrimination. As of July 2009, 12 States plus the District of Columbia explicitly prohibit workplace discrimination on the basis of both sexual orientation and gender identity. They include California (1992, 2003), Colorado (2007), District of Columbia (1977, 2006), Illinois (2006), Iowa (2007), Maine (2005), Minnesota (1993), New Jersey (1992, 2007), New Mexico (2003), Oregon (Jan. 2008), Rhode Island (1995, 2001), Vermont (1991, 2007), and Washington (2006). In addition, 9 other States prohibit workplace discrimination on the basis of sexual orientation alone: Connecticut (1991), Delaware (2009), Hawaii (1991), Maryland (2001), Massachusetts (1989), Nevada (1999), New Hampshire (1998), New York (2003), and Wisconsin (1982).

These anti-discrimination laws have made a significant difference, but after all this time, they have been introduced and passed in less than half the States. And even in States that have them, precise prohibitions are inconsistent, cultural norms are difficult to change, and local enforcement of the laws may be lax. Discrimination may be subtle and difficult to pinpoint, such as when people are passed over for promotion but never told why. Also, the hesitancy of many individuals to come out because of the persistence of discriminatory attitudes and practices enables State and local government officials to continue the discrimination because no one may ever complain.

In sum, for all the aforementioned reasons, a strong and overarching Federal Employment Non-Discrimination Act—with powerful and effective enforcement mechanisms—is vitally necessary to make it clear that such discrimination is abhorrent and is no longer acceptable in this country.

Sincerely,

STUART BIEGEL.

ATTACHMENT

CHAPTER 3.—ONGOING COMPLEXITIES FACING LGBT EDUCATORS: RIGHTS ON PAPER, BUT PERSISTENT CHALLENGES IN THE LEGAL AND PUBLIC POLICY ARENAS

For LGBT teachers and school site administrators, the realities are perhaps even more complex than those that exist for gay and gender non-conforming youth. The history of public education in this country is filled with examples of K–12 educators who were excluded from employment initially or in fact lost their jobs when it was discovered that they were lesbian, gay, bisexual, and/or transgender.[1] And as recently as 1978, California Proposition 6 (The Briggs Initiative) sought to completely bar "homosexuals" from teaching in the State's public schools.[2]

Indeed, the Briggs Initiative campaign was not that far removed in time from the post-World War II era of pervasive government-sanctioned harassment, vilification, and brutalization of gays. In his extensive documentation of the cultural and historical forces that accompanied the anti-gay activity on the part of law enforcement officials, David Sklansky explained that related policies and practices "lasted well into the 1960s:"

> Along with the Red Scare, the Lavender Scare quickly spread outward from investigations of government officials to embrace many other sectors of American life. Private businesses, particularly those hoping to sell goods or services to the government, began widespread screening and surveillance of their employees to ferret out homosexuals. School teachers, local government employees, and university professors came under scrutiny for their sexual practices and inclinations.[3]

Sklansky emphasized that "[g]ay men and lesbians remained objects of fear, ridicule, and contempt" throughout the decade that has come to be associated with an entire panoply of "rights" movements. He told of a 1966 Time Magazine essay on The Homosexual in America, for example, in which the editors concluded that homosexuality was "a pernicious sickness" and "a pathetic little second-rate substitute for reality" that deserved "no encouragement, no glamorization, no rationalization, [and] no fake status as minority martyrdom." The essay, Sklansky wrote, "warned that mainstream values were under 'vengeful, derisive' attack from '[h]omosexual ethics and esthetics'; in some areas of the arts, 'deviates' were 'so widespread' they sometimes appeared 'to be running a kind of closed shop.'"[4]

In 1978, only 12 years after the Time Magazine essay, many Americans still shared a similar mind set, and the Briggs Initiative was seen by large numbers of registered voters as a logical response to the emergence of the gay rights movement and the attendant coming out of gays and lesbians across the country.

Supreme Court Justice Antonin Scalia, dissenting in *Lawrence* v. *Texas* (2003), aligned himself unapologetically with the thinking behind the 1978 Initiative when he insisted that "[m]any Americans do not want persons who openly engage in homosexual conduct as partners in their business, as scoutmasters for their children, as teachers in their children's schools . . ." Two other members of the Court at the time, Chief Justice Rehnquist and Justice Thomas, joined in Scalia's opinion. And while the L.A. Times reported in 2004 that "[a]lmost 7 in 10 Americans know someone who is gay or lesbian and say they would not be troubled if their elementary school-age child had a homosexual teacher," and while 61 percent in the same poll said that "a homosexual would make a good role model for a child,"[5] the Pew Research Center found in 2007 that 28 percent of Americans still agree with the goals of the Briggs Initiative and believe that school boards "should be able to fire" teachers who are known to be gay.[6]

The complex and highly nuanced nature of this area is reflected in additional noteworthy findings from the Pew Survey. For example, in the 20 years that Pew had been tracking this issue, the percentages of people who would support firing gay and lesbian teachers for no reason other than their sexual orientation dropped from 51 percent in 1987 to under 30 percent for the first time in 2007. And while such firing gains support from 38 percent of those who do not have "close friends or family members who are gay," the support level drops to 15 percent for those who do have such a level of contact with LGBTs. In addition, geography is clearly a factor in this context. Pew found that "[p]eople living in the south (37 percent) are less likely to know gay people well than are people living in the Northeast or West, and people living in rural areas (34 percent) are less likely to say so than those in urban or suburban areas."[7]

In sum, recent poll data and national survey results continue to support the conclusion that there has been a significant positive change in the attitudes of Americans toward LGBT educators. However, it remains the case that substantial percentages of people—particularly in certain regions and in rural areas—continue to

oppose the idea that LGBT educators would even be hired to teach their children. After all the progress that has been made, the number of people who oppose allowing gays and lesbians to teach even at the college and university level is as high as 20–25 percent in certain parts of the country.[8] And despite the positive correlation between knowing gay people well and support for them in this context, a full 15 percent of those "who have a close friend or family member who is gay" would still support firing them from teaching jobs for no reason other than their sexual orientation. With regard to transgender teachers, all evidence points toward the fact that opposition to their being brought in to teach at any level is even higher yet.

In light of these realities, K–12 educators are still confronted with a combination of subtle pressure and express admonition that together limit their ability to be open about who they are. And too often such limitations continue to be reflected in job placement and promotion decisions that favor educators whose sexual orientations and gender identities appear to conform to mainstream norms. Public school educators may have the right to be out under the law, but in day-to-day educational practice—and particularly in certain communities—that right may be severely curtailed.[9]

A key distinction between K–12 educators and K–12 students in this regard is the difference in their respective roles. Teachers and school site administrators are expected to build academic skills and impart knowledge, subject to relevant State standards and curricular frameworks. They may be delegated with the responsibility of imparting certain values that are contained in statutory or policy guidelines, but beyond these guidelines they are generally prohibited from seeking to persuade students to adopt particular political, religious, or social points of view. Yet while public school educators cannot feel as free as their students might feel to speak about their own lives, identities, and personal perspectives, neither must they feel that they have to keep their identities to themselves. Within the parameters of their designated roles, they have the same right to be out regarding fundamental aspects of identity, personhood, and group affiliation as their straight counterparts.

This openness, however, is not without its limits. Most courts recognize that teachers are not automatons and have a right to be open about who they are, but at the same time it is generally agreed that under First Amendment principles K–12 teachers should not be indoctrinating their students. While the courts have not provided a precise test for *indoctrination*, the First Circuit Court of Appeals recently set forth the contours of relevant guidelines in this area. The Court concluded, under applicable precedent, that if it is assumed "that there is a continuum along which an intent to influence could become an attempt to indoctrinate," factors to consider would include whether the alleged indoctrination was "systemic," whether students were "required . . . to agree with or affirm" a particular idea, and whether they were "subject to a constant stream" of similar content.[10]

The chapter begins by examining the range of First Amendment guidelines that govern freedom of expression for public employees in an education setting, documenting the types of settings and interactions that may present themselves and how rights may vary depending on such circumstances. It then turns to the Fourteenth Amendment, which provides the central foundation for prohibitions against employment discrimination in the public sector. After exploring the results of noteworthy litigation in this context, the chapter analyzes the impact of other legal developments that have further bolstered the right to be out for K–12 public school educators. Finally, the chapter turns to a case study of LGBT educator mistreatment that demonstrates how much work still needs to be done before day-to-day realities unfold in a manner consistent with these legal developments.

FIRST AMENDMENT RIGHTS OF EDUCATORS

As the U.S. Supreme Court explains in the *Tinker* decision, neither students nor teachers shed their constitutional rights to freedom of expression at the schoolhouse gate. First Amendment rights are explicitly made available to public school teachers and school site administrators, subject to specific limitations that arise out of the "special characteristics of the school environment."[11]

Basic Rules From Case Decisions: Pickering, Connick, and Ceballos

In the 1968 case of *Pickering* v. *Board of Education of Township High School District No. 205*, the U.S. Supreme Court directly addressed the free speech rights of public school educators. Teacher Marvin Pickering brought a lawsuit challenging the school board's decision to dismiss him for sending a letter to a local newspaper expressing concern over a proposed tax increase and criticizing the way in which the board and the superintendent had addressed budget issues in the past. In its defense, the school board contended that the dismissal was justified because Pickering's letter was "sufficiently critical in tone" to result in interference with "or-

derly school administration," and because some of the statements in the letter were actually false.[12]

The Court ruled in favor of the teacher, finding that the statements were "in no way directed towards any person with whom [Pickering] would normally be in contact in the course of his daily work as a teacher," and that there were therefore no issues regarding either the maintaining of discipline or interfering with "harmony among coworkers." As to the apparent falsehood of some of the remarks, the Court found that "absent proof of false statements knowingly or recklessly made," a teacher may not be dismissed for exercising his "right to speak on issues of public importance." Indeed, the Court concluded that on matters of "legitimate public concern":

> [F]ree and open debate is vital to informed decisionmaking by the electorate. . . . [I]t is essential that [teachers] be able to speak out freely . . . without fear of retaliatory dismissal.[13]

Thirteen years later, in 1983, the Supreme Court revisited its decision in *Pickering* when it considered the scope of a public employee's free speech rights outside of an education setting. In the case, *Connick* v. *Myers*, an assistant district attorney in New Orleans was terminated from her position after distributing a questionnaire soliciting the views of her fellow staff members on such matters as transfer policy, office morale, and level of confidence in supervisors. Ruling for the employer, the Court found this situation to be different from that in *Pickering* because the distribution of the questionnaire was the equivalent of speaking "not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest."[14]

The Court examined the First Amendment rights of public employees again in the 2006 case of *Garcetti* v. *Ceballos*, ruling by a vote of 5–4 against a deputy district attorney who claimed he had been reassigned and denied promotion as a result of internal memos he had written to his supervisor.[15] In the memos, he complained that a search warrant, central to a case he was prosecuting, contained numerous inaccuracies and reflected shoddy work by law enforcement officials. The Court looked primarily to *Pickering* and *Connick*, and distinguished the fact pattern from that in *Pickering* by noting that in this case "the controlling factor . . . is that his expressions were made pursuant to his duties as a calendar attorney" and concluding that in such a context he did not have First Amendment protection. "We hold," Justice Kennedy wrote, "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[16]

While the *Ceballos* decision was controversial and the subject of much criticism, basic principles derived from *Pickering* and *Connick* appear to have been affirmed. And to the extent that this decision can be construed as applying to K–12 teachers who "make statements pursuant to their official duties," it must be noted that teachers have always been faced with the fact that their freedom of expression rights are most limited when they are speaking in a formal classroom setting. In addition, the *Ceballos* opinion explicitly identifies a distinction between teacher speech and that of a Deputy District Attorney writing an internal memo, expressly mentioning teaching as an area where "some expressions related to [the] job" are in fact granted First Amendment protection.[17]

Under *Pickering*, *Connick*, and *Ceballos*, then, educators appear to have the greatest freedom of expression when they seek to communicate their views outside of the formal "work" environment and on matters of public concern. Such expression would likely merit the highest level of First Amendment protection. But the case decisions should not be construed as limiting K–12 educators' free speech rights to such situations alone. *Pickering*, read together with the aforementioned language in *Tinker*, stands for the unequivocal recognition of broad First Amendment rights for educators.[18]

Discerning Rules for Different Types of K–12 Educator Expression

While Federal courts in different parts of the country have not always applied the *Pickering* and *Connick* rulings in a consistent fashion, a consensus appears to have emerged in most places regarding allowable restrictions on the "speech" of K–12 educators.[19]

In a formal classroom setting, the fundamental guiding principle is that educators are expected to keep to the curriculum and confine their comments to the facilitation of goals and objectives linked to State-adopted content standards and reflected in approved instructional materials. However, most courts have recognized that educators cannot realistically be expected to keep to a script in the classroom.[20] They must necessarily have the freedom to adjust their presentations according to the needs of their students, the circumstances of the class environment, and how a

given lesson might be unfolding. In particular, teacher comments during learning activities and class discussions are inevitably shaped by student comments. The best teachers at the K–12 level rarely follow a lesson plan so rigid that they will be saying the same thing no matter what the students say or no matter how the activity is unfolding.

Outside of a formal classroom setting, of course, circumstances can be very different. While some courts, even during this era, appear to convey the impression that teacher comments to students must be limited to curriculum matters or to basic supervisory instruction, most have recognized that limitations of this type are neither realistic nor practical. Nor would such a restrictive approach reflect what actually transpires in schools and communities on a day-to-day level. Even apart from the counseling role that teachers are expected to play in most jurisdictions, teachers and students do chat and do communicate about things other than the curriculum as a matter of course, on the yard, in the hallways, on field trips, during extracurricular activities, and inevitably outside of the education setting if they run into each other in the community.[21]

In sum, educators are expected to act professionally when interacting with their students. Viewed traditionally as important role models, they are indeed often held to a higher standard. In a formal education setting, they are expected to keep to the education process. They may not engage in the political, religious, or social indoctrination of their students, and they may not act counter to official school district policies. But outside of the classroom—within the parameters of the above guidelines—they need not feel that they must severely curtail lawful expression . . . so long as they do not engage in activities that would disrupt their work environment or interfere with the collaborative nature of faculty and staff interaction.

'Out' Speech Scenarios in a Public School Setting

There is no one way to be out, and there are an infinite number of ways for persons to identify as LGBT. In a K–12 setting, "out" speech can vary tremendously. Students can learn of their teacher's identity, for example, through a letter to the editor in a local newspaper where the teacher identifies as gay while commenting on an LGBT-related issue. They may learn that a teacher is LGBT if the teacher attends a school function with a partner of the same or similar gender. They may find out that a teacher is gay or transgender through a friend or family member who may already know. In these types of situations, the educator's First Amendment rights are very strong. Being gay is legal in all 50 States, and—absent additional facts—none of the rules discussed above are violated under such circumstances. All persons are entitled to be open about fundamental aspects of identity and personhood in their communities.

On school grounds, interaction tends to be more structured, and gay or gender non-conforming educators who are out to their students typically communicate their identity during one of three relatively predictable scenarios. They may do so while conversing with students informally regarding such casual topics as pop culture, fashion, sports, family, and related matters; while engaging in non-curricular related communication—often before or after class—regarding current issues and events; or while teaching a formal lesson or conducting a classroom activity. Assuming that the self-identification is communicated in a professional manner that parallels the way that any straight colleague might reveal an ethnic or religious identity, allude to her marital status, or reference family-related circumstances and events, the only scenario where an LGBT person should arguably exercise additional discretion is the formal classroom setting.[22]

Even apart from any of the legal constraints referenced above, it is generally agreed that as a matter of best practices, K–12 teachers should strive to keep to the curriculum and avoid references to their own lives. However, given the fluid and often-unpredictable nature of classroom interaction, there may be instances even in such formal settings that either warrant reference to a teacher's individual circumstances or may naturally include such references without violating any standards of professionalism.

For example, there are school districts (and private schools) across the country that mandate LGBT-related discussions and activities—sometimes at a particular time of year and generally linked to the teaching of tolerance and the celebration of differences. The Los Angeles Unified School District has done this by officially recognizing June as "Gay and Lesbian Awareness Month." As reported in a 2000 Ninth Circuit opinion, an official District memo designated the month as "a time to focus on gay and lesbian issues," and noted that the Board of Education's resolution setting this in motion was passed to support "Educating for Diversity."[23] The memo also informed schools that "posters and materials in support of Gay and Lesbian Awareness Month" would be provided to them, and that these "were designed

to aid in "the elimination of hate and the creation of a safe school environment for all students."[24] In circumstances such as these, LGBT-related lessons consistent with District policy and delivered pursuant to a State's academic and curricular standards might appropriately include references by teachers to actual gay individuals and their work. Heterosexual teachers conducting such lessons might decide to mention gay friends or family members of their own. In a similar fashion, LGBT teachers might choose to reference their own identities in this context . . . especially if they are already out on campus and in the larger community.

Another instance of "out" speech that could fit naturally during formal classroom interaction might be a lesson on another country, where a teacher shares her experiences traveling through that country. A unit on Brazil, for example, is greatly enhanced if a teacher has been there and can bring in pictures and objects from the trip. In these circumstances, if a heterosexual teacher has traveled with a spouse or even with a boyfriend or girlfriend, the teacher often references that fact or may even show **pictures or videos** that include these others. In the same manner, LGBT educators who desire to do so should conceivably feel equally comfortable indicating that they have visited particular places in Brazil with a partner, boyfriend, or girlfriend of the same or similar gender.

However, every situation and every school community is different, and just as heterosexual teachers might choose to exercise discretion in these types of lessons, so too should LGBT educators exercise similar discretion. In addition, although again there is no hard and fast rule here, gay and gender non-conforming teachers who are not already out at school would probably be advised not to plan to come out for the first time in front of their classes in a formal setting.

Of course, teachers cannot plan for every possible interaction that may occur. And a classic example of unpredictability in the classroom is when a student asks the teacher a question of a personal nature. Indeed, it is rare for a school year to go by anywhere in the country without teachers being asked such questions as "who did you vote for?" or "what's your opinion on this?" or "are you married?" It was just this sort of unpredictability that led to a highly publicized controversy in 2004 regarding Ron Fanelle's "out" speech to his seventh and eighth grade students.

The Fanelle Controversy and Its Implications: A Case Study

A popular social studies teacher at Monte Vista Middle School in Ventura County, California, Ron Fanelle agreed to marry longtime partner Randy Serak when San Francisco Mayor Gavin Newsom opened City Hall ceremonies to same-sex couples in early 2004. Fanelle, who was out to his colleagues and his principal but not to his students, was congratulated on the marriage at a staff meeting, after which several teachers apparently spread the news.

According to reports in the L.A. Times, the Ventura County Star, the San Jose Mercury-News, and CNN, Fanelle was asked by one of his students in front of his entire seventh and eighth grade class whether it was true that he had recently gotten married. He chose to answer "yes." He was then asked whether it was true that he had married another man, and he answered "yes" to that as well. It is not clear from the news reports exactly what transpired, whether a formal lesson had already been under way, and precisely what interaction followed. It appears, however, that students gave him a standing ovation, and that several follow-up questions were asked . . . such as how long the two had been together and why he did not wear a wedding ring or have a picture of Serak on his desk. It also appears that a boy in the class "began muttering negative comments under his breath," and that Fanelle then chose to conduct an unplanned discussion regarding suffrage, bigotry, harassment law, and the Magna Carta.

As a result of these events, one parent apparently requested that his child be removed from the class, and another—whose child was not in the class at all—chose to raise the issue publicly at the next school board meeting. The parent was quoted as saying that he came to the meeting ". . . with a heavy heart. A seventh-grade history teacher announced to his students he's gay. I'm very upset and disappointed that this person was bringing his homosexual platform to the classroom." The story was picked up by the local media, a District "investigator" showed up unannounced at Fanelle's home to ask him questions, and there were intimations that Fanelle might be disciplined or even fired. The California Teachers Association provided him with an attorney, and Fanelle also contacted the highly regarded legal director of the National Center for Lesbian Rights—Shannon Minter—who spoke on his behalf to the press.[25]

Several weeks later, after an outpouring of support for Fanelle among parents and students in the community, the school board announced that the "investigation" had ended, and insisted that there was never any consideration of discipline or job-related action. Yet the emotional and very public nature of the controversy that had

ensued left Fanelle and many other LGBT educators concerned about the still-prevailing double standard that apparently exists in so many places.

Application of Basic First Amendment Principles. The Fanelle matter was a widely reported incident that did not result in any legal action. But had a case gone forward, and had Fanelle chosen to contest any efforts by the District to reprimand, censor, or discipline him in any way, the First Amendment principles outlined above would have been central to his case. He would have been able to argue that not only did he have the right to reveal his same-sex marriage under basic freedom of expression doctrine, but that he had the right to be treated the same as any straight teacher who had revealed his or her different-sex marriage.

A married teacher, when asked if he or she is in fact married, is entitled under U.S. law to answer the question affirmatively. Whether the marriage is a gay marriage or a straight marriage is irrelevant in these circumstances. Fanelle did not break any laws, and unless all teachers are prohibited from responding to questions about their marital status, he must be allowed to respond as he did. Indeed, these assertions would be at the heart of his case at the intersection of the 1st and Fourteenth Amendments and would likely result in a victory for him.

It is conceivable, however, that had this case gone to trial, the District would have acknowledged the above points but would have sought to focus on the discussion that ensued in his class after his response to the questions, and on the age-appropriateness of Fanelle's comments and actions. They might have argued that he was within his rights to answer the initial questions, but that he should have then returned to the lesson of the day, consistent with the principle that in a formal classroom setting a teacher is supposed to be delivering the curriculum.

Debriefing, Responding to Student Questions, and "The Teachable Moment." While it is unclear from the reports exactly what took place during the discussion, the activity apparently addressed the topic of marriage equality within the larger context of the history of our legal system. Fanelle appeared to have focused on highlights of how the legal system had grown and developed by acknowledging basic rights of human beings and addressing discriminatory practices of both monarchies and elected governments. Among these highlights were the Magna Carta and the right to vote.[26]

Building on the principle that teachers cannot be expected to be automatons, and that the direction a lesson takes is inevitably shaped by student questions and comments, there is no evidence from the reports that Fanelle engaged in any sort of one-sided diatribe or exhibited any attempt to indoctrinate his students. Under the continuum analysis referenced above, for example, an attempt to indoctrinate only arises in circumstances such as when the alleged indoctrination is "systemic," when the students are "required . . . to agree with or affirm" a particular idea, and/or when they are "subject to a constant stream" of similar content. Nothing of this sort happened here. In fact, there were no allegations of any efforts at indoctrination. The parent who complained to the school board did not have a student in Fanelle's class and did not focus on the discussion that ensued, but merely on the fact that Fanelle acknowledged his homosexuality.[27]

Neither is there any evidence that the teacher even strayed from the content of his curriculum. This was a seventh and eighth grade social studies class. Seventh grade curriculum in California includes world history, and eighth grade curriculum includes U.S. history. Fanelle appeared to be conducting a focused discussion that brought together highlights from both.

As a matter of best practices, Fanelle was also following two research-based guidelines that every K–12 teacher preparation program recommends: seek to debrief highly unusual occurrences and take advantage of the *teachable moment*. Something very different had just happened in this classroom. Students could not and should not be expected to simply return to the matters at hand without having had a chance to process the event. And this was also a classic example of a teachable moment, particularly in light of the fact that in the Spring of 2004, the media was filled with pictures of gay and lesbian couples getting married in Massachusetts and San Francisco, Canada was in the process of legalizing same-sex marriage, and a debate over these matters was raging across the Nation. The best social studies teachers are always expected to integrate current events into the curriculum, helping students see the relationship between present and past events as well as the larger scope of history across the board. What better opportunity to do this than the revelation that the students' own teacher had participated in the very events that were at the top of the news during that time.

Age Appropriateness and the "Teaching" of Gay Marriage. As to the age-appropriateness question, there was no evidence that Fanelle's discussion was not age appropriate.[28] Traditionally, marriage has not been a topic that is off limits in a K–12 classroom, and students at every age know that people form relationships,

pair up, and often eventually get married. Middle school students in the earlier stages of adolescence are particularly cognizant of these facts, as they begin to experiment with friendships and relationships of their own.

Yet while marriage as a topic has come up as a matter of course in K–12 classrooms throughout history, and indeed elementary school students in the United States have traditionally been taught a unit on "the family" in the primary grades, it must be acknowledged that the question of how to approach it in public schools today has emerged in the aftermath of unprecedented developments over the past decade. Internationally, during this time, seven countries (Belgium, Canada, the Netherlands, Norway, Spain, South Africa, and Sweden) legalized same-sex marriage. In the U.S., same-sex marriage was legalized in six States (Connecticut, Iowa, Maine, Massachusetts, New Hampshire, and Vermont), and gay marriages in other jurisdictions were recognized in New York, Rhode Island, and DC. Six other States plus DC had in place some form of civil union or domestic partnership for same-sex couples. And approximately 18,000 same-sex couples remained legally married in California. In addition, by the end of 2009, 18 States now offered benefits for same-sex partners of State employees.[29]

The tension regarding the dramatic developments that led to the legal recognition of same-sex relationships in so many contexts and on so many fronts since the year 2000 came to a head during and after the 2008 California Proposition 8 campaign. Advocates of Proposition 8, which sought to take away the newly won right of gay and lesbian persons to marry the person they loved, had great success turning the debate away from marriage equality and directly toward the public schools. In the eyes of many, a widely distributed campaign ad featuring Pepperdine University Law School Professor Richard Peterson was seen as helping to turn the tide in favor of proponents of the proposition, which was approved by the voters, 52 percent to 48 percent.

The Transcript of the 'Yes on 8' ad with Prof. Richard Peterson reads as follows:

> Mom, guess what I learned in school today?
>
> What, sweetie?
>
> I learned how a prince married a prince, and I can marry a princess.
>
> Prof. Richard Peterson (Pepperdine)—"Think it can't happen? It's already happened. When MA legalized gay marriage, schools began teaching second graders that boys can marry boys. The courts ruled parents had no right to object." (Video shows "No Legal Right to Object," and then the name of the case "*Parker* v. *Hurley*" and its cite (2008).)[30]
>
> Under CA law, public schools instruct kids about marriage. (Video shows Ed Code Section 51933 (7) "Instruction and materials shall teach respect for marriage . . . ")
>
> Teaching children about gay marriage will happen here unless *we* pass Proposition 8. Yes on 8.[31]

While the ad clearly tapped into the fear of the inevitable—i.e. that to the extent that same-sex relationships would now be completely acceptable under the law, any reference to gays and lesbians in the schools would ultimately be no more unusual or unacceptable than a reference to a man dating or marrying a woman—it must be noted that whether and to what extent the California public schools "taught" gay marriage was not dependent on the passage of Proposition 8. Many teachers were already addressing these issues within the context of the State curricular standards, and students were bringing in front-page newspaper articles reporting on developments in this context across the country and around the world. Fanelle's class discussion was just one of many examples. These practices did not stop when Proposition 8 was approved. Indeed, if anything, the volatile aftermath of the ballot initiative campaign led to much more "teaching" of gay marriage in public school classrooms than had ever been the case before. And absent additional facts, such discussions are completely legal.[32]

The events surrounding Ron Fanelle's "out" speech reflect what can and does happen in some areas of this country when a K–12 educator reveals an identity that may vary from the expected norm. Such events can be particularly difficult during times when emotions are running high regarding gay and lesbian issues, as they were in March 2004 and in the Fall of 2008, both locally and nationally.

The Fanelle controversy also reflects the continuing prevalence of "conspiracy theories," as indicated by the one parent's allegation at the school board meeting that the teacher was "bringing his homosexual platform to the classroom."[33] Even so, in spite of all that occurred and all the emotions that were stirred up within this community, the District acknowledged in the end that Fanelle did nothing wrong, and no case was ever brought against him. Such an acknowledgment is clearly rooted in the conclusion that both under the law and as a matter of policy

Fanelle was well within his rights and conducted himself both appropriately and professionally.

FOURTEENTH AMENDMENT RIGHTS OF EDUCATORS

The Fourteenth Amendment Equal Protection Clause is the central guiding principle governing employment discrimination law in the public sector. Under this venerable constitutional provision, people similarly situated must be treated equally. When intentional discrimination is shown, the Fourteenth Amendment alone often serves as the primary basis for a plaintiff's victory. In addition, the mandate of the Equal Protection Clause can be strengthened by specific Federal and State laws prohibiting discrimination on the basis of categories such as race, gender, religion, age, and disability.[34]

Gay and gender non-conforming educators in a growing number of States can benefit from such specific laws, which grant explicit protection against discrimination on the basis of LGBT status. But the Fourteenth Amendment remains the primary vehicle that aggrieved educators can employ in this context. While no education cases addressing alleged discrimination on the basis of LGBT status have reached the U.S. Supreme Court, the Court did prohibit LGBT-related discrimination in *Romer* v. *Evans* and *Lawrence* v. *Texas*.

Indeed, even in the years immediately preceding the 2003 decision in *Lawrence*, the tide had begun to turn in favor of out educators who were dismissed from their positions simply because of who they were. Under employment discrimination law, as reflected primarily in Fourteenth Amendment Equal Protection Clause principles, such dismissals are not holding up in court.

Glover v. *Williamsburg Local School District*

A noteworthy example of this trend is the 1998 Federal court victory by Ohio teacher Bruce Glover. A 46-year-old openly gay white man in a relationship with an African-American man, Glover left the insurance industry to pursue a career in education. After successfully completing student teaching and receiving an Ohio Teaching Certificate, he took a position as an upper elementary teacher in Williamsburg.[35]

Things started to deteriorate when a false rumor began circulating that Glover and his partner had been holding hands at the sixth grade holiday party. In January, even after it had become clear that the rumor was false and that Glover had done nothing other than be out as a gay person, District officials began warning him, lecturing him, monitoring his classroom excessively, and creating an increasingly hostile and humiliating environment. Administrators admonished him "to be careful not to do anything which might fuel rumors and upset the community," and warned him "that people in the community might be concerned if Glover had to stay after school alone with a male student." In addition, he was told "that he had better be careful because there was a small group of parents that was out to get him."[36]

At the end of the year, despite a solid overall record of teacher evaluations, he was not rehired.

Glover challenged the decision not to rehire him under the Equal Protection Clause of the Fourteenth Amendment. He alleged that the Board's decision was discriminatory "based on his sexual orientation, his gender, and the race of his partner." The Court determined that "[h]omosexuals . . . are entitled to at least the same protection as any other identifiable group which is subject to disparate treatment by the State." The Court also explained that the principle would be the same if Glover had been arrested discriminatorily based on his hair color, his college bumper sticker, or his affiliation with a disfavored company. Furthermore, the Court declared:

> [A] State action which discriminates against homosexuals and is motivated solely by animus towards that group necessarily violates the Equal Protection Clause, because a "desire to effectuate one's animus against homosexuals can never be a legitimate governmental purpose."[37]

The Court found that the evidence, taken together, "demonstrates that the . . . purported reason for Glover's nonrenewal was pretextual, and in fact the Board discriminated against Glover on the basis of his sexual orientation"[38]

The Court went on to find that the Board's "wrongful decision" denied him the opportunity to teach at Williamsburg Elementary School in both 1996–1997 and 1997–1998, and that he had been unable to secure a permanent teaching job since the nonrenewal of his contract. Therefore, the Court ordered the Board to re-instate him as a full-time teacher at Williamsburg Elementary School with a 2-year contract, beginning with the 1998–1999 school year. Glover was also awarded money for back pay as well as emotional distress. The Court emphasized that as a result

of the Board's wrongful actions, "he suffered considerable anguish as well as humiliation in the community. Glover's psychological injuries also had physical effects, including anxiety, sleeplessness, and digestive problems" for which Glover had been receiving treatment since the Fall of 1996.

Weaver v. *Nebo School District*

The ruling in the *Weaver* case is consistent with the trend recognizing strong Fourteenth Amendment rights for openly LGBT educators in an employment discrimination context. In this 1999 lawsuit, a Utah Federal court considered the case of 19-year veteran teacher and volleyball coach Wendy Weaver—a person with an "unblemished" record and a reputation as "an effective and capable teacher"—who answered affirmatively when asked by a senior team member if she was gay. She was subsequently admonished "not to make any comments, announcements or statements to students, staff members, or parents of students regarding . . . [her] . . . homosexual orientation or lifestyle." In addition, she was removed from her position as volleyball coach.[39]

Ms. Weaver brought a lawsuit challenging the school district's decisions under both the First Amendment and the Fourteenth Amendment. The Court found that "to the extent [that the letters of admonishment] limit her speech in this area, they violate the First Amendment."

Turning to the Equal Protection Clause claim, the Court also found in favor of the plaintiff. "[T]he Fourteenth Amendment of the U.S. Constitution entitles all persons to equal protection under the law," the Court explained. "It appears that the plain language of the Fourteenth Amendment's Equal Protection Clause prohibits a State government or agency from engaging in intentional discrimination—even on the basis of sexual orientation—absent some rational basis for so doing. [And] the Supreme Court has recognized that an 'irrational prejudice' cannot provide the rational basis to support a State action against an equal protection challenge."[40]

The Court then found that the "negative reaction" some members of the community may have towards gays and lesbians "is not a proper basis for discriminating against them":

> If the community's perception is based on nothing more than unsupported assumptions, outdated stereotypes, and animosity, it is necessarily irrational and under *Romer* and other Supreme Court precedent, it provides no legitimate support for the School District's decisions.
>
> Although the Constitution cannot control prejudices, neither this court nor any other court should, directly or indirectly, legitimize them.[41]

The District was ordered to re-instate Weaver as the volleyball coach, and to remove the offending letters of admonishment from her personnel file.[42]

The Dana Rivers Settlement

The former David Warfield had already built an impressive resume when he was hired by a suburban Sacramento school district to teach history and journalism at Center High. He had been a Navy electronics expert, a political consultant and school board member in Huntington Beach, CA, a baseball coach, and a whitewater rafting instructor.

Warfield proved to be a highly successful teacher at Center High throughout the 1990's. Over a 9-year period, students often called him one of the best teachers they ever had, and many remembered him as a major influence on their lives. According to the New York Times, he developed a program for unmotivated students that became the award-winning Media Communications Academy. He was the recipient of a $80,000 grant for the program, won the school's Stand and Deliver award for the teacher who most inspires students, and received a standing ovation from the district's staff at its annual meeting in late 1998.[43]

Yet when Warfield revealed in a Spring 1999 letter to his colleagues that he was transitioning from male to female, would be undergoing gender-reassignment surgery, and planned to return to school as an MTF (male-to-female) transgender person named Dana Rivers, it was not long before he was removed from his teaching position.[44]

While the exact parameters of what transpired during those months may never come to light, it is well established that—upon learning the news of the teacher's transition—the school board sent a letter disclosing it to all 1,500 families in the district. Only a handful of parents protested the teacher's actions, but board members who were uncomfortable with Rivers' gender identity expressed their disapproval openly and triggered an increasingly rancorous debate.

Rumors abounded during that spring and summer, including allegations by a handful of parents that Rivers had shared inappropriate personal details regarding the decision with her students.[45] According to school board member Ray Bender, the

majority of the board did not want a transgender teacher in the District, and these allegations enabled them to justify their 3–2 decision never to allow Rivers back. She was put on administrative leave in late summer, and eventually dismissed.

Bender, who voted against dismissal, was quoted as saying that the Dana Rivers controversy had become "a cause for religious conservatives assisted by the Pacific Justice Institute, a local conservative legal organization that demanded that the school board fire the teacher or face a lawsuit." Indeed, one board member was heard telling a parent that this was "a holy issue."[46]

The parental allegations were disputed by Rivers and several of her former colleagues. The colleagues stated that students learned the news of the transition when teachers read the original coming out letter to their classes. And Rivers reported that as rumors began circulating throughout the school and students began asking about them, she agreed to an interview with the school newspaper, which published a 2,600-word profile during the final week of the semester.[47]

Represented by private counsel but also in consultation with the ACLU, Rivers challenged her termination as discriminatory and as a violation of her First Amendment rights. Very quickly, she won a $150,000 settlement with the school district. Although she reportedly vowed that she would never teach again, she was offered a job 18 months later in a suburban San Jose high school and returned to the classroom in the Fall of 2001.[48]

In addition to her ongoing contributions as an educator, Rivers became a prominent public interest activist, and has continued working to achieve equal rights for transgender persons.[49]

OTHER LEGAL DEVELOPMENTS BOLSTERING THE RIGHT TO BE OUT FOR LGBT EDUCATORS

While the Equal Protection Clause of the Fourteenth Amendment remains the country's most basic prohibition against discrimination by the government and other public officials, a range of other legal developments provide additional protection in both the public and the private sectors.

For LGBT educators, one of the most significant developments in this context was the California Supreme Court's 1969 decision in *Morrison* v. *State Board of Education*. Most State education codes include the provision that a teacher may be dismissed for "immoral or unprofessional conduct." Yet these words are typically not defined, and it was not until this case that a major U.S. court interpreted their meaning and determined how they should be applied. Coincidentally, the dispute at issue in this case was LGBT-related, arising over an attempt to revoke the credential of a male teacher who had engaged in a brief consensual affair with another male teacher in his school district.[50]

Marc Morrison was a fully credentialed educator employed by the Lowell Joint School District in the Whittier-La Habra area of southern California during the early 1960's. His record was unblemished, with no one ever complaining about or criticizing his classroom performance, and no suggestion that even his "conduct outside the classroom . . . was other than beyond reproach."

By early 1963, Morrison had become friends with fellow teacher Fred Schneringer, and apparently served as a trusted adviser for him and his wife. In the spring of that year, a time when the Schneringers were "involved in grave marital and financial difficulties," Morrison spent much time with the two of them, frequently visiting their apartment and providing them with ongoing "counsel and advice." When Schneringer later obtained a separation from his wife, Morrison suggested a number of women whom Schneringer might consider dating.[51]

A year after these events, for reasons that remain unclear, Schneringer chose to reveal that during a 1-week period in April 1963, he and Morrison "engaged in a limited, non-criminal physical relationship." At the time, most common homosexual acts were considered crimes in almost every State, and the fact that the conduct between the two was described as "non-criminal" indicates just how limited the physical contact must have been.[52] Yet as a result of these events Morrison was apparently pressured to resign from the District, and the State Board of Education followed by revoking his teaching credential, a revocation that Morrison chose to contest in Court.[53]

While Morrison acknowledged that the contact had been "of a homosexual nature," this was not a "gay rights" case in the traditional sense of the term. Morrison never claimed to be gay,[54] never asserted any rights under either the First or Fourteenth Amendments, and never argued that he was being discriminated against in any way. His entire argument, which ultimately carried the day, was that what he had done did not warrant revocation of his teaching credential because it had nothing to do with his fitness to teach.

Justice Matthew Tobriner, writing on behalf of the California Supreme Court majority, proceeded to conduct a thorough review of other decisions addressing dismissal of employees—both within and outside of education—for alleged "immoral or unprofessional conduct" or "moral turpitude." Tobriner found that by using these terms in the Education Code "the Legislature surely did not mean to endow the employing agency with the power to dismiss any employee whose personal, private conduct incurred its disapproval:"

> In the instant case the terms denote . . . conduct . . . which indicates unfitness to teach. Without such a reasonable interpretation the terms would be susceptible to so broad an application as possibly to subject to discipline virtually every teacher in the State.[55] . . . We cannot believe that the Legislature intended to compel disciplinary measures against teachers . . . [for conduct that] . . . did not affect students or fellow teachers. Surely incidents of extramarital heterosexual conduct against a background of years of satisfactory teaching would not constitute "immoral conduct" sufficient to justify revocation of a life diploma without any showing of an adverse effect on fitness to teach.[56]

The Court examined the circumstances surrounding Morrison's brief affair and found "no evidence" whatsoever that his conduct "indicated his unfitness to teach."[57] In conclusion, Justice Tobriner emphasized that "[t]he right to practice one's profession is sufficiently precious to surround it with a panoply of legal protection," and that "[t]he power of the State to regulate professions and conditions of government employment must not arbitrarily impair the right of the individual to live his private life, apart from his job, as he deems fit."

The *Morrison* decision proved to have wide-ranging impact over the entire area of public employment law, and it soon took on the trappings of a national decision as one court after another followed its reasoning and adopted its conclusions.[58] For gays and lesbians, the decision was particularly important. The fact that private homosexual conduct between consenting adults would not result in the loss of employment absent additional facts was a giant step forward for LGBT educators. Only a decade earlier, it was the gays who suffered the most under the arbitrary dismissal policies of the McCarthy era, when President Eisenhower issued an executive order requiring that all "known homosexuals" be dismissed from government jobs.[59] More people lost their jobs under this edict than under any other category of alleged security threat during the McCarthy "witch hunts."[60]

In the decades that followed, Federal and State laws have been adopted that seek to provide additional protection above and beyond the Equal Protection Clause. Some of these laws focus specifically on the workplace, while others are more general. Most typically, the laws delineate exactly which groups are protected.

Title VII of the Civil Rights Act of 1964, for example, prohibits discrimination in the workplace on the basis of "race, color, religion, sex, or national origin." To the extent that LGBT educators alleging employment discrimination also fall into one or more of these categories, and should they be able to prove discriminatory conduct on the basis of such characteristics, their legal position might certainly be strengthened. But as a general rule, apart from the Equal Protection Clause and the *Morrison* decision, the most important guarantee of equal treatment for LGBT educators in this area is the passage of a Federal or State law specifically prohibiting discrimination on the basis of sexual orientation or gender identity.[61]

Over the past decade, there has been significant movement in this area, with the number of States explicitly prohibiting employment discrimination on the basis of sexual orientation increasing by almost 50 percent, from 11 to 21. The State statutes typically add sexual orientation status to a list of other categories—such as race, gender, age, and disability—that are already protected.

Increased protection against gender identity discrimination in the workplace has also been forthcoming in recent years. According to the Human Rights Campaign (HRC), as of July 2009, 12 States plus the District of Columbia explicitly prohibit workplace discrimination on the basis of both sexual orientation and gender identity. They include California (1992, 2003), Colorado (2007), District of Columbia (1977, 2006), Illinois (2006), Iowa (2007), Maine (2005), Minnesota (1993), New Jersey (1992, 2007), New Mexico (2003), Oregon (Jan. 2008), Rhode Island (1995, 2001), Vermont (1991, 2007), and Washington (2006).[62]

In addition, 9 other States prohibit workplace discrimination on the basis of sexual orientation alone: Connecticut (1991), Delaware (2009), Hawaii (1991), Maryland (2001), Massachusetts (1989), Nevada (1999), New Hampshire (1998), New York (2003), and Wisconsin (1982).[63]

Several other States also provide a level of statutory protection for LGBTs. Indiana and Pennsylvania, for example, have personnel rules prohibiting discrimination based on sexual orientation or gender identity for public employees, while Alaska,

Louisiana, and Montana protect public employees against sexual orientation discrimination but do not address gender identity.[64]

Finally, an often over-looked area in this context is the opportunity to build protections against discrimination into collective bargaining agreements. Models exemplifying such an approach are in existence nationwide, and indeed the prospects of forging alliances between LGBTs and labor movements should not be discounted.[65]

All told, this is an area that has seen much progress, and the right to be out for LGBT educators under our legal system continues to be strengthened as a result.

SCHROEDER V. HAMILTON SCHOOL DISTRICT: A CASE STUDY OF LGBT EDUCATOR MISTREATMENT

The *Schroeder* case is perhaps the most egregious example in recent memory of an educator who was abused and vilified for no reason other than his LGBT status. Not only was the 20-year District veteran mistreated by school officials, but he was also mercilessly harassed over an extended period of time by members of the suburban Milwaukee school community, including colleagues, parents, and students. Yet, unlike all the other cases identified in this chapter, and despite the fact that the mistreatment led to both a nervous breakdown and the loss of employment, the *Schroeder* case is the only one to have been decided against the teacher.[66]

The facts of the case document, at great length, a pattern of indifference by school officials to the persistent and pervasive mistreatment of an openly gay teacher who had come out after being with the District for over 15 years. In the years immediately after he came out, Schroeder experienced harassment primarily from students at Templeton Middle School. This included "a student calling him a faggot and remarking 'How sad there are any gays in the world'; another student physically confront[ing] Schroeder after shouting obscenities at him; catcalls in the hallways that he was a 'queer' or a 'faggot'; obscenities shouted at him during bus duty; harassing phone calls with students chanting 'faggot, faggot, faggot' and other calls where he was asked whether he was a 'faggot'; and bathroom graffiti identifying Schroeder as a 'faggot,' and describing, in the most explicit and vulgar terms, the type of sexual acts they presumed he engaged in with other men." Schroeder reported this harassment on several occasions, and the defendants apparently "consequenced" students who could be identified. Yet much of the harassment was allegedly anonymous, and the District made little or no apparent effort to discover who might have been behind it.

After repeatedly requesting a transfer, Schroeder was finally re-assigned to Lannon Elementary School in the Fall of 1996. At Lannon, the harassment came primarily from parents in the school community. An anonymous memo, for example, was circulated by a parent, stating that "Mr. Schroeder openly admitted at a District meeting that he was homosexual. Is that a good role model for our 5-, 6- and 7-year-old children?" People began calling him a pedophile and suggesting that he was sexually abusing small boys. The tires on Schroeder's car were slashed, and he began receiving anonymous, harassing phone calls at home, which included comments such as "Faggot, stay away from our kids" and "We just want you to know you . . . queer that when we pull out all our kids, you will have no job."

Not only did District colleagues consistently fail to intervene, but they often made things worse through their own comments and the messages they conveyed to others. Fellow teachers at both schools reportedly made numerous insulting and homophobic comments about Schroeder behind his back over time. The Assistant Principal refused to relieve Schroeder of bus duty, even after repeated requests and extensive evidence that some of the most egregious harassment occurred when students shouted anti-gay epithets at him from bus windows. Little or no apparent effort was expended on the part of either the bus driver or the administration to limit this student behavior. Instead, Schroeder was told that "you can't stop middle school kids from saying things. Guess you'll just have to ignore it."[67]

After repeated complaints by Schroeder over time, the administration at Templeton finally sent a memo to faculty and staff. However, the memo only stated "that students were continuing to use 'inappropriate and offensive racial and/or gender-related words or phrases,' and that 'if you observe or overhear students using inappropriate language or gestures, please consequence them as you feel appropriate.'" Indeed, perhaps the most egregious behavior on the part of school officials was the refusal by Templeton administrators to even mention the word "gay" or the words "sexual orientation" in their communication with the school community. People reading such a memo, for example, could reasonably conclude that it had absolutely nothing at all to do with LGBT issues.

Others, however, might find the comments of the Lannon principal a few years later to be even more egregious than the decision of these administrators to treat

terms such as *sexual orientation* as "unmentionable" in a school setting. At Lannon, as a result of completely unsupported allegations on the part of certain parents that Schroeder was a pedophile, the principal told Schroeder that they might need to implement "proximity supervision," meaning that Schroeder would not be allowed to be alone with male students.[68]

At trial, and during the appeal, the District asserted that its officials did "all that could be done." While the Seventh Circuit's majority ultimately disagreed with the District and acknowledged that more could indeed have been done, both Judge Daniel A. Manion and Judge Richard A. Posner found no violation of the Equal Protection Clause because they concluded that school officials did "all that [was] required." The panel majority held that the evidence presented by Schroeder did not amount to proof that he had been "treated differently from his non-homosexual colleagues."

Yet the judges also held that even if there had been differential treatment in particular instances, that treatment was justified. Judge Manion, writing for the majority, focused extensively on the refusal of District administrators to use the word *gay* or the term *sexual orientation* in the memo to the school community. The Court acknowledged the differential treatment between an earlier response to racial harassment and the response to the harassment of the openly gay teacher, but found this differential treatment to be justified. Manion concluded that the school was right to not mention the words in a middle school environment. "Unfortunately," he stated, "there is no simple way of explaining to young students why it is wrong to mock homosexuals without discussing the underlying lifestyle or sexual behavior associated with such a designation."[69]

In his concurrence, Judge Posner went even further than Judge Manion, explicitly concluding that some teachers deserve greater protection than others, and that schools are justified in protecting gay teachers less. "I write separately," Posner declared, "to emphasize that our decision would be the same even if Schroeder were right [and had demonstrated that he had been discriminated against on the basis of his sexual orientation]. "Homosexuals have not been accorded the constitutional status of blacks or women, . . . [and] as for whether the defendants would have been irrational in failing to protect a homosexual teacher as assiduously as they would have protected a black or female teacher subjected to the same amount of abuse, a number of considerations show that they would not have been."[70]

A principled reassessment of the Manion and Posner opinions leads to the conclusion that not only was the *Schroeder* case wrongly decided under the law and as a matter of public policy in 2002, but that today such a case may very well be decided differently.

First and perhaps foremost, the majority failed to acknowledge key facts. In the words of dissenting Judge Diane P. Wood:

> *Never*, in the course of these events, did the administration ever attempt to dissuade either students, parents, or anyone else in the broader community of the school district, to refrain from discrimination or harassment based upon sexual orientation. Indeed, . . . school officials never even told the students that the words being used to describe Schroeder transgressed the general code of civility the majority is recommending to schools. Schroeder was just told to tough it out.
>
> The only thing Schroeder wants is the *same* treatment that everyone else is receiving.[71]

Schroeder argued, essentially, that the District violated his rights by treating him differently than others because of his openly gay identity. The District replied that—practically speaking—it could only do so much, and that in any case its legal obligations do not extend to "protecting" its employees from the type of mistreatment Schroeder experienced, especially when at least some of the mistreatment took place outside of the work environment and when at least some of the perpetrators were persons outside of the District's control.

It must be acknowledged that society often asks more from school officials than they are reasonably able to do. Indeed, the duty to supervise on school grounds under tort law is generally viewed as a duty to protect students, not as a duty to protect teachers. Yet as a matter of policy it is unfathomable to imagine school district officials telling faculty that they should not expect their personal safety to be addressed on campus. Indeed, laws mandating safe environments for employees in the workplace generally are widespread and extensive at both the Federal and the State levels.

Perhaps the strongest argument set forth by the defendants in the *Schroeder* case is that they should not be held accountable for the portion of the harassment that took place outside of school grounds. Even so, the law recognizes that the obligations of school officials do not stop at the boundaries of District property, online or offline.

Relevant legislation and recent court decisions often include explicit obligations in this regard.[72] In addition, bonds between schools, families, and communities are recognized in both the scholarly literature and the policy mandates of school districts as an integral component of the work that takes place in K–12 public education. On a day-to-day level, such mandates are reflected in parental advisory groups, school site councils, joint ventures with local businesses, and a wide range of school-family-community partnerships. Education leaders are not generally expected to limit their work to what takes place within schoolhouse gates, and the most effective District officials always see their responsibilities as extending out into the larger school community, including but not limited to building bridges and maximizing communication. Such responsibilities are informed by the recognition that what takes place outside the schoolhouse gates often impacts what goes on within those gates, and vice versa. In the end, therefore, there is much that these officials can in fact do if a teacher is being mistreated off campus for reasons that relate directly to and flow from what is taking place on campus.

Schroeder demonstrated that he was in fact treated differently in this context than others were and others might have been.[73] Yet the panel majority did not acknowledge the differential treatment, even as it attempted, in almost the next breath, to justify the very same differential treatment it would not acknowledge. In retrospect, the Court was wrong on both counts. Compelling evidence was presented of disparate and differential treatment by school officials of the openly gay veteran teacher. And Judge Manion's attempts to justify the school's treatment of LGBT harassment as different from other forms of harassment demonstrates a disappointing lack of familiarity with the scholarly research regarding age-appropriate methods of addressing peer mistreatment in the schools. Manion suggested that the only way to address anti-gay harassment among middle schoolers is to discuss homosexual activity in explicit detail, a suggestion that flies in the face of consistent findings by both scholars and practitioners today. Upper elementary and middle school students know what being gay means. They do not need to be given any details; they simply need to be taught that every person—gay or straight—deserves to be treated with equal dignity and equal respect. These are lessons that can and should be imparted at any age level.

In the same context, Judge Posner asserted that "the school authorities' options are limited by an understandable reticence about flagging issues of sex for children . . . [which will make them] prematurely preoccupied with issues of sexuality."[74] This assertion, however, completely ignores the fact that the question of whether it was appropriate to even mention the word gay in a memo occurred at a middle school, and students at that level are already preoccupied with these very issues. In addition, one might ask how it can be considered inappropriate to talk openly about homosexuality in an educational environment for purposes of improving school climate when this very educational environment is already filled with so many ongoing references to homosexuality, as reflected in the pervasive anti-gay comments, the homophobic rhetoric, and the unusually explicit and demeaning graffiti.

As to Judge Posner's conclusion that openly gay teachers can be treated differently and can be given less protection than their colleagues, it is certainly the case under current Equal Protection Clause jurisprudence that some types of discrimination merit a higher level of scrutiny than others. Racial discrimination, for example, triggers strict scrutiny, gender discrimination triggers an intermediate level of review, and discrimination on the basis of sexual orientation in 2002 merited no more than rational basis review.[75] Yet this construct only addresses how courts are to act when faced with allegations of discrimination in civil lawsuits. It is not intended as a policy directive for school officials regarding how to treat faculty and staff. Effective school site administrators must—in principle and in practice—treat all their faculty members with equal dignity and equal respect. The implications of doing otherwise—for school climate and for the ability of a school to conduct an effective educational program—are highly troubling even to imagine. Levels of scrutiny under the Equal Protection Clause are simply irrelevant for these purposes.

Moreover, Judge Posner's attempt to negate the existence of any actual injury is particularly disingenuous. Posner suggested that there was no actual injury because the harassment was not physical but simply constituted words. In any harassment inquiry, however, the Court is expected to look at the totality of circumstances, and in this fact pattern it is undeniable that the aggregate result of the mistreatment led to devastating injuries: a complete nervous breakdown and the loss of employment. As Judge Wood described it, "there is no dispute that Schroeder was a very good teacher; he taught successfully for the District for 22 years . . . [Yet] he left the school . . . [on February 11, 1998] . . . a ruined man."[76]

With so much discrimination still evident *within the law* in 2002, the *Schroeder* panel majority was not a complete outlier when it concluded that differential treatment could be justified under a principled reading of Federal anti-discrimination law. The decision bucked the emerging trend, but cases such as *Glover* and *Weaver* were decided by the lower courts, and the LGBT student cases could conceivably be distinguished as inapplicable precedents because they also included ongoing physical abuse. Perhaps most importantly, a good number of States—both at the time that the events unfolded, and even in 2002—still criminalized private consensual relations between gay adults.[77]

After the 2003 decision in *Lawrence* v. *Texas*, however, an attempt to justify the type of differential treatment that was evident in *Schroeder* is likely to be more difficult. Blanket assertions such as the one by Judge Manion that "[a] student cannot . . . be disciplined for expressing a home-taught religious belief that homosexual acts are immoral" would likely be deemed incorrect as a matter of law today. Students do indeed have the right to express home-taught religious beliefs, but a student's religious beliefs cannot be invoked to justify or explain away the brutal mistreatment of an openly gay employee when similar mistreatment of other employees would not be tolerated. Manion's reasoning not only runs counter to *Lawrence*, but also ignores central principles identified by the courts under the Establishment Clause of the First Amendment.

Absent additional facts, a school district's persistent refusal to intervene on behalf of a beleaguered employee and a Federal court's attempts to justify such actions in this context fly in the face of the broad liberty and equality principles articulated in *Lawrence*.[78] And *Lawrence* is re-inforced in a growing number of States by local laws explicitly prohibiting discrimination on the basis of LGBT status.[79]

Eight years after the decision by a divided appellate panel, and at least 12 years after most of the events took place, a reassessment of this case leads to the conclusion that were the lawsuit to be filed today, Tommy Schroeder would likely emerge victorious. Indeed, such a principled reassessment serves as an example of just how significant the gains by LGBTs have been and just how strong the aggregate power of both case law and statutory law has become in this area.

LGBT educators choosing to be out can still expect a certain level of controversy in certain circumstances, but their First Amendment rights in combination with their Fourteenth Amendment rights are generally so strong that if they keep to the guidelines set forth in this chapter, their actions will be protected under the law. Educators have the right to identify openly as LGBT should they wish to do so. Moreover, in circumstances where it may be viewed as appropriate for heterosexual colleagues to reference their relationships, display pictures of loved ones, or even introduce boyfriends, girlfriends, spouses, or children, it is equally appropriate under the law for gay persons to do the same. LGBTs also have the same right as their colleagues to play supportive roles as advisers for students with similar interests and identities. For example, just as an openly Christian teacher can serve as a faculty adviser for an after-school student Bible club, so too can an openly gay or transgender teacher serve as a faculty adviser for a gay-straight alliance. Just as a teacher with a strong ethnic identity can serve as an advisor for students who seek a safe place to discuss their own identity-related issues, so too can an openly LGBT educator volunteer to serve as an advisor for queer or questioning students pursuant to District-approved "safe zone" programs.

Both school districts and courts of law have acknowledged the implications of these changing realities in a wide variety of contexts. Even defamation law is in the process of transformation as a result. Before 2003, it was often relatively easy for a straight person who was alleged to be gay to actually win a defamation lawsuit against the person making that claim. After 2003, however, it is going to be much harder to show that such an allegation alone—absent additional facts—constitutes defamation. A Federal court indicated as much only 2 months after the Fanelle controversy when it declared that it could not find a statement that an individual is gay "capable of a defamatory meaning":

> [I]n this day and age, I cannot conclude that identifying someone as a homosexual discredits him. . . . First, the large majority of the courts that have found an accusation of homosexuality to be defamatory per se . . . emphasized the fact that such a statement imputed criminal conduct. This rationale is extinguished by the Supreme Court's recent ruling in *Lawrence* v. *Texas*. . . . Second, I reject the offensive implication of plaintiffs' argument that, even without the implicit accusation of a crime, portions of the community feel homosexuals "are less reputable than heterosexuals . . ."
>
> While [recent Federal and State court decisions acknowledge] that a segment of the community views homosexuals as immoral, [they also conclude] that courts should not, directly or indirectly, give effect to these prejudices. If this

Court were to agree that calling someone a homosexual is defamatory per se—it would, in effect, validate that sentiment and legitimize relegating homosexuals to second-class status.[80]

REFERENCES

1. See, e.g., E. Edmund Reutter, Jr., *The Law of Public Education* (New York: Foundation Press, 1994), 657. See also *Acanfora* v. *Bd. of Educ. of Montgomery County*, 491 F. 2d 498 (4th Cir. 1974); *Gish* v. *Bd. Of Educ.*, 145 N.J. Super. 96 (1976); *Gaylord* v. *Tacoma School Dist. No. 10,* 88 Wash.2d 286, 559 P.2d 1340 (en banc) (1977) (all examples of cases where courts upheld the removal of openly gay teachers from public school teaching positions).

2. The initiative, while favored overwhelmingly in the early polls, was defeated by the voters, 59 percent–41 percent. Many credit the unequivocal opposition of Governor Jerry Brown, President Carter, and then former Governor Ronald Reagan for the defeat of this initiative. See, e.g., *The Times of Harvey Milk* (1984), the Academy Award-winning documentary film that addresses these and related issues.

3. David Alan Sklansky, "Privacy, Policing Homosexuality, and Enforcing Social Norms—'One Train May Hide Another': Katz, Stonewall, and the Secret Subtext of Criminal Procedure," 41 *UC Davis Law Review* 875, 906–907 (2008). In this context, Sklansky added that "[t]he terror and cruelty of a charge of homosexuality, the way such a charge could destroy, in a blow, a man's reputation and livelihood, his family life and his place in the community—all of this was well known to Americans regardless of their own sexual practices, and witnessed repeatedly, often close at hand." Ibid. at 911.

4. Ibid. at 913, quoting from "The Homosexual in America, *Time*, Jan. 21, 1966. See also Hendrik Hertzberg, "Stonewall Plus Forty," The New Yorker, July 6 & 13, 2009.

5. See Elizabeth Mehren, "The Times Poll: Acceptance of Gays Rises Among New Generation," *Los Angeles Times*, April 11, 2004. See also Gregory Lewis & Howard E. Taylor, "Public Opinion Toward Gay and Lesbian Teachers: Insights for all Public Employees," *Review of Public Personnel Administration* 21 (2001): 133–51.

6. See Pew Research Center for the People and the Press, May 2007 Survey, *http://pewresearch.org/pubs/485/friends-who-are-gay* (accessed 9–18–09).

7. See ibid.

8. 2008 data from the General Social Survey reveals similar differences regarding geography when the focus turns to higher education. While the number of Americans who believe that gays and lesbians should not be allowed to teach at colleges and universities is noticeably lower than at the K–12 level, the percentages of those who would bar LGBTs from academic positions at post-secondary institutions still range from a low of 14.6 percent in the Pacific region to a high of 26.9 percent in the "West South Central" portion of the country. See GSS: The General Social Survey, *http://www.norc.org/GSS+Website/* (accessed 7–24–09).

9. In higher education, circumstances are generally better for LGBT educators, but many of these same pressures exist, especially at less gay-friendly institutions. See, e.g., Shane Windmeyer, *The Advocate College Guide for LGBT Students* (New York: Alyson Books, 2006), listing both the top 20 and top 100 colleges and universities for LGBT students in the United States.

In recent years, the organization known as Soulforce has conducted "equality rides" across the United States to call attention to issues that still remain unresolved in this regard. Comprised primarily of LGBTs in their twenties who themselves identify as Christian, Soulforce teams have visited universities that expressly limit LGBT expression and in many cases expel students and dismiss faculty who are openly gay or lesbian. The visits met with varying responses from college administrators. See, e.g., Lou Chibbaro, Jr., "30 Arrests Made at 'Equality Ride' protests in Virginia," *Washington Blade*, March 17, 2006. See generally *www.soulforce.org* (accessed 8/1/09).

10. See *Parker* v. *Hurley*, 514 F.3d 87, 105–107 (1st Cir. 2008). In *Hurley*, the Court addressed claims that the reading aloud of *King and King*—a gay-positive book—by a teacher in an elementary school classroom constituted indoctrination in violation of the Free Exercise Clause. Determining that the U.S. Supreme Court "has never utilized an indoctrination test under the Free Exercise Clause, much less in the public school context," the First Circuit did not address "whether or not an indoctrination theory under the Free Exercise Clause [was] sound." It did find an "intent to influence" the students' point of view. But "even assuming there is a continuum along which an intent to influence could become an attempt to indoctrinate," Judge Lynch wrote,

> "This case is firmly on the influence-toward-tolerance end. There is no evidence of systemic indoctrination. There is no allegation that Joey was asked to affirm gay marriage. Requiring a student to read a particular book is generally not coercive of free exercise rights."

Ibid.

11. See *Tinker* v. *Des Moines Indep. Commun. Sch. Dist.*, 393 U.S. 503, 506 (1969): "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years."

12. *Pickering* v. *Bd. of Educ.*, 391 U.S. 563 (1968). The school board sought to justify its decision by insisting that the publication of the letter was "detrimental to the efficient operation and administration of the schools" and that, under relevant Illinois law, the "interests of the schools" required his dismissal.

13. Ibid. at 572.

14. *Connick* v. *Myers*, 461 U.S. 138 (1983).

15. 547 U.S. 410 (2006).

16. Ibid. at 421.

17. See generally ibid.

18. And indeed the *Connick* Court emphasized that it was not in any way suggesting that speech outside matters of public concern would not also be protected:

> We do not suggest . . . that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment. "The First Amendment does not protect speech and assembly only to the extent it can be characterized as political. 'Great secular causes, with smaller ones, are guarded.'" We, in no sense, suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and punish such expression by all persons in its jurisdiction."

Ibid. at 147.

19. For some time, now, Federal appeals courts have differed regarding which Supreme Court decisions may be most directly applicable to educator speech at the K–12 level. Many have applied *Pickering* and *Connick* directly, noting that *Pickering* in particular directly implicates educator speech. Others apply principles from the K–12 student freedom of the press case, *Hazelwood* v. *Kuhlmeier* (discussed supra, in Chapter 2). Some apply principles from both. *Pickering* is often viewed as applying to a greater extent to speech outside of the classroom, focusing more directly on teacher as citizen. *Hazelwood*, on the other hand, with its focus on "legitimate pedagogical concerns" and the extent to which the speech may "bear the imprimatur of the school," is often seen as more directly applicable to teacher expression in a formal classroom setting. Increasingly, however, it has become possible to reconcile the approaches of the various appeals court decisions and come up with a broad range of guidelines that educators would be wise to follow anywhere in the country. See, *e.g*, Karen C. Daly, "Balancing Act: Teachers' Classroom Speech and the First Amendment," 30 *Journal of Law & Education* 1 (2001). See generally, R. Weston Donehower, "Boring Lessons: Defining the Limits of a Teacher's First Amendment Right to Speak Through the Curriculum," 102 *Michigan Law Review* 517 (2003); Ailsa W. Chang, "Resuscitating the Constitutional "Theory" of Academic Freedom: A Search for a Standard Beyond *Pickering* and *Connick*," 53 *Stanford Law Review* 915 (2001).

20. See, e.g., *Cockrel* v. *Shelby County Sch. Dist.*, 270 F.3d 1036 (6th Cir. 2001).

21. See ibid. at 1051–1052: "We believe that the Fourth and Fifth Circuits . . . [in Boring and Kirkland] . . . have extended the holding of *Connick* beyond what the Supreme Court intended . . ."

Even the 2007 decision against an educator in the case of *Mayer* v. *Monroe County Community School Corp.*, which some have suggested should be viewed as an outlier, is not inconsistent with these general guidelines. In *Mayer*, 474 F.3d 477 (7th Cir. 2007), a non-tenured probationary teacher argued that her First Amendment rights had been violated when she was let go at the end of the 2002–2003 school year because of comments she had made in a formal classroom session during a lesson on current events. According to Ms. Mayer, she answered a pupil's question "about whether she participated in political demonstrations by saying that, when she passed a demonstration against this Nation's military operations in Iraq and saw a placard saying 'Honk for Peace', she honked her car's horn to show support for the demonstrators." The Court found for the school district, and in so doing stated that "the school system does not "regulate" teachers' speech as much as it *hires*

that speech. Expression is a teacher's stock in trade, the commodity she sells to her employer in exchange for a salary."

While this decision has been criticized for its characterization of K–12 teachers as little more than functionaries charged with the figurative equivalent of playing back recorded messages to their students, *see*, e.g., Bob Egelko, "'Honk for Peace' Case Tests Limits on Free Speech," *San Francisco Chronicle*, May 14, 2007, the basic rule articulated by the Court—the teachers must keep to the curriculum in a formal classroom setting—is not a departure from a guiding principle that has been in existence for some time now.

In addition, it should be noted that the lower court ruling in the same case explicitly recognized that teachers interact with students in a variety of settings and need not limit their conversations in the same manner that they might be required to do in a formal classroom setting. Indeed, the Court states that it would be appropriate for the district to provide "teachers and students the opportunity to engage in discussions about the war [in this manner] elsewhere on school property." See 2006 WL 693555 (S.D. Ind.) at *12.

22. As referenced earlier, curricular related speech is sometimes analyzed under *Hazelwood*, sometimes under *Pickering*, and sometimes under both. It can be argued that non-curricular-related speech regarding controversial or other political issues falls under *Pickering* every time, since *Pickering* addressed exactly this sort of expression. And it may very well be the case that day-to-day conversation falls under neither.

23. The memo goes on to State that the District's multicultural and human relations education policy includes the expectations that "[e]ach student has equal access to a quality education and an opportunity to participate fully in the academic and social activities of the school," and "School policies and practices act to foster a climate that reduces fears related to difference and deters name-calling and acts of violence or threats motivated by hate and bigotry." *Downs* v. *Los Angeles Unified Sch. Dist.*, 228 F.3d 1003 at 1005–06 (9th Cir. 2000).

24. "In recognition that some of the materials can be controversial in nature," the memo further states that "the representations on the posters" were reviewed by, among other groups, the "Parent Community Services Branch." The Memorandum also "recognizes that schools are part of a community and must respect the sentiments held by the local community." Ibid. at 1006.

25. See generally Amanda Covarrubias, "Not So Happily Ever After," *Los Angeles Times*, March 24, 2004.

26. Ibid.

27. See ibid.

28. The current definition of "age appropriate" from the California Education Code reads as follows: "'Age appropriate' refers to topics, messages, and teaching methods suitable to particular ages or age groups of children and adolescents, based on developing cognitive, emotional, and behavorial capacity typical for the age or age group." Cal. Ed. Code Section 51931 (2009).

29. See National Conference of State Legislatures, Issues & Research: Human Services, *http://www.ncsl.org/IssuesResearch/HumanServices/SameSexMarriage/tabid/16430/Default.aspx* (accessed 7/19/09).

30. See infra, Chapter 4, for a detailed analysis of *Parker* v. *Hurley* and its implications.

It must be emphasized, however, that contrary to the assertion in the 'Yes on 8' ad, the First Circuit Court of Appeals never ruled that the parent plaintiffs "had no legal right to object." Not only is this language nowhere to be found in the decision, but in fact the Court made it clear that parents are not powerless, that they can indeed object by bringing their case to the school board, and that they can vote out of office any official whose job performance is found to be lacking. The appellate panel even identified the parameters of an "indoctrination" analysis that might be employed by future litigants. However, the panel concluded that under the facts of this case, no constitutional violation occurred.

31. See *http://www.youtube.com/watch?v=0PgjcgqFYP4* (accessed 7/28/09).

32. For a detailed examination of K–12 curriculum and pedagogy issues within the context of conflicting values in the aftermath of Proposition 8, see generally Douglas NeJaime, "Inclusion, Accommodation, and Recognition: Accounting for Differences Based on Religion and Sexual Orientation," 32 *Harvard Journal of Law & Gender* 303 (2009).

33. Allegations of the existence of a so-called "homosexual agenda" include the aforementioned statements of Justice Scalia in his *Lawrence* v. *Texas* dissent. See also Alan Sears and Craig Osten, *The Homosexual Agenda: Exposing the Principal Threat to Religious Freedom Today* (Nashville, TN: B&H Publishing Group, 2003), a book co-written by the heads of the Alliance Defense Fund and featured on the

Web site of James Dobson's Focus on the Family. Goals that are allegedly embodied in this conspiratorial agenda include talking about "gays and gayness" as loudly and as often as possible; portraying gays as victims, not as aggressive challengers; giving "homosexual protectors" a just cause; making gays look good; making victimizers look bad; and getting funds from corporate America. See generally ibid.

34. See, e.g., Title VII of the Civil Rights Act of 1964, and the Americans with Disabilities Act of 1990 (ADA). See also the Age Discrimination in Employment Act (ADEA).

35.. *Glover* v. *Williamsburg Local School District*, 20 F. Supp. 2d 1160 (S.D. Ohio 1998).

36. Ibid. at 1165.

37. Ibid. at 1169, 1174–75. The Court quoted here from *Romer* v. *Evans*:

> "If the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."

38. See ibid. . . . at 1174:

> Perhaps the Board feared that a gay teacher would act inappropriately or somehow be a troublemaker. Or perhaps the Board was responding to perceived disapproval in the community of having a gay teacher at Williamsburg. Regardless of the Board's reasoning, Glover had established that he was an above average first-year teacher who was more qualified than the woman chosen by the Board to replace him. . . . [And additional] evidence introduced at trial supports a finding that the Board's decision was motivated by animus towards him as a homosexual.

39. *Weaver* v. *Nebo School District*, 29 F. Supp. 2d 1279, 1280–1281 (D. Utah 1998).

40. Ibid. at 1285, 1287.

41. Ibid. at 1287–89. The Court added the following:

> The record now before the court contains no job-related justification for not assigning Ms. Weaver as volleyball coach. Nor have the defendants demonstrated how Ms. Weaver's sexual orientation bears any rational relationship to her competency as teacher or coach, or her job performance as coach—a position she has held for many years with distinction.

42. In fact, a later State suit on this matter brought by a citizens group was dismissed by the Supreme Court of Utah, with Weaver winning all court costs. *Miller* v. *Weaver*, 2003 UT 12.

43. See Evelyn Nieves, "After Sex Change, Teacher Is Barred From School," *New York Times*, Sept. 27, 1999.

44. See ibid. See also Marvin Dunson III, "Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law," 22 *Berkeley Journal of Employment & Labor Law* 465 (2001).

45. "One parent stood up at a board meeting and said that her daughter was traumatized," Mr. Bender said. "But right after that, her daughter stood up and told the board that her mother was wrong." Nieves, *Teacher Is Barred*.

46. Ibid.

47. On an annual District staff day in September 1999, 200 District teachers—along with 40 students—held a lunchtime rally for Ms. Rivers across the street from the District offices. But the school board majority ignored this show of support and voted for dismissal.

"I didn't have to send a letter to everyone telling them what I was doing," Ms. Rivers said. "I could have just walked into school. But what confusion would that have led to?" See ibid.

48. See Cynthia Hubert, "Being Herself: Dana Rivers Has a New Home, a New Campus—and a New Life as a Woman," *Sacramento Bee*, November 14, 2001.

49. See ibid. See also Helen Y. Chang, "My Father Is a Woman, Oh No!: The Failure of the Courts to Uphold Individual Substantive Due Process Rights for Transgender Parents under the Guise of the Best Interests of the Child," 43 *Santa Clara Law Review* 649 (2003).

50. *Morrison* v. *State Bd. of Educ.*, 1 Cal. 3d 214 (1969).

51. Ibid. at 218–19.

52. "Neither sodomy (Pen. Code § 286), oral copulation (Pen. Code § 288a), public solicitation of lewd acts (Pen. Code § 647, subd. (a)), loitering near public toilets (Pen. Code § 647, subd. (d)), nor exhibitionism (Pen. Code § 314) were involved. Conviction of such offenses would have resulted in the mandatory revocation of all diplomas and life certificates issued by the State Board of Education." Ibid. at 218, n.4.

53. After the affair had been disclosed, Morrison resigned his position with the District. The record does not indicate what transpired between him and his employers, but at the time a common practice involving acts appearing to fall under the category of "immoral or unprofessional" was that employees would be suspended without pay pending the results of an investigation, and if the allegations were true they would ultimately be presented with the choice of either resigning or being dismissed.

54. It is important to note that these events happened before the Stonewall riots and long before specific statutory protections for LGBT individuals were in place, even in California. Admitting one's homosexuality would have been a radical step in the early 1960s, especially for a person seeking to retain a public position such as teaching.

55. In a particularly poignant footnote, Justice Tobriner stated:

> The problem of ascertaining the appropriate standard of "morality" was aptly put in Robert N. Harris, Jr., *Private Consensual Adult Behavior: The Requirement of Harm to Others in the Enforcement of Morality*, 14 UCLA L. REV. 581, 582 & n.4. "[I]n a secular society—America today—there may be a plurality of moralities. Whose morals shall be enforced? . . . There is a tendency to say that public morals should be enforced. But that just begs the question. Whose morals are the public morals?" Ibid. at 227, n.19.

56. The Court concluded that the terms themselves are capable of multiple interpretations even within the same community, and noted that "[i]n the opinion of many people laziness, gluttony, vanity, selfishness, avarice, and cowardice constitute immoral conduct." Ibid. at 225–26.

57. The Court explained that in determining whether particular conduct indicated unfitness to teach, a board may consider such matters as "the likelihood that the conduct may have adversely affected students or fellow teachers," the degree of such adverse effect, the "remoteness in time" of the conduct, any extenuating or aggravating circumstances, the praiseworthiness or blameworthiness of the teacher's motives, and the likelihood of the conduct's recurrence. Examining the circumstances surrounding Morrison's brief affair under this framework, the Court found "no evidence" whatsoever that his conduct "indicated his unfitness to teach." Ibid. at 229, 236.

58. For example, in 1976, the Colorado Supreme Court explicitly cited the language in *Morrison* when discussing the definition of "immorality" in that State's teaching regulations. The court held that any immorality that would force a teacher from his position be directly related to his unfitness to teach. *Weissman* v. *Board of Education*, 190 Colo. 414, 420–21 (1976).

59. Exec. Order No. 10,450, Sec. 8, 18 Fed. Reg. 2489 (1953).

60. See, e.g., David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in the Federal Government* (Chicago: University of Chicago Press, 2004).

61. It should be noted that at the Federal level—as of late 2009—there was still no explicit statutory protection against discrimination on the basis of LGBT status. The Employment Non-Discrimination Act (ENDA) was first introduced in Congress in 1994 as an important step toward addressing this issue, but it has not yet received sufficient support to pass. See, e.g., Arthur S. Leonard, "Sexual Minority Rights in the Workplace," 43 *Brandeis Law Journal* 145 (2004–2005).

President Obama promised, during the 2008 campaign, to support the passage of ENDA, and committed to including protections against both discrimination on the basis of sexual orientation and discrimination on the basis of gender identity. This commitment was reaffirmed during the first year of his presidency. See generally "The White House: Issues—Civil Rights," *http://www.whitehouse.gov/issues/civil_rights/* (accessed 7/29/09):

> President Obama also continues to support the Employment Non-Discrimination Act and believes that our anti-discrimination employment laws should be expanded to include sexual orientation and gender identity. He supports full civil unions and Federal rights for LGBT couples and opposes a constitutional ban on same-sex marriage. He supports repealing Don't Ask Don't Tell in a sensible way that strengthens our armed forces and our national security, and also believes that we must ensure adoption rights for all couples and individuals, regardless of their sexual orientation.

Although the Gallup Poll, consistent with other surveys, still shows that a substantial number of Americans are conflicted regarding whether LGBTs should be hired as public school teachers, fully 89 percent agreed in 2008 with the statement that "homosexuals should have equal rights in terms of job opportunities." Only

8 percent disagreed. *http://www.gallup.com/poll/1651/Gay-Lesbian-Rights.aspx* (accessed 7–23–09).

62. See Statewide Employment Laws and Policies, Human Rights Campaign, July 7, 2009, *http://www.hrc.org/documents/Employment_Laws_and_Policies.pdf* (accessed 7/14/09). The numbers in parentheses indicate the most recent year(s) when relevant statutory changes were made.

63. See ibid.

64. See Human Rights Campaign, State Laws Listing, State by State, *http://www.hrc.org/laws_and_elections/state.asp* (accessed 7/15/09).

65 See generally Kitty Krupat & Patrick McCreery, eds., *Out at Work: Building a Gay-Labor Alliance* (Minneapolis: University of Minnesota Press, 2000).

66. *Schroeder* v. *Hamilton School District*, 282 F.3d 946 (7th Cir. 2002).

67. Ibid. at 948–949. In another incident consistent with these actions by District officials, the Superintendent herself failed to intervene when—during a meeting with Schroeder—a student directed an anti-gay slur at him right in front of her eyes. Ibid.

68. See ibid.

69. Ibid. at 952, 954–955.

70. The questionable reasoning set forth by Judge Posner to justify protecting gay teachers "less assiduously" than others included the following contentions (in his own words): (1) "it is not irrational to prioritize protective activities"; thus, "if race relations are a particularly sensitive area in a particular school, the school authorities are not irrational in deciding to devote more time to defusing racial tensions than to preventing harassment of a homosexual (or overweight, or undersized, or nerdish, or homely) teacher"; (2) "when most of the abuse is anonymous, the school authorities may be unable to prevent it without a disproportionate commitment of resources . . . or a disproportionate curtailment of student rights"; "a public school's primary commitment is to its students, not to its teachers, and this limits the extent to which it must use police tactics to deal with nonviolent . . . harassment of a teacher"; and (3) "the school authorities' options are limited by an understandable reticence about flagging issues of sex for children . . . [which will make them] prematurely preoccupied with issues of sexuality." Ibid. at 957–958.

71. Ibid. at 961 (Wood, J., dissenting).

72. California Education Code Section 44807, for example, states that "[e]very teacher in the public schools shall hold pupils to a strict account for their conduct on the way to and from school."

In the Federal courts, recent cases have found that school officials have increasingly broad power to hold students accountable for their expression outside of the school setting, online or offline, that may have an impact on day-to-day affairs within a school community. See, e.g., *Wisniewski* v. *Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34 (2nd Cir. 2007); *Doninger* v. *Niehoff*, 527 F.3d 41 (2nd Cir. 2008).

73. The Assistant Principal herself conceded to Schroeder that she would have handled allegations of sexual harassment by a female teacher differently than she had handled his complaints.

74. Ibid. at 958.

75. Under the Equal Protection Clause of the Fourteenth Amendment, intentional discrimination on the basis of race or the infringement of a fundamental right are subject to strict scrutiny. Intentional discrimination on the basis of gender or "illegitimacy" typically merits an intermediate level of scrutiny, while all other discrimination between and among groups similarly situated generally merits no more than rational basis review. Discrimination on the basis of sexual orientation has traditionally fallen into the rational basis category, with great deference given to lawmakers, policymakers, and practitioners on a day-to-day level. Yet LGBT plaintiffs have begun to prevail even under rational basis review.

Over the past several years, there has been significant movement on this front, with both Federal and State courts considering whether a heightened level of judicial review is warranted for sexual orientation discrimination.

In *Witt* v. *Dept. of Air Force*, 527 F.3d 806 (9th Cir. 2008), for example, the Ninth Circuit determined that not only was the *Lawrence* ruling applicable to a former Air Force major's challenge to "Don't Ask, Don't Tell," but that "*Lawrence* requires something more than traditional rational basis review." Ibid. at 819. In *Perry* v. *Schwarzenegger*, No. 09–CV–2292 VRW (2009), the Federal lawsuit challenging the constitutionality of California Proposition 8 under the Fourteenth Amendment, plaintiffs argue that the ballot initiative must be reviewed with strict scrutiny because it both impairs a fundamental right *and* discriminates on the basis of sexual orientation. At the same time, plaintiffs also assert that Proposition 8 does not even withstand rational basis review, let alone strict scrutiny. *Plaintiffs' Notice of Motion*

and Motion for a Preliminary Injunction, and Memorandum of Points and Authorities in Support of Motion for a Preliminary Injunction, Perry v. *Schwarzenegger* (May 27, 2009). A trial on this matter was pending as of late summer 2009 in the U.S. District Court, Northern District of California, in front of Chief Judge Vaughn Walker.

At the State court level, in May 2008, the California Supreme Court became the first court in the land to recognize strict scrutiny for discrimination against gays and lesbians. In Re Marriage Cases, 43 Cal.4th 757, 840–841; 76 Cal.Rptr.3d 683, 751 (2008). A year later, upholding the constitutionality of Proposition 8 under California State law, Chief Justice Ronald George reaffirmed that in California,

> "Statutes according differential treatment on the basis of sexual orientation are subject to the strict scrutiny standard of review. . . . [W]ith respect to the . . . designation of the word 'marriage,' Proposition 8 does change the rule, [but it] . . . must be understood as creating a limited exception . . . [that] does not alter the general equal protection principles . . . Those principles continue to apply in all other contexts."

Strauss v. *Horton*, 46 Cal.4th 364, 411–412; 93 Cal.Rptr.3d 591, 627 (2009).

In 2009, the Iowa Supreme Court ruled unanimously that prohibiting same-sex marriage violated the Iowa Constitution, and in so doing it agreed with a 2008 Connecticut Supreme Court decision holding that discrimination on the basis of sexual orientation warranted a heightened level of judicial review. *Varnum* v. *Brien*, 763 N.W.2d 862, 889–896 (2009).

Of particular interest within the larger context of this book is the Iowa Court's analysis of immutability as a factor that would support a finding of heightened scrutiny. The Court concluded that it:

> "need not definitively resolve the nature-versus-nurture debate currently raging over the origin of sexual orientation in order to decide plaintiffs' equal protection claims. . . . [W]e agree with those courts that have held the immutability "prong of the . . . inquiry surely is satisfied when . . . the identifying trait is 'so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change [it].'"':
>
>> In this case, the County acknowledges sexual orientation is highly resistant to change. Additionally, "sexual orientation 'forms a significant part of a person's identity.'" Sexual orientation influences the formation of personal relationships between all people—heterosexual, gay, or lesbian—to fulfill each person's fundamental needs for love and attachment. Accordingly, because sexual orientation is central to personal identity and "may be altered [if at all] only at the expense of significant damage to the individual's sense of self," classifications based on sexual orientation "are no less entitled [to be reviewed under heightened scrutiny] . . . than any other group that has been deemed to exhibit an immutable characteristic."

Ibid. at 893.

76. Schroeder, 282 F.3d at 961. Not only did the panel majority understate the case by refusing to acknowledge either the existence or the impact of the outright hostility toward gays in this setting, but at times it appeared to be justifying the very hostility that it would not acknowledge. Judge Posner, for example, stated that the District's tepid response to Schroeder's complaints "may have been influenced by the hostility of some parents to the idea of their kids' being taught by a homosexual," a statement that implicitly lends credence to such a parental view. And Judge Manion actually suggested that religious views could justify such hostility.

77. Twenty-five of our fifty States (but not Wisconsin) had anti-sodomy laws at the time Schroeder began teaching in 1990. In 2002, when the Court decided against Schroeder, such activity was ostensibly legal in the Seventh Circuit States of Wisconsin and Illinois, but still illegal right next door in Michigan, Missouri, the neighboring States of Kansas, Oklahoma, and Texas, and in eight other States across the land. American Civil Liberties Union, "Getting Rid of Sodomy Laws: History and Strategy that Led to the Lawrence Decision," (2003), *www.aclu.org* (accessed 3/12/07).

78. See, e.g., *Milligan-Hitt* v. *Board of Trustees of Sheridan County School Dist. No. 2*, 2008 WL 1795068 (10th Cir. 2008), upholding a rural Wyoming school district's ostensible demotion in 02–03 of two principals who were living together as a lesbian couple, even in light of acknowledged anti-gay animus presented into evidence, but at the same time expressly situating the facts implicating the qualified immunity analysis in the pre-*Lawrence* era:

> Although the district court found that there were genuine issues of material fact as to whether Mr. Dougherty's actions had been unconstitutional, it held

that the law governing discrimination on the basis of sexual orientation had not been clearly established in 2002 and early 2003, before the Supreme Court's decision in *Lawrence* v. *Texas*, which arguably clarified the issue. Ibid. at *3.

79. See generally Nan D. Hunter, "Living with *Lawrence*," 88 *Minnesota Law Review* 1103 (2004); Pamela S. Karlan, "Loving *Lawrence*," 102 *Michigan Law Review* 1447 (2004); Laurence H. Tribe, "*Lawrence* v. *Texas: The 'Fundamental Right' That Dare Not Speak Its Name," 117 Harvard Law Review* 1893 (2004).

80. *Albright* v. *Morton*, 321 F. Supp. 2d 130, 136–38 (D. Mass. 2004).

WOMEN'S LAW PROJECT,
PHILADELPHIA, PA 19107,
November 5, 2009.

Hon. TOM HARKIN, *Chairman,*
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
731 Hart Senate Office Building,
Washington, DC 20510.

Hon. MIKE ENZI, *Ranking Member,*
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
379A Russell Senate Office Building,
Washington, DC 20510.

DEAR CHAIRMAN HARKIN AND RANKING MEMBER ENZI: On behalf of the eleven undersigned organizations, we write to express our support for S. 1584, the Employment Non-Discrimination Act (ENDA). The passage of ENDA would provide lesbian, gay, bisexual, and transgender (LGBT) individuals with long overdue protection against discrimination in the workplace. Additionally, ENDA would preclude defendants from using the presence of sexual orientation- or gender identity-based claims to shield otherwise actionable title VII sex stereotype discrimination claims.

LGBT employees often face discrimination based on their failure to conform to sex stereotypes, discrimination that is rooted in stereotypes about how men and women "should" look, sound, or behave and about how their bodies "should" appear. But there is no question that discrimination based on sex stereotypes is unlawful. It is well settled that title VII's prohibition on sex discrimination proscribes discrimination based on gender stereotypes. The U.S. Supreme Court held long ago in *Price Waterhouse* v. *Hopkins* that the failure to promote a female employee based on her variation from prevalent stereotypes about women was an actionable sex discrimination claim under title VII. 490 U.S. 228, 250 (1989). A similar prohibition on sex stereotype discrimination by government actors exists under the Federal Equal Protection Clause. In *United States* v. *Virginia*, the Supreme Court held that gender-based government action must pass heightened scrutiny and cannot be based on "overbroad generalizations about the different talents, capacities, or preferences of males and females." 518 U.S. 515, 533 (1996).

Yet defendant employers continue to argue to courts that sex stereotype discrimination claims under title VII do not apply where there is also discrimination based on sexual orientation or gender identity. Many courts have correctly rejected those arguments and recognized actionable sex stereotype discrimination regardless of an employee's sexual orientation or gender identity. For example, just 2 months ago, the U.S. Court of Appeals for the Third Circuit reversed a district court's finding that a self-described "effeminate" gay man could not proceed with his title VII claim because he was merely asserting a sexual orientation discrimination claim "repackaged as a gender stereotyping claim." *Prowel* v. *Wise Business Forms, Inc.* . . . F.3d . . ., 2009 WL 2634646, at *6 (3d Cir. Aug. 28, 2009). Instead, the court found that the plaintiff "was harassed because he did not conform to [his employer's] vision of how a man should look, speak, and act—rather than harassment based solely on his sexual orientation." Id. And a district court in Georgia recently denied a motion to dismiss a title VII claim brought by a transgender State Government employee, finding that "it is now well-established in Federal law that discrimination based on the failure of an individual to conform to sexual stereotypes is a form of sex discrimination." *Glenn* v. *Brumby*, . . . F. Supp. 2d . . ., 2009 WL 1849951, at *6 (N.D. Ga. June 25, 2009).

Some courts, however, have been misguided by defendants' arguments and dismissed valid claims of discrimination against LGBT employees based on sex stereotypes by construing them as claims of discrimination based solely on sexual orientation or gender identity. In a number of cases, for example, courts have discounted

valid evidence of sex stereotyping because the language used in the harassment also referred to the plaintiffs sexual orientation. *See, e.g, Trigg* v. *New York City Transit Authority*, C.A. No. 99–CV–4730, 2001 WL 868336 (E.D.N.Y., July 26, 2001). Other courts have incorrectly dismissed title VII sex stereotype claims because of a plaintiff's transgender status. S*ee, e.g., Oiler* v. *Winn-Dixie Louisiana, Inc.*, No. Civ. A. 0093114, 2002 WL 31098541 (E.D. La. Sept. 16, 2002). Enacting ENDA's explicit protection against discrimination based on sexual orientation and gender identity would curtail defendants' ability to confuse the issues in this way and to persuade courts that valid title VII sex stereotype claims should be dismissed merely because the plaintiff is (or is perceived to be) an LGBT individual.

Ensuring that American workplaces are free of sex discrimination, including discrimination based on gender stereotypes, is vital to achieving true gender equity in the workplace. We urge Congress to pass ENDA, to give LGBT employees the workplace equality they need and deserve, and to preclude defendants from misguiding courts to dismiss actionable claims of impermissible sex stereotyping because of the concurrent existence of sexual orientation- or gender identity-based discrimination.

Sincerely,

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LETTER OF OPPOSITION

AMERICANS UNITED (AU),
November 4, 2009.

Hon. TOM HARKIN, *Chairman,*
U.S. Senate,
Committee on Health, Education, Labor, and Pensions,
428 Dirksen Senate Office Building,
Washington, DC 20510.

Re: Do Not Expand the Religious Exemption in S. 1584, the Employment Non-Discrimination Act of 2009

DEAR CHAIRMAN HARKIN: We are writing on behalf of Americans United for Separation of Church and State to urge you to resist any effort to further expand the religious exemption contained in S. 1584, the Employment Non-Discrimination Act of 2009 (ENDA). Although we would prefer a more narrow exemption than the one currently in S. 1584—one that would require a religious organization to profess a religious justification for engaging in discrimination based on sexual orientation or gender identity for a particular job position in order to obtain the exemption—we are willing to accept the current exemption so long as it is not further expanded. Below, we seek to explain the breadth of the current religious exemption and to set out why use of the title VII exemption in ENDA is understandable and would provide for legal consistency to employers and employees.

Founded in 1947, Americans United is a non-partisan, non-profit membership organization dedicated to preserving the constitutional principle of church-state separation in order to ensure religious freedom for all Americans. Americans United recognizes the importance of providing certain religious exemptions, such as the one that applies to privately-funded jobs under Title VII of the Civil Rights Act of 1964, as amended. When drafting such exemptions, however, Congress must find the proper and delicate balance between the interests of religious organizations and the civil rights of individuals. In extending the religious exemption to those organizations that already receive an exemption under title VII, Congress is close to the proper balance. But expanding it to include a broader array of organizations—even religious business owners engaged in commerce—not only disturbs that delicate balance, but could nearly swallow the bill's protections against sexual orientation and gender identity discrimination entirely.

THE BREADTH OF THE EXEMPTION

Section 6 of S. 1584 grants religious organizations a blanket exemption from ENDA. It states simply and clearly that "[t]his Act shall not apply" to certain religious organizations. It also clearly defines those exempt religious organizations as *all* of those organizations that are permitted to discriminate on the basis of religion under sections 702(a) and 703(e)(2) of title VII. Simply put, if the religious organization may discriminate on the basis of religion under Title VII of the Civil Rights Act, the organization may also discriminate on the basis of sexual orientation and gender identity under ENDA. There is no ambiguity or lack of clarity.

Whether a religious organization meets the definition provided under section 702 of the Civil Rights Act is usually clear. *EEOC* v. *Townley Eng'g & Mfg. Co.*, 859 F. 2d 610, 618 (9th Cir. 1988). In cases where the determination is less clear cut, the court engages in a fact-specific inquiry to determine whether the organization's

purpose and character are primarily religious. *Id.; Killinger* v. *Samford Univ.*, 113 F. 3d 196, 200 (9th Cir. 1988). The outcomes of these inquiries have been consistent and reasonably predictable. For example, the courts have drawn a distinction between religious individuals who own for-profit business and institutions that designates their chief purpose as providing religious instruction.[1]

The exemption for religious educational institutions under 703(e) (2) of title VII is similarly employed. *EEOC* v. *Kamehameha Schools/Bishop Estate*, 990 F.2d 458 (9th Cir. 1993) (examining six factors in its fact-based inquiry). The courts engage in a fact-based analysis to determine whether the exemption applies.

EXPANDING THE TITLE VII EXEMPTION FOR ENDA WOULD CREATE CIVIL RIGHTS HARM AND LEAD TO NONSENSICAL RESULTS

Using the title VII exemption to define which religious organizations receive the exemption is understandable, as the case law defining the meaning of sections 702(a) and 703(e)(2) is vast, well understood, and has served religious organizations' institutional interests well for the last several decades.

Some contend that an even broader definition of "religious organization" should be used in ENDA. But defining the organizations provided the exemption in a broader way under ENDA than in title VII would create inconsistencies across civil rights statutes, resulting in confusion for both employers and employees. Under such a scenario, a religious organization would have to comport to one legal standard to determine whether it is exempt from the prohibition against religious discrimination and an even broader legal standard to determine whether it is exempt from ENDA. The end result could be that the organization could be permitted to discriminate for particular job positions on the basis of sexual orientation and gender identity, but *not* on the basis of religion. Such a result is nonsensical—if the religious identity of the organization is not strong enough to justify *religious* discrimination, how could it then justify discrimination on the basis of sexual orientation or gender identity?

Applying a unitary legal standard—no broader than what has existed for decades under title VII—reduces confusion and inconsistency and eliminates nonsensical results.

CONCLUSION

The religious exemption as currently drafted in ENDA—a blanket exemption—is sufficiently broad and sufficiently defined using title VII's definition and decades of case law. There is no legitimate reason to expand the exemption further, unless the goal is to erode the reach of ENDA itself. The scope of title VII's religious exemptions have served the interests of religious organizations well and they should be sufficiently clear to provide consistency to employers and employees in delineating which religious organizations will be exempt from ENDA's important protections.

Sincerely,

AARON D. SCHUHAM,
Legislative Director.

MAGGIE GARRETT,
Assistant Legislative Director.

U.S. DEPARTMENT OF JUSTICE,
WASHINGTON, DC 20539,
January 15, 2010.

Hon. TOM HARKIN, *Chairman,*
Committee on Health, Education, Labor, and Pensions,
U.S. Senate,
Washington, DC 20510.

DEAR MR. CHAIRMAN: Please find enclosed responses to questions arising from the appearance of Assistant Attorney General Thomas E. Perez before the committee on November 5, 2009, at a hearing entitled "Employment Non-Discrimination Act: Ensuring Opportunity for All Americans." We hope that information is of assistance

[1] *Compare Townley*, 859 F. 2d at 619 ("[T]he beliefs of the owners and operators or corporations are simply not enough in themselves to make the corporation 'religious' within the meaning of section 702.") *with Killinger*, 113 F. 3d at 200 (applying Section 702(a) to determine that "a teaching job in a divinity school of a religious educational institution is at the core of the section 702 exemption: the inherent purpose of such schools is the stuff of God and God's attributes.")

to the committee. Please do not hesitate to call upon us if we may be of additional assistance. The Office of Management and Budget has advised us that there is no objection to submission of this letter from the perspective of the Administration's program.

Sincerely,

RONALD WEICH,
Assistant Attorney General.

RESPONSE TO QUESTIONS OF SENATOR ENZI BY THOMAS E. PEREZ

Question 1. In the absence of a specific employment protection for sexual orientation, some courts have interpreted title VII to provide such protection. If ENDA is enacted, is it your view that the existing bill would allow a successful plaintiff filing claims under both title VII and ENDA for the same alleged wrongful conduct could obtain a dual recovery? If not, why does it contain a provision specifically providing that it does not invalidate or limit the rights, remedies, or procedures available under any other law or regulation? Why would such a result be warranted? What changes could be made to the bill to eliminate the possibility of such a dual recovery?

Answer 1. As the Supreme Court has recognized, taking adverse action against an employee based on sex-stereotyping is prohibited as part of title VII's prohibition on sex discrimination. This specific type of claim arises when an employer discriminates against an individual who does not conform to the gender stereotypes associated with his or her sex (e.g., when a female dresses or acts in a perceived masculine manner), as in *PriceWaterhouse* v. *Hopkins*, 490 U.S. 228 (1989). ENDA prohibits discrimination based on actual or perceived sexual orientation or gender identity—" gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual's designated sex at birth." Thus, a claim of sexual orientation and/or gender identity discrimination under ENDA may overlap with a sex-stereotyping claim under title VII to the extent that the discrimination against an individual is based on the individual's failure to conform to the gender-related appearance, mannerisms or stereotypes associated with his or her sex. However, Federal courts have refused to extend the sex-stereotyping theory to title VII cases of discrimination based strictly on sexual orientation. As a result, ENDA is necessary to provide protection against discrimination based specificaIly on sexual orientation, irrespective of whether individuals conform with their designated gender stereotypes.

Like title VII, ENDA seeks to provide for make-whole relief for victims of employment discrimination. If supported by the facts, a plaintiff hypothetically could bring a title VII claim under a sex-stereotyping theory and an ENDA claim, but if enacted, ENDA would not allow this plaintiff, if successful, to obtain a double recovery for the same alleged wrongful conduct. First, any back pay award is limited by the amount that would have been paid to the plaintiff in the absence of discrimination; an individual may not recover multiple awards of back pay regardless of the number or type of violations plead. In addition, the Supreme Court has long held that Federal courts "can and should preclude double recovery by an individual" in Federal employment discrimination suits. *General Telephone Co. of Northwest* v. *EEOC*, 446 U.S. 318,333 (1980); *see also EEOC* v. *Wafffle House, Inc.*, 534 U.S. 279, 297 (2002). Accordingly, Federal courts use their wide discretion to limit equitable relief and, where appropriate, to instruct juries to avoid providing double recovery when awarding compensatory and punitive damages. *See, e.g., Reynolds* v. *Octel Communications Corp.*, 924 F. Supp. 743,747 (N.D. Tex. 1995) (plaintiff not entitled to receive both punitive damages under title VII and liquidated damages under the ADEA). Thus, in the above example, a court following these principles would limit the specific remedial relief (e.g., reinstatement, back pay, compensatory damages) awarded by a Federal court to a successful plaintiff alleging both title VII and ENDA claims to the amount necessary to make that individual whole and avoid duplication of remedies.

Also, like title VII, ENDA has a provision describing the act's relationship to other laws. Section 15 of ENDA expressly states that:

> "The Act shall not invalidate or limit the rights, remedies, or procedures available to an individual claiming discrimination under any other Federal law or regulation or any law or regulation of a State or political subdivision of a State."

This provision does not suggest that dual recovery is permitted under ENDA. Rather, it serves as a clear statement that ENDA neither restricts nor supplants

existing Federal or State protections against discrimination. This amplification is important for several reasons. For example, the provision acts to preserve the limited, but well-established, case law regarding sex-stereotyping as a form of discrimination under title VII. It also affirms that a gay, lesbian, bisexual or transgender plaintiff may bring separate viable claims under both title VII and ENDA, e.g., a lesbian plaintiff may be harassed because she is a woman and denied a promotion because she is a lesbian. This approach, of course, mirrors those that apply under other anti-discrimination laws; an individual who is subjected to discrimination based both on race and on age may file separate claims under title VII and the ADEA. In addition, while ENDA does not permit disparate impact claims, individuals may bring such claims based on sexual orientation under some State laws.

In sum, well-established law eliminates the possibility of double recovery under both title VII and ENDA and nothing in ENDA suggests otherwise. As such, I recommend no changes to the legislation in this respect.

Question 2. It has been stated that individuals protected under ENDA would actually have access to greater remedies than those protected under title VII by way of their race, color, religion, sex or national origin, or under the ADA by way of disability. Namely, ENDA claimants could recover attorney and other fees from administrative proceedings, including an EEOC determination. EEOC decisions are not considered "final orders" and so are not subject to appeal. Therefore, an employer would not be able to contest any such award and, in fact, the EEOC is not even required to provide documented reasons for its decisions. Do you believe that plaintiffs alleging discrimination based on sexual orientation and sexual identity should be entitled to greater remedies than other title VII and ADA plaintiffs? Why would it be appropriate to deprive employers of their due process rights to contest attorney's fees awards solely for plaintiff's alleging discrimination based on sexual orientation and sexual identity? What changes could be made to the bill to ensure that ENDA claimants are treated the same as all other discrimination claimants in terms of potential recovery?

Answer 2. The Supreme Court has long held that Federal courts may award reasonable attorneys' fees to prevailing plaintiffs for work done in connection with certain administrative proceedings specified under title VII. *See New York Gus Light Club, Inc.* v. *Carey*, 447 U.S. 54 (1980). In this respect, permitting an award of reasonable attorneys' fees for work done in connection with certain administrative proceedings under ENDA is fully consistent with well-established law under both title VII and the ADA, and thus would not provide plaintiffs alleging discrimination based on sexual orientation or gender identity with any greater remedies than plaintiffs alleging discrimination under title VII or the ADA.

Section 12 of ENDA basically tracks the language in section 706(k) of title VII, except that title VII provides that a Federal court, in its discretion, may award reasonable attorneys' fees to a prevailing party, while ENDA vests that authority and discretion in specific entities described in section 10(a) of the act. These entities include the EEOC, the Library of Congress, the Board of Directors of the Office of Compliance, the Merit System's Protection Board, the President, and the Federal courts. It is our understanding that the above-enumerated entities (excluding the Federal courts) currently have authority and discretion to award reasonable attorneys' fees in their respective administrative proceedings (e.g., title VII authorizes the EEOC to award reasonable attorneys' fees in the Federal sector process), where employers may exercise their due process rights to contest such awards. To the extent that Section 12 of ENDA could be read to suggest that the EEOC has authority to award reasonable attorneys' fees outside of the Federal sector process (i.e., in the private sector and State and local government processes), the language could be clarified to be consistent with title VII and the ADA—that is, to make clear that each of the above-enumerated entities has the same power to award reasonable attorneys' fees as each entity already has under the statutes identified in Section 10(a) of ENDA (e.g., title VII and GERA for the EEOC, the Congressional Accountability Act for the Board of Directors of the Office of Compliance).

Question 3. In addition to prohibiting discrimination in employment on the basis of gender identity, ENDA places affirmative obligations on employers with regard to shared shower or dressing facilities in which being seen unclothed is unavoidable for individuals who have either "undergone" or who are "undergoing" transition to a different gender. The bill text leaves employers with a great deal of questions about how this requirement would work. Specifically, employers wonder what would constitute "notification" that private dressing and shower facilities will be required? Would the requirement also extend to bathroom facilities? The bill states that no

new facilities would be required, but would employers be required to renovate existing facilities?

Answer 3. Section 8(a)(3) of ENDA states that it is not unlawful to deny

> "access to shared shower or dressing facilities in which being seen unclothed 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."

The notification required by ENDA relates to the individual advising the employer that the individual has undergone or is undergoing gender transition. The notification may be oral or in writing. The bill does not require any new construction of private dressing or shower facilities. Rather, the employer's obligation is to provide reasonable access to adequate shower or dressing facilities that are consistent with the employee's gender identity, once notice is given. The language in this section does not mention bathroom facilities.

Section 8(a)(4) states that "[n]othing in this Act shall be construed to require the construction of new or additional facilities." As stated above, the requirement is for an employer who is on notice to provide an employee with reasonable access to shower or dressing facilities consistent with the employee's gender identity. Providing "reasonable access" does not amount to or equate with an obligation to renovate shower or dressing facilities.

RESPONSE TO QUESTIONS OF SENATOR ENZI BY HELEN NORTON

Question 1. In the absence of a specific employment protection for sexual orientation, some courts have interpreted title VII to provide such protection. If ENDA is enacted, is it your view that the existing bill would allow a successful plaintiff filing claims under both title VII and ENDA for the same alleged wrongful conduct could obtain a dual recovery? If not, why does it contain a provision specifically providing that it does not invalidate or limit the rights, remedies, or procedures available under any other law or regulation? Why would such a result be warranted? What changes could be made to the bill to eliminate the possibility of such a dual recovery?

Answer 1. Current law permits plaintiffs to plead alternative claims that challenge the same conduct under different legal theories—but does not permit double recovery by a plaintiff who succeeds on more than one claim that challenges the same conduct. ENDA is fully consistent with such law.

A wide range of unlawful conduct violates more than one statute. Plaintiffs' ability under current law to plead alternative theories is particularly helpful when different causes of action provide for different statutes of limitations, different procedural mechanisms, etc. For example, an employer's intentional race discrimination may violate 42 U.S.C. §1981 (which prohibits race discrimination in the making and enforcement of contracts, including employment contracts) as well as title VII's prohibition on discrimination in the terms and conditions of employment. Similarly, an employer that engages in pay discrimination on the basis of sex may violate both title VII and the Equal Pay Act. Outside of the antidiscrimination context, to identify just one of countless examples, a merchant who engages in false advertising may commit common law fraud as well as violate Federal and/or State consumer protection statutes.

So, too, if ENDA is enacted, an employer that takes an adverse employment action against an employee or applicant because that person departs from stereotypes associated with being male or female might be found to violate both title VII's ban on employment discrimination based on sex and ENDA's ban on employment discrimination based on gender identity. ENDA simply preserves a plaintiff's ability to plead such alternative theories by providing that it does not invalidate or limit the rights, remedies, or procedures available under any other law or regulation.

Longstanding remedies law, moreover, makes clear that a plaintiff who successfully establishes that a defendant's conduct satisfies the elements of more than one legal claim is not entitled to double recovery. As the Supreme Court has repeatedly emphasized, "It goes without saying that the courts can and should preclude double recovery by an individual." *E.E.O.C.* v. *Waffle House, Inc.*, 534 U.S. 279, 297 (2002) (quoting *Gen. Tel. Co. of the Northwest* v. *E.E.O.C.*, 446 U.S. 318, 333 (1980)). Courts uniformly apply this basic principle of law. *See, e.g., Starrett* v. *Wadley*, 876 F.2d 808, 822 n.19 (10th Cir. 1989) ("As to plaintiff's damages, we note that plaintiff should not be allowed 'double recovery' under section 1983 and title VII. For example, if plaintiff is awarded damages under section 1983 for lost back pay, she cannot recover back pay damages under title VII."); *Anderson* v. *Group Hospitalization,*

Inc., 820 F.2d 465, 473 (D.C. Cir. 1987) (compensatory damages awarded under both 42 U.S.C. § 1981 and title VII for same time period would constitute impermissible double recovery); *Williams* v. *Trans World Airlines*, 660 F.2d 1267, 1274 (8th Cir. 1981) ("The district court found that the plaintiff succeeded under both title VII and [42 U.S.C.] section 1981, and apparently doubled the damages award. This is clearly erroneous, as damages are only recoverable once for a transaction involving two violations of law.").

No language change is thus needed to prevent the possibility of double recovery by a plaintiff who prevails on more than one claim that challenges the same conduct, because clear and longstanding precedent makes clear that he or she can recover only once.

Question 2. It has been stated that individuals protected under ENDA would actually have access to greater remedies than those protected under title VII by way of their race, color, religion, sex or national origin, or under the ADA by way of disability. Namely, ENDA claimants could recover attorney and other fees from administrative proceedings, including an EEOC determination. EEOC decisions are not considered "final orders" and so are not subject to appeal. Therefore, an employer would not be able to contest any such award and, in fact, the EEOC is not even required to provide documented reasons for its decisions. Do you believe that plaintiffs alleging discrimination based on sexual orientation and sexual identity should be entitled to greater remedies than other title VII and ADA plaintiffs? Why would it be appropriate to deprive employers of their due process rights to contest attorney's fees awards solely for plaintiff's alleging discrimination based on sexual orientation and sexual identity? What changes could be made to the bill to ensure that ENDA claimants are treated the same as all other discrimination claimants in terms of potential recovery?

Answer 2. I agree that the remedies available under ENDA should track those available under the other Federal antidiscrimination statutes. I believe, however, that ENDA's language does in fact parallel that of other Federal law and in no way deprives employers of their due process rights.

Section 12 of ENDA provides that:

> "[I]n an action *or administrative proceeding* for a violation of this Act, an entity described in section 10(a) (other than paragraph (4) of such section), in the discretion of the entity, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee (including expert witness fees) as part of the costs." (emphasis added).

This language parallels the attorney's fees provision of the Americans with Disabilities Act of 1990, which provides:

> "In any action *or administrative proceeding* commenced pursuant to this chapter, the court or agency, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, including litigation expenses, and costs, and the United States shall be liable for foregoing the same as a private individual." 42 U.S.C. § 12205 (emphasis added).

I know of no instance in the ADA's nearly 20-year history in which this language has been misinterpreted to assess attorney's fees against an employer based on the EEOC's investigative determination that there is reasonable cause to believe that an employer has engaged in unlawful discrimination. No doubt this is because the Federal antidiscrimination statutes do not provide the EEOC with the authority to adjudicate discrimination charges with respect to private, State, or local government employers and thus there is no "prevailing party" at this administrative stage as required to trigger a fee award. Instead, Federal law confers the Commission only with the authority to investigate such charges and, if it finds reasonable cause, to seek to conciliate the dispute. If conciliation is unsuccessful, the Commission may choose to bring a civil action against the employer itself (or, in the case of a State or local government employer, to refer the charge to the Department of Justice for possible litigation). Alternatively, the Commission may decline to litigate; in that case, the charging party retains the right to pursue a civil action himself or herself. See 42 U.S.C. 2000e–5. But not until a court decides that civil action is there a "prevailing party" that triggers the possibility of attorney's fee awards.

Instead, I believe that the reference to "administrative proceedings" addresses those limited circumstances in which Federal law creates special processes for the administrative adjudication of discrimination charges—including the assessment of remedies—by entities "described in section 10(a) (other than paragraph (4) of such section)." For example, title VII creates a separate process for the resolution of discrimination charges by Federal executive branch employees and provides the EEOC with the authority to enforce such protections through appropriate remedies. 42

U.S.C. § 2000e-16(a) and (b). Similarly, the Congressional Accountability Act protects Federal legislative branch employees from job discrimination, 2 U.S.C. § 1311, and permits the award of attorney's fees after administrative proceedings before a hearing officer or the Board of Directors of the Office of Compliance. *See* 2 U.S.C. § 1361.

Question 3. In addition to prohibiting discrimination in employment on the basis of gender identity, ENDA places affirmative obligations on employers with regard to shared shower or dressing facilities in which being seen unclothed is unavoidable for individuals who have either "undergone" or who are "undergoing" transition to a different gender. The bill text leaves employers with a great deal of questions about how this requirement would work. Specifically, employers wonder what would constitute "notification" that private dressing and shower facilities will be required? Would the requirement also extend to bathroom facilities? The bill states that no new facilities would be required, but would employers be required to renovate existing facilities?

Answer 3. If an employee has undergone a gender transition *before* starting work with a particular employer, the duty of nondiscrimination under these sections applies based on the employee's gender as established at the time of employment (e.g., through the employee's name, clothing, mannerisms, or employment references). In this case, the employer need not inquire, and the employee need not disclose, information regarding the employee's transition. The employer's obligation is simply not to discriminate in the event that the past transition comes to the employer's attention.

If, on the other hand, an employee undergoes gender transition *after* starting work with a particular employer, I understand the terms "notification" in ENDA section 8(a)(3) and "notified" in section 8(a)(5) to mean that that employee must take some affirmative step to communicate the matter to the employer. *See, e.g., Detroit Coil Co.* v. *Int'l Ass'n of Machinists & Aerospace Workers*, 594 F.2d 575, 580 (6th Cir. 1979) ("The word 'notified', in its ordinary usage, means the completed act of bringing information to the attention of another"). Courts have consistently interpreted the term "notification" under Federal employment law to include any communication that is sufficient to express the matter to the employer in an understandable way, without requiring any special form or any "magic words." *See, e.g., Smith* v. *Midland Brake, Inc.*, 180 F.3d 1154, 1172 (10th Cir. 1999) (en banc) (concluding that the ADA does not require an employee to use any "magic words" when notifying an employer of his or her disability and request for reasonable accommodation); *Sarnowski* v. *Air Brooke Limousine, Inc.*, 510 F.3d 398, 402 (3d Cir. 2007) (concluding that the FMLA does not require an employee to use any "magic words" when notifying an employer of his or her request to take leave for a serious health condition).

Section 8(a)(3) of ENDA provides a defense to employers who meet certain conditions with respect "to the denial of access to shared shower or dressing facilities in which being seen unclothed is unavoidable." It thus applies only to the denial of access to those shared workplace facilities in which, unlike nearly all restrooms, being seen unclothed is unavoidable. Longstanding OSHA regulations already require employers to ensure employee privacy in restrooms through the provision of stalls or single-user restrooms. Indeed, these regulations, which apply to all permanent places of employment, require that "[e]ach water closet shall occupy a separate compartment with a door and walls or partitions between fixtures sufficiently high to assure privacy." 29 CFR § 1910.141(c).

Section 8(a)(4) provides that employers are not required to construct new physical facilities in order to comply with the act. It does not speak to any duty to renovate or modify existing facilities.

[Whereupon, at 12:26 p.m., the hearing was adjourned.]

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