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H.R. 3017, EMPLOYMENT NON–DISCRIMINATION ACT OF 2009

HEARING

BEFORE THE

COMMITTEE ON
EDUCATION AND LABOR

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED ELEVENTH CONGRESS

FIRST SESSION

HEARING HELD IN WASHINGTON, DC, SEPTEMBER 23, 2009

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H.R. 3017, EMPLOYMENT NON–DISCRIMINATION ACT OF 2009

Wednesday, September 23, 2009
U.S. House of Representatives
Committee on Education and Labor
Washington, DC

The committee met, pursuant to call, at 10:03 a.m., in room 2175, Rayburn House Office Building, Hon. George Miller [chairman of the committee] presiding.

Present: Representatives Miller, Kildee, Payne, Andrews, Woolsey, Hinojosa, Tierney, Kucinich, Holt, Hirono, Hare, Clarke, Fudge, Polis, Tonko, Pierluisi, Titus, Chu, Kline, McKeon, Ehlers, Biggert, Platts, McMorris Rodgers, Guthrie, McClintock, and Hunter.

Staff present: Aaron Albright, Press Secretary; Tylease Alli, Hearing Clerk; Tico Almeida, Labor Counsel (Immigration and International Trade); Jody Calemine, General Counsel; Alejandra Ceja, Senior Budget/Appropriations Analyst; Lynn Dondis, Labor Counsel, Subcommittee on Workforce Protections; Adrienne Dunbar, Education Policy Advisor; Carlos Fenwick, Policy Advisor, Subcommittee on Health, Employment, Labor and Pensions; David Hartzler, Systems Administrator; Broderick Johnson, Staff Assistant; Alex Nock, Deputy Staff Director; Joe Novotny, Chief Clerk; Rachel Racusen, Communications Director; Meredith Regine, Junior Legislative Associate, Labor; James Schroll, Junior Legislative Associate, Labor; and Mark Zuckerman, Staff Director; Andrew Blasko, Speech Writer and Communications Advisor; Kirk Boyle, General Counsel; Casey Buboltz, Coalitions and Member Services Coordinator; Cameron Coursen, Assistant Communications Director; Ed Gilroy, Director of Workforce Policy; Rob Gregg, Senior Legislative Assistant; Richard Hoar, Professional Staff Member; Barrett Karr, Staff Director; Alexa Marrero, Communications Director; Molly McLaughlin Salmi, Deputy Director of Workforce Policy; Ken Serafin, Professional Staff Member; Linda Stevens, Chief Clerk/Assistant to the General Counsel; and Loren Sweatt, Professional Staff Member.

Chairman MILLER [presiding]. The quorum being present, the committee will come to order. The Education and Labor Committee meets today to examine historic legislation that will finally end legal discrimination on the basis of sexual orientation and gender identity.

H.R. 3017, the Employment Non-Discrimination Act, will ensure that employment decisions are based on merit and performance and not prejudice. Twenty-nine states permit employers to make critical employment decisions based solely on an employee's sexual orientation.

In 38 states, it is perfectly legal to discriminate based on gender identity. If you happen to live in one of these states, employers can legally fire, refuse to hire, demote or pass over you for a promotion on the basis of your sexual orientation or gender identity.

Because of this, 172 million Americans are subject to legal employment discrimination including those who work for state governments. Fully qualified individuals are being denied employment or being fired from their jobs for completely non-work related reasons.

This is profoundly unfair and indeed un-American and it is bad for business. Tellingly, major businesses have adopted policies to insure that they are able to attract and retain the best, most qualified employees, regardless of their sexual orientation or gender identity. They have done so both because it is the right thing to do and because it helps their bottom line.

Our entire work force and our nation's competitiveness will benefit from ensuring that every worker is judged on how they do their job and not who they are. If we do nothing, untold numbers of American workers will continue to work with the legitimate fear that they will be fired for nothing more than who they love or their gender identity.

The Employment Non-Discrimination Act would protect all Americans from this type of injustice by extending employment discrimination protections for gay, lesbian, bi-sexual, transgender and heterosexual workers. It would prohibit businesses with 15 or more employees, employment agencies, government agencies and labor unions from using sexual orientation or gender identity as the basis for employment decisions.

The Employment Non-Discrimination Act provides the same procedures for handling workers' grievances as Title VII employment discrimination claims. The bill will also exempt religious organizations from covering using the exact language found in Title VII of the Civil Rights Act and supported by more than 400 members in the last Congress.

Today we will hear from three panels of witnesses on this legislation. I would like to recognize the strong leadership of our first panel, Representative Barney Frank and Tammy Baldwin. It is because of their tireless efforts that we are here today debating this important legislation.

I am also pleased to welcome a representative of the Obama Administration to give their perspective on the Employment Non-Discrimination Act. Our last panel, we will hear testimony from the Georgia state legislative employee who was fired after she informed her supervisor that she intended to undergo gender reassignment.

In addition, two expert witnesses will present extensive records documenting the longstanding and widespread pattern of discriminatory actions by state and local governments against the lesbian, gay, bi-sexual and transgender employees.

One will discuss the role prejudice played when he was denied a promotion in a state university. Another witness will talk about

the balance that the Employment Non-Discrimination Act strikes between civil rights workers and the interests of religious organizations.

For more than three decades, gay, lesbian, bi-sexual and transgender Americans have waged a courageous campaign for their workplace rights. I regret that it had to wait so long for us to respond. We took a big step forward in 2007 when the House held its first ever hearing, committee votes and House passed the Employment Non-Discrimination Act.

Unfortunately, President Bush threatened to veto the Employment Non-Discrimination Act if it reached his desk at that time. But today we have a new opportunity. We have a new president who supports the civil rights of all Americans and has vowed to sign the legislation into law. I look forward to hearing from all of our witnesses today on this very important bill.

And with that, I would like to recognize the senior Republican member of our committee, Mr. Kline, for his opening statement.

[The statement of Mr. Miller follows:]

Prepared Statement of Hon. George Miller, Chairman, Committee on Education and Labor

The Education and Labor Committee meets today to examine historic legislation that will finally end legal discrimination on the basis of sexual orientation and gender identity.

H.R. 3017, the Employment Non-Discrimination Act, will ensure that employment decisions are based on merit and performance and not prejudice.

Twenty-nine states permit employers to make critical employment decisions based solely on an employee's sexual orientation. And in 38 states, it is perfectly legal to discriminate based on gender identity.

If you happen to live in one of these states, employers can legally fire, refuse to hire, demote, or pass you over for promotion on the basis of your sexual orientation or gender identity. Because of this, 172 million Americans are subject to legal employment discrimination, including those who work for state governments.

Fully qualified individuals are being denied employment or are being fired from their jobs for completely non-work-related reasons. This is profoundly unfair and, indeed, un-American. And, it is bad for business.

Tellingly, many major businesses have adopted policies to ensure they are able to attract and retain the best, most-qualified employees, regardless of their sexual orientation or gender identity. They have done so both because it is the right thing to do and because it helps their bottom line.

Our entire workforce and our nation's competitiveness will benefit from ensuring that every worker is judged on how they do their job, not who they are. If we do nothing, untold numbers of American workers will continue to go to work with the legitimate fear that they could be fired for nothing more than who they love or their gender identity.

The Employment Non-Discrimination Act would protect all Americans from this type of injustice by extending employment discrimination protections for gay, lesbian, bisexual, transgender and heterosexual workers.

It would prohibit businesses with 15 or more employees, employment agencies, government agencies and labor unions from using sexual orientation or gender identity as the basis for employment decisions. The Employment Non-Discrimination Act provides the same procedures for handling workers' grievances as Title VII employment discrimination claims. The bill will also exempt religious organizations from coverage, using the exact language found in Title VII of the Civil Rights Act and supported by more than 400 members in the last Congress.

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For more than three decades, gay, lesbian, bisexual and transgender Americans have waged a courageous campaign for their workplace rights. I regret that they had to wait so long for us to respond.

We took a big step forward in 2007 when the House held the first ever hearing, committee votes and House passage of the Employment Non-Discrimination Act.

Unfortunately, President Bush threatened to veto the Employment Non-Discrimination Act if it reached his desk at that time. But today we have a new opportunity.

We have a new President who supports the civil rights of all Americans and has vowed to sign this legislation into law.

I look forward to hearing from all our witnesses today on this very important bill.

Mr. KLINE. Thank you, Mr. Chairman, and good morning everybody. We are here today to examine the Employment Non-Discrimination Act of 2009, a bill that would have major consequences for workplaces across the nation.

As I understand it, this legislation is very similar to legislation of the same name introduced in 2007. This panel considered the legislation 2 years ago and eventually it was brought to a vote in the full U.S. House of Representatives before stalling in the Senate.

Two years ago, my colleagues and I raised a number of substantive policy concerns about this legislation. Some changes were made before the bill went to the House floor. But unfortunately, 2 years later, many issues have not been resolved and our concerns have not been alleviated.

H.R. 3017 represents a significant departure from longstanding civil rights law. It creates an entirely new protected class that is vaguely defined and often subjective. For instance, the legislation extends protections based on "perceived sexual orientation."

Attempting to legislate individual perceptions is truly uncharted territory and it does not take a legal scholar to recognize that such vaguely defined protections will lead to an explosion in litigation and inconsistent judicial decisions.

Similarly, the protections based on gender identity have raised both philosophical and logistical questions from the outset. In fact, the bill ultimately brought to a vote did not include those protections precisely because their application would have been so problematic, yet 2 years later, the legislation before us again includes the gender identify protections.

Although I am keeping my remarks brief to accommodate the schedules of this unusually large number of witnesses, there is one final concern I must raise before I yield back. I think we must carefully consider the consequences of H.R. 3017 for religious and family-based organizations that make hiring decisions consistent with their faith and mission.

H.R. 3017 contains an exemption that attempts to create a linkage to the religious exemption found in Title VII of the Civil Rights Act of 1964. Unfortunately, we will hear testimony today that raises a great deal of uncertainty about how that exemption will

be applied. Will it be interpreted as simply restating the hiring protections based on an applicant's religion?

Consider a faith-based organization with expressed religious teachings related to sexual orientation. While longstanding civil rights law protects a faith-based organization's right to hire in a manner consistent with their faith traditions, we may hear concerns that H.R. 3017 could potentially exclude any faith traditions that deal with sexual orientation or gender identity.

At a minimum, this is likely to contribute to an already confusing and contradictory patchwork of legal interpretations and spur significant new litigation as a direct result of the legal mine fields that would spring up under H.R. 3017.

As I mentioned at the outset, this is far-reaching legislation that would have major consequences for workplaces across the nation. I hope today's hearing will not simply gloss over the legal and substantive concerns, but will instead thoroughly explore the ramifications of such an unprecedented expansion and revisions of our civil rights laws.

Thank you, Mr. Chairman, I yield back.

[The statement of Mr. Kline follows:]

Prepared Statement of Hon. John Kline, Senior Republican Member, Committee on Education and Labor

Good morning, Chairman Miller, and thank you. We're here today to examine the Employment Non-Discrimination Act of 2009, a bill that would have major consequences for workplaces across the nation.

As I understand it, H.R. 3017 is largely identical to legislation of the same name introduced in 2007. This panel considered the legislation two years ago, and eventually it was brought to a vote in the full U.S. House of Representatives before stalling in the Senate.

Two years ago, my colleagues and I raised a number of substantive policy concerns about this legislation. Some changes were made before the bill went to the House Floor, but unfortunately, two years later, many issues have still not been resolved and our concerns have not been alleviated.

H.R. 3017 represents a significant departure from longstanding civil rights law. It creates an entirely new protected class that is vaguely defined and often subjective. For instance, the legislation extends protections based on—quote—"perceived" sexual orientation.

Attempting to legislate individual perceptions is truly uncharted territory, and it does not take a legal scholar to recognize that such vaguely defined protections will lead to an explosion in litigation and inconsistent judicial decisions.

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Thank you Chairman Miller, I yield back.

Chairman MILLER. Thank you. Pursuant to committee rule 7C, all members may submit opening statements in writing, which will be made part of the permanent record. Our first panel today will be made up of two of our colleagues, the Honorable Barney Frank from the 4th District of Massachusetts. He is Chairman of the Financial Services Committee and a lead sponsor of ENDA in this Congress and the 110th Congress.

Representative Frank has been an outspoken advocate of the rights of those in the LGBT community and a leader against all forms of discrimination in the workplace. I am proud to hold this hearing today and look forward to hearing from him in a moment.

The Honorable Tammy Baldwin from the 2nd District of Wisconsin is also an original cosponsor of ENDA. Representative Baldwin has worked for many years as an attorney, local government official and is a member of Congress who brings attention to the discrimination that gay, lesbian, bisexual and transgender people face in the workplace.

Representative Baldwin, thank you for your efforts and we look forward to hearing from you today.

Barney, we will begin with you.

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

Mr. FRANK. Thank you, Mr. Chairman and I—well, Frank, Secretary Geithner, is testifying before the Financial Services Committee just down the hall, so I will ask to leave from the committee after I have spoken.

I want to express to you, Mr. Chairman, and to Mr. Andrews, the chairman of the subcommittee, my deep appreciation for the extraordinary efforts you have taken, thoughtful and sensible and sensitive on this issue over the years.

I find it hard to argue for legislation that bans discrimination. I guess in this one my instincts are to be a counter puncher. It just seems to me so self-evident that an American who would like to work and support himself or herself ought to be allowed to do that judged solely on his or her work ethic and talents that I don't know what more to say.

Sometimes we have been accused, those of us who are gay or lesbian, of having a radical agenda. As I look at radicalism through history, trying to get a job or join the military have not been the hallmarks of radicalism. That is what we are talking about today.

Now this House, last session, under the leadership of you, Mr. Chairman and Mr. Chairman of the subcommittee, passed this bill by a large majority including a number of Republicans and I was very pleased to see that.

There is an added element today, the transgender element, so I just want to address that. But I want to first respond to the comments of the Ranking Member and those were perfectly reasonable, obviously, and I have found this is often the case that people say, you know, when it comes to protecting a group against discrimination I harbor no ill will for them but I worry about disruptive effects.

The one thing I would say is this. I was first elected to a legislature in 1972 in Massachusetts. In the ensuing years I have worked on legislation to protect people against religious discrimination, discrimination based on race, discrimination based on ethnicity, discrimination based on gender, discrimination based on just condition of disability and of age.

I must say the time that I worked on all those I was not the beneficiary of any of them. I caught up on the age part. But in every single case—and I remember when we re-enacted the legislation with you playing a major role, Mr. Chairman, to say that you had a particular obligation not to discriminate if you took federal funds.

And in every single case, when we have voted against discrimination the arguments have been similar. It is not that we dislike these people. In our case there is a few that don't say that. But in general the argument is from thoughtful people, it will be too disruptive.

The point I want to make is this. They always, the opponents of discrimination legislation, predict disruption, and it never happens. The secret about any discrimination legislation is that it becomes very hard to enforce. They have historically been under-enforced rather than over-enforced.

The gentleman sort of raises a reasonable question, has—could this lead to litigation? But while most states in this country do not offer that protection to people like me and my colleague from Wisconsin and our colleague from Colorado, we are subject to being fired just because of our personal characteristics here.

There is no history of litigation of the sort that is conjured up. There is no negative history. This isn't the first time this has happened. The gentlewoman from Wisconsin state did it first. My state did it second. These laws have been on the books for well over 20 years in places. There are many states that have them. There is no record of this being disruptive. This simply is a non-existent fear.

And I have to say this, in a rare instance of the media not wanting to contradict politicians, they generally love to show that we haven't been telling the truth, I wish they would go back and look at any discrimination based on age and race and disability and gender and religion, et cetera, et cetera, and look at the predictions that were made of chaos and look at the total absence of chaos that ensued because that clearly is the case.

Finally, I just want to address the issue of transgender. It was very controversial last time. I didn't think we had the votes. I hope we will now. I remember when I first introduced legislation to prevent discrimination in employment based on sexual orientation 37 years ago, many of my colleagues in the legislature were troubled by it and made uneasy by it.

It was a new thing to them. Yes, I believe the issue of transgender is a new one to people. It takes time for people to get used to it, but there is no more reason to discriminate against someone because he or she is transgender than because he or she is gay or lesbian or in any other of the categories.

We are not asking that anybody get a pass. There is no affirmative action in this bill. To the extent that the transgender issue raises a couple of special issues about changing clothes facilities, the bill addresses them. And I have to say, there are some people who have expressed some puzzlement about people who are transgender.

I understand that this is a concept that for some people it is kind of, it is new. But I can guarantee them, as my colleagues in the legislature 37 years ago got to know gay people and talked to us, the fear that there was something just so troubling, that went away.

The same happens. It has certainly been our experience. Yes, the transgendered community was a hidden community for years because of the degree of prejudice they faced. That barrier has dropped and they deserve a great deal of credit, the members of that community, for getting out there and introducing themselves and talking to people.

Let me just say to my colleagues, there is nothing to be afraid of. These are our fellow human beings. They are not asking you for anything other, in this bill, for the right to earn a living. Can't you give them that? If you don't like them, if you don't want to be friends, I think you are missing on something, but that is your choice.

But how can we, as people who make the laws in this wonderful country, under our great Constitution, say to one small group of our fellow citizens, you know there is something about you that some people don't like, so you are not eligible for work. You can be fired. You can't get a promotion. I cannot understand why anybody would want to say that to a group of our fellow citizens, and that is all that this bill does.

Thank you, Mr. Chairman.

Chairman MILLER. Thank you, Barney. We know that you are chairing a hearing, and I don't think this committee has any objections to you leaving at this point if that is what you want to do.

Mr. FRANK. No, after.

Chairman MILLER. After Tammy.

Mr. FRANK. Very often there are objections to my not leaving.

Chairman MILLER. I know. Yes, right. [Laughter.]

I didn't want to put that question in. [Laughter.]

Tammy, welcome to the committee. We look forward to your testimony. Thank you for being here.

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

Ms. BALDWIN. Thank you, Chairman Miller. Thank you Ranking Member Kline and all members of the committee. I am delighted to join you in support, in strong support of the Employment Non-Discrimination Act.

As my colleague, Barney Frank, just mentioned, my home state of Wisconsin enacted the first employment non-discrimination act in the nation. The year was 1982, more than a quarter century ago. At that time, only 41 municipalities and eight counties in the entire United States offered any protections against discrimination based on sexual orientation.

Wisconsin's efforts to pass the nation's first sexual orientation antidiscrimination statute was, at that time, supported by a broad bipartisan coalition including members of the clergy, various religious denominations, medical and professional groups.

The measure was, in fact, signed into law by a Republican governor, Lee Sherman Dreyfus, who based his decision to support the measure on the success of municipal ordinances that provided similar protections.

Since Wisconsin passed its statute in 1982, 20 additional states and the District of Columbia, covering roughly 44 percent of the U.S. population have passed similar measures. Twelve states and Washington, D.C. also prohibit discrimination based on gender identity.

In addition to state and local measures, hundreds of American companies have enacted policies protecting their LGBT employees. Currently, 85 percent of Fortune 500 companies extend protections based on sexual orientation and more than one third do so on the basis of gender identity also.

There is a clear record demonstrating the need for these protections. Lesbian, gay, bi-sexual and transgender employees are harassed. They are fired or not hired or passed over for advancement without regards to the merit of their work.

Studies of LGBT employees reveal significant levels of discrimination or harassment occurring in workplaces across the country. For example, according to a 2007 report that was published by the ACLU, nearly 30 percent of LGBT workers report that they have experienced discrimination or unfair treatment in the workplace, and one in four say they experience it on a weekly basis.

Further, as you will hear later in the testimony from Mr. Sears, many state governments have engaged in a widespread pattern of unconstitutional employment discrimination against LGBT employees. Without ENDA, these Americans do not have basic protection against workplace discrimination.

As my colleagues know, the Employment Non-Discrimination Act will provide basic protections against workplace discrimination on the basis of sexual orientation and sexual identity. ENDA does not create special rights.

It simply affords to all Americans basic employment protections from discrimination based on irrational prejudice or bias. The importance of non-discrimination laws cannot be overstated. Substantively, they provide real remedies and a chance to seek justice.

Symbolically, they say to Americans judge your fellow citizens by their integrity, their character and talents and not their sexual orientation or gender identity or race or religion for that matter. Symbolically, these laws also say that irrational bias has no place in our workplace.

Mr. Chairman, Americans are ready for ENDA. According to a 2008 Gallup poll, 89 percent of the country believes that gay and

lesbian Americans should have equal rights in terms of job opportunities. In another poll, 71 percent of Americans agree that performance should be the standard of judging an employee, not whether they are transgender.

Americans rightly believe that their hardworking friends and neighbors should not be denied job opportunities, fired or otherwise be discriminated against just because of their sexual orientation or gender identity. Yet, as The New York Times editorialized just 2 weeks ago, federal law has lagged behind the reality of American life.

Mr. Chairman, it is time to bring our laws in line with the reality of American life. Over the past 2 years, we have held very constructive discussions on ENDA, not only within the LGBT community but here in Congress.

Spurred by constituent meetings and conversations in their communities back home, my colleagues have deepened their understanding about why affording to all Americans basic employment protections from discrimination based on irrational prejudice is so meaningful.

And here in Washington, we have discussed why transgender individuals, Americans who lead incredibly successful, stable lives, are dedicated parents, who contribute immeasurably to their communities and their country and why they, too, must be included in ENDA. And Chairman Andrews, your hearing on gender identity last June was a real testament to that effort.

More than 40 years ago, we enacted the Civil Rights Act of 1964 that banned discrimination on the basis of race, color, religion, sex or national origin. We knew then that an irrational hatred, bias and fear had no place in our workplace. And now it is time to declare, as a nation, that discrimination based on sexual orientation or gender identity is unlawful as well.

Through your work and your efforts in this committee, I know you will help fulfill this promise. Again, I very much appreciate the chance to testify before your committee.

[The statement of Ms. Baldwin follows:]

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

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

I am a strong supporter of H.R. 3017, the Employment Non-Discrimination Act of 2009.

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

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

Since Wisconsin passed its statute in 1982, twenty additional states and the District of Columbia (roughly 44% of the population) have passed similar protective measures. Twelve states and Washington D.C. also prohibit discrimination based on gender identity. In addition to state and local measures, hundreds of American companies have enacted policies protecting their LGBT employees. Currently, 85% of

the Fortune 500 companies extend protections based on sexual orientation and more than one-third do so on the basis of gender identity.

There is a clear record demonstrating the need for these protections: lesbian, gay, bisexual, and transgender employees are harassed, fired, not hired, and passed over for advancement without regard to their merit. Studies of LGBT employees reveal significant levels of discrimination or harassment occurring in workplaces across the country. For example, according to a 2007 report published by the ACLU, nearly 30% of LGBT workers reported that they have experienced discrimination or unfair treatment in the work place and one in four said they experience it on a weekly basis (Working in the Shadows: Ending Employment Discrimination for LGBT Americans). Further, as you'll hear later from Mr. Sears, many state governments have engaged in a widespread pattern of employment discrimination against LGBT employees. Without ENDA, these American do not have basic protections against workplace discrimination.

Mr. Chairman, I would like to share with you Sheri Swokowski's story. Sheri is a retired Colonel, and former Director of Human Resources for the Wisconsin National Guard from DeForest, Wisconsin. In 2006, she traveled out to Fort Belvoir, Virginia to teach at the U.S. Army Force Management School—given her background and experience in the Army Guard, Sheri was a lead instructor. In August 2007, she began her transition from male to female and informed her human resources department (she was employed by a large government contractor, not the school itself) of her intent to teach the fall courses as a woman for the first time. Soon after this conversation, Sheri was told her teaching services were no longer needed and that her transition was "her problem." To hear Sheri tell her story is heartbreaking. She knows she was qualified for the position, but she also recognizes that her former employer didn't see her as Sheri—they only saw her gender identity. The sad reality is that Sheri's life and her livelihood would be different today if ENDA were the law of the land.

We now have the chance to do so by passing H.R. 3017. As my colleagues know, the Employment Nondiscrimination Act, or ENDA, will provide basic protections against workplace discrimination on the basis of sexual orientation or gender identity. ENDA does not create "special rights." It simply affords to all Americans basic employment protection from discrimination based on irrational prejudice.

The importance of nondiscrimination laws cannot be overstated. Substantively, they provide real remedies and a chance to seek justice. Symbolically, they say to Americans, judge your fellow citizens by their integrity, character, and talents, not their sexual orientation, or gender identity, or their race or religion, for that matter. Symbolically, these laws also say that irrational hate or fear have no place in our work place.

Mr. Chairman, Americans are ready for ENDA. According to a 2008 Gallup Poll, 89% of the country believes that gay and lesbian Americans should have "equal rights in terms of job opportunities." In another poll, 71% of Americans agree that performance should be the standard for judging an employee, not whether they are transgender. Americans rightly believe that their hard-working friends and neighbors should not be denied job opportunities, fired or otherwise be discriminated against just because of their sexual orientation or gender identity. Yet as the New York Times editorialized just two weeks ago, "Federal law has lagged behind the reality of American life." (9/12/09)

Mr. Chairman, it is time to bring our laws in line with the reality of American life. Over the past two years, we have held constructive discussions on ENDA not only within the LGBT community, but here in Congress. Spurred by constituent meetings and conversations in their communities back home, my colleagues have deepened their understanding about why affording to all Americans basic employment protection from discrimination based on irrational prejudice is so meaningful. And here in Washington, we have discussed why transgender individuals—Americans who lead incredibly successful, stable lives, are dedicated parents, contribute immeasurably to their communities and their country—and why they, too, must be included in ENDA. Chairman Andrews, your hearing on Gender Identity last June was a testament to that effort.

I believe the conclusion of these discussions and debates is that Congress is ready to pass H.R. 3017. More than 40 years ago, we enacted the Civil Rights Act of 1964 that banned employment discrimination on the basis of race, color, religion, sex, or national origin. We knew then that irrational hate and fear have no place in our work place and now is the time to declare—as a nation—that discrimination on the basis of sexual orientation or gender identity is unlawful, as well. Through your work and your efforts in this Committee, I know we will help fulfill this promise.

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

Thank you.

Chairman MILLER. Thank you very much. And again, we know your schedule. If there is any member that has a burning question that they would not be able to ask, Ms. Baldwin.

Thank you, appreciate that.

Our second panel will be a representative of the administration, Mr. Stuart Ishimaru, who is the Acting Chairman of the U.S. Equal Employment Opportunity Commission. Mr. Ishimaru has previously served as deputy assistant attorney general to the Civil Rights Division of the U.S. Department of Justice, where he supervised the division's attorneys in high profile litigation related to employment discrimination.

He was also appointed by President Clinton to acting staff director to the U.S. Commission on Civil Rights and additionally served as a former professional staff member to both the House Judiciary and Armed Services Committee.

Mr. Ishimaru received his BA from the University of California Berkley and his Juris Doctorate from the George Washington University.

Welcome to the committee. We are going to give you 5 minutes to summarize your testimony and then we will make questions available from the members of the committee.

STATEMENT OF STUART J. ISHIMARU, ACTING CHAIRMAN, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Mr. ISHIMARU. Thank you, Mr. Chairman. I have a written statement that I ask be made a part of the record.

Chairman MILLER. It will, without objection, be so ordered.

Mr. ISHIMARU. Thank you, Mr. Chairman, and thank you to the committee for having us here today for this important hearing. It is a privilege to be here to represent the Obama Administration and the EEOC in this first hearing of this Congress to consider the Employment Non-Discrimination Act, a bill that to voice the administration's strong support for legislation that prohibits discrimination on the basis of sexual orientation and gender identity.

Our nation prides itself on embracing the principle that persons should be judged based on merit and ability, not race, religion, class, culture or other extraneous factors. Our civil rights laws reflect and uphold this principle.

All Americans have the right to find jobs, keep jobs, earn promotions, pay raises and other benefits of employment based on their qualifications and hard work, not on characteristics such as sexual orientation or gender identity, which have no bearing on workplace performance.

Unfortunately, this right remains elusive or almost nonexistent for many Americans because of lack of federal legislation explicitly prohibiting sexual orientation and gender identity discrimination in employment. Study-after-study has shown that employment discrimination against LGBT individuals remains a significant problem.

Only 21 states and D.C. prohibit employment discrimination on the basis of sexual orientation and even a smaller number, 12 plus D.C. also prohibit employment discrimination on the basis of gen-

der identify. States therefore leave large numbers of LGBT individuals without recourse for workplace discrimination on the basis of sexual orientation and gender identity.

When our EEOC investigators hear complaints about sexual orientation discrimination and gender identity discrimination from members of the public to whom we serve, hoping to find justice, we usually have to say we can't help you, that the laws don't apply.

This discrimination can take many forms. It can be overt instances of anti-gay epithets that harass and belittle employees, and it may be the explicit denial of workplace opportunities on these bases.

We see this time-and-time again and we have to turn people away, generally, because the federal law does not apply. Because the current patchwork of state laws leaves big gaps in coverage, federal government action is necessary to provide protection against employment discrimination on the basis of sexual orientation and gender identity.

Protecting valued members of our workforce from discrimination should not be left solely to the states. Discrimination in the state of Washington is just as wrong as discrimination in Florida. It is a critical statement of national policy that the federal government will not tolerate discriminating that is based on invidious bias against individuals because of their sexual orientation and gender identity.

Our federal workforce, too, also lacks statutory protections from sexual orientation and gender identity discrimination. 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 13087 prohibits employment discrimination on the basis of sexual orientation in much of the executive branch. But the remedies available under 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.

I hear from employers all the time and they tell me that they want good employees working for them. They are always searching for good people and they tell me that they want basic fairness in the workplace. But they also say this is a smart business decision not to discriminate and they want to obtain and attract talent to work for them.

They want to do this for a couple of reasons. They want to do it because it complies with the law, but it also lets them go to the largest talent pool available out there to not to exclude anyone on the basis of extraneous factors and certainly large businesses, many large businesses get this.

If you look at figures, 87 percent of the Fortune 500 companies have implemented non-discrimination policies that include sexual orientation and 41 percent had policies that include gender identity.

And although an increasing number of businesses have started addressing workplace fairness for LGBT employees, a large number

of individuals still face discrimination on the basis of sexual orientation in the workplace.

And I have found—if I can sum up, Mr. Chairman—I have been a civil rights lawyer for 25 years, now, and I have found in the other areas that Congress has covered by the civil rights laws that they are—that prejudice often is overcome by exposure to other people.

And in the workplace I have found, during my time at the EEOC, people are working with people of different races, people of different genders, people of different religions. And they find that they have common interests, common hopes, common dreams and aspirations.

And from that, they learn that people aren't that different from themselves. And I am hopeful that enactment of legislation that will prohibit discrimination on the basis of sexual orientation and gender identity will do the same type of thing here.

So I thank you for holding the hearing today to address this important step of protecting employees from arbitrary discrimination and those of employers to operate their businesses. Again, I thank you for the opportunity to testify and look forward to the questions from the members of the committee.

[The statement of Mr. Ishimaru follows:]

Prepared Statement of Stuart J. Ishimaru, Acting Chairman, U.S. Equal Employment Opportunity Commission

Mr. Chairman and members of the House Education and Labor Committee, thank you for the opportunity to appear before you at this important hearing. It is a privilege to represent the Obama Administration and the EEOC at the first hearing this Congress to consider ENDA, to voice the Administration's strong support for legislation that prohibits discrimination on the basis of sexual orientation and gender identity. This legislation will provide sorely needed and long overdue federal protection for lesbian, gay, bisexual, and transgender (LGBT) individuals, who unfortunately still face widespread employment discrimination.

Our Nation prides itself on embracing the principle that persons should be judged based on merit and ability, not on race, religion, class, culture or other extraneous factors. Our civil rights laws reflect and uphold this principle. All Americans have the right to find jobs, keep jobs, and earn promotions, pay raises and other benefits of employment based on their qualifications and hard work, not on characteristics such as sexual orientation or gender identity, which have no bearing on workplace performance.

Unfortunately, this right remains elusive, or even non-existent for many Americans, because of the lack of federal legislation explicitly prohibiting sexual orientation and gender identity discrimination in employment. Studies have shown that employment discrimination against LGBT individuals remains a significant problem. Job applicants and employees who are talented, fully qualified, and hard-working are denied jobs, fired, or otherwise discriminated against in the workplace simply because they happen to be lesbian, gay, bisexual, or transgender.

Only 21 states and D.C. prohibit employment discrimination on the basis of sexual orientation and an even smaller number—12 states plus D.C.—also prohibit employment discrimination on the basis of gender identity. State laws therefore leave large numbers of LGBT individuals without recourse for workplace discrimination on the basis of the sexual orientation or gender identity.

While our investigators often hear complaints of sexual orientation and gender identity discrimination from members of the public who come to us hoping to find justice, we are currently without jurisdiction to help them in most cases. This discrimination can take many forms, ranging from overt instances of the use of anti-gay epithets to harass or belittle employees, to the explicit denial of employment, promotion, or career enhancing assignments because of the employee's sexual orientation or gender identity. Unfortunately, although we hear regularly from working Americans who complain that they have been discriminated against because of their sexual orientation or gender identity, we have to tell them that our federal laws provide them no explicit protection.

Because the current patchwork of state laws leaves big gaps in coverage, federal government action is necessary to provide protection against employment discrimination on the basis of sexual orientation and gender identity. Protecting valued members of our workforce from discrimination should not be left solely to the states—discrimination in Washington State is just as wrong as discrimination in Florida. It is a critical statement of national policy that the federal government will not tolerate discrimination that is based on invidious bias against individuals because of their sexual orientation and gender identity.

Yet, no federal statute yet provides the comprehensive and unambiguous protection that is needed to combat employment discrimination on the basis of sexual orientation and gender identity. As you know, under current law, no federal employment civil rights statute explicitly includes "sexual orientation" or "gender identity" among its protected categories. 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 is often quite limited and varies significantly from court to court.

Moreover, our federal workforce also lacks strong statutory protection from sexual orientation and gender identity discrimination. 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 13087 prohibits employment discrimination on the basis of sexual orientation in much of the Executive Branch. But the administrative remedies available under 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.

For these reasons, enactment of legislation is needed to clearly 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 is a matter of basic fairness in the workplace. But it also is a smart business decision for those employers who seek to attract and retain talented, dedicated, and hardworking employees. By allowing employment discrimination on the basis of sexual orientation or gender identity, our society cheats itself out of the contributions of very able and talented individuals throughout the nation. As the international marketplace becomes increasingly competitive, and as we work to revitalize and strengthen our economy, America does not have the luxury of wasting talent or allowing workplace hostility to overtake productivity and teamwork.

Many of the nation's top businesses recognize that discrimination is bad for business. 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%) of the Fortune 500 companies had implemented non-discrimination policies that include sexual orientation, and 207 (41%) had policies that include gender identity. Although an increasing number of businesses in the United States have started addressing workplace fairness for LGBT employees, a large number 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've explained why legislation like ENDA is needed and why it makes good business sense. Now let me briefly summarize some misconceptions about the scope and impact of the legislation you are considering.

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 would underlie this coverage have been well-established for decades.

Also important is what the proposed legislation does not do. ENDA explicitly precludes disparate-impact claims, does not permit quotas or other forms of preferential treatment, and does not allow the EEOC to collect statistics on sexual orientation and gender identity from covered entities or to require those entities to collect such statistics themselves. Moreover, ENDA does not apply to small business with fewer than 15 employees, tax-exempt private membership clubs, or religious organizations. Indeed, ENDA contains a broad exemption for religious organizations, and does not apply to any corporation, association, educational institution, or society that is exempt from the religious discrimination provisions of Title VII. Moreover, nothing in ENDA infringes on individuals' ability to practice their religion, to hold and adhere to their religious beliefs, and to exercise their First Amendment rights of free speech on these or other issues. In addition, ENDA would not apply to the relationship be-

tween the federal government and members of the armed forces, and would not affect federal, state, or local rules providing veterans' preferences in employment decisions.

While ENDA would be a vital tool to ensure equal rights and opportunities in the workplace for LGBT Americans, there is nothing to suggest that it will burden employers, cause a flood of cases that would threaten to overwhelm the EEOC or the Department of Justice, or clog the federal courts. On the contrary, the experience of states with sexual orientation and gender identity discrimination statutes suggests that complaints under these statutes make up a relatively small portion of total employment discrimination complaints. We expect that the same would hold true at the federal level.

As I noted at the outset of my testimony, this hearing is the first in this Congress to consider ENDA. But ENDA is not a new bill. The first sexual orientation nondiscrimination bill was introduced in the U.S. House of Representatives in the early 1970s. Unfortunately, the need for this legislation remains as strong today as it was then.

By holding this hearing today, this Committee has taken an important step to address the need of employees to be protected from arbitrary discrimination and those of employers to operate their businesses.

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

Chairman MILLER. Thank you very much. The suggestion has been raised that somehow this is very different than other discrimination legislation and there would be an eruption of cases and lawsuits, administration determination, what have you.

What is your sense of your capacity when you look at this law, and you look at the history of dealing with discrimination cases to manage this, to be able to write the regulations in a manner in which employers would be able to deal with it?

Mr. ISHIMARU. Surely. This legislation is based on Title VII of the 1964 Civil Rights Act, which we enforce. We believe that we are capable and able to write regulations and to provide guidance and to do the enforcement necessary for this.

We are in the process right now of writing regulations both for the Genetic Information Non-Discrimination Act and the Americans With Disabilities Amendments Act. So we are used to doing this. We are used to providing that sort of detail. We have people who are knowledgeable and ready to do the work.

It has also been our experience that when new laws are enacted, there are cases filed, but the numbers quite often start off slowly as people start to understand what their rights are and as we educate employers are of what their responsibilities are.

You know, we believe that there will be some new cases. But given the experience in the states, and a number of states have these protections, we don't believe that the numbers will be extraordinary. We think it will be a manageable number and a number we can handle.

Chairman MILLER. Thank you. Again, some questions been raised in the testimony about the use of the word perceived here, and whether or not that raises new issues or not within the enforcement of civil rights.

Mr. ISHIMARU. I don't think so, Mr. Chairman. You know, I was thinking back to the days after 9/11, and when people were perceived to be Muslim or Arab. And quite often, people who had dark skin, who looked different, were perceived to be of certain groups.

And we found at the EEOC that these people may be South Asian. They may be from the Middle East but not of Muslim or Arab descent. But they looked like it and they were perceived to

be of it and they were excluded from employment opportunities because of that.

And we found that to be a violation of the law in many instances and the courts have agreed with us. In the ADA, it was written into the law, protections for people who are regarded as disabled.

You know, we also believe that if someone believes that someone is of a certain group and they are taking actions against that person erroneously, it still should be illegal. And that is something that we have dealt with time and time again.

Chairman MILLER. Thank you.

Mr. Kline?

Mr. KLINE. Thank you, Mr. Chairman. Thank you for being with us today, Mr. Chairman.

A couple of points, I am going to kind of get back to this—a little bit of this notion that the chairman—Chairman Miller—was talking about when he was talking about perceived, but first just a sort of comment.

I found it interesting that when you were talking about Fortune 500 companies and essentially businesses making sound business decisions because they wanted to expand their workforce, have a bigger pool to choose from, that they were doing it.

Some—I think you said 87 percent—had policies that said they would not discriminate; they would hire regardless of sexual orientation. A much smaller number, because of gender identity, because frankly that is a little bit more complicated issue and they may have some difficulty with that.

But my point is is that this is a business decision. If they really want to expand the workforce, if they want to take advantage of very capable, qualified persons regardless of sexual orientation, they can do that now.

And they can do it without this legislation, which would subject them perhaps to litigation if they didn't follow "the letter of the law." So right now, they have a freedom to do that anyway, and most of them are choosing to do so.

Let us go back to this question of unambiguous. I think you stated in your testimony that this legislation provides comprehensive and unambiguous protection. Chairman Miller raised the question of perceived. I still think that is in fact problematic, but there are other issues.

For instance, the bill affords protections to individuals that have "undergone" or who are "undergoing" gender transition. And yet the bill provides no definition for that term or phrase. That doesn't strike me as unambiguous. It looks to me like that in fact might be a little bit confusing. Can you comment on that concern?

Mr. ISHIMARU. Mr. Kline, I am not sure if I said unambiguous because having worked on for the Congress, I know there is always ambiguity when you craft legislation and—but think that going to the question of whether gender identity is defined enough. You know, I think there is a sound definition in the bill, and I think questions of how to further define it, if there are ambiguities, is best addressed through a regulatory process.

We did that with the disability law. We provided more guidance to people through regulations. And that, we find, works out well.

Mr. KLINE. Okay. Not to get in a, you know, a quarrel here, but I am just reading your testimony——

Mr. ISHIMARU. Okay.

Mr. KLINE [continuing]. And in fact it says, "provides a comprehensive and unambiguous protection that is needed." So——

Mr. ISHIMARU. My apologies.

Mr. KLINE. No, no. That is quite all right. But that is important, I think, when we are looking at putting things in statute and passing legislation here that we be as clear as possible.

I understand there is a regulation writing process that follows, but the more clarity we have here, I think the better as we go forward. And if we have things that are ambiguous, we ought to be making every effort in the Congress to clear up that ambiguity.

Thank you. And Mr. Chairman, I yield back.

Mr. KILDEE. Of the 21 states and D.C. that prohibit discrimination on the basis of sexual orientation and the 12 states that prohibit discrimination on the basis of gender identity, I ask this just to make a point.

Has the economy of those states suffered? Have people fled those states because they have those laws? Has unemployment increased? Have there been negative things that make those states kind of second-rate because they have done that, passed legislation recognizing the rights of people? Have there been negative consequences because of the pursuit of justice?

Mr. ISHIMARU. Not that I am aware of, Mr. Kildee.

Mr. KILDEE. Nor am I aware of. I travel around this country. Wisconsin has a very enlightened law. Michigan has not yet caught up yet. Wisconsin, by the way, is doing economically better than Michigan right now.

I just can't see why people think that this is going to be a negative thing. I mean, the economy is doing well. There is no difference in the environment. People aren't fleeing the state. Yet people have this irrational fear that this is going to make their state somewhat less than other states. I just could not understand that. Thank you very much.

Mr. ISHIMARU. Thank you.

Chairman MILLER. Mrs. Biggert?

Mrs. BIGGERT. Thank you, Mr. Chairman. Mr. Chairman, I think in your testimony, you talk about how many—that the states having the sexual orientation and gender and identity. And then there is the Fortune 500, 80 percent——

Mr. ISHIMARU. Right.

Mrs. BIGGERT [continuing]. Of those companies have some sort of this. Do you know how many cases that they have had to solve in these companies? I mean, does this come up a lot?

Mr. ISHIMARU. I don't know how many. We don't track that because we don't have jurisdiction over that. We have concurrent jurisdiction on a number of other areas, but because we don't have jurisdiction the EEOC doesn't have jurisdiction.

Mrs. BIGGERT. Yes. I realized, I just wondered if there had been a study or a report that had been done on that.

Mr. ISHIMARU. But what—I think from a quick scrub of talking to people that the numbers, though, are not overwhelming. There are certainly cases where it comes up, but the numbers, you know,

to go to the earlier question whether this will overwhelm the system, we have not found the numbers to be overwhelming.

Mrs. BIGGERT. Okay. And do you—well you probably don't know this either, but I think this is something that I am wondering about because talking about whether the states or whether the federal government, there would have to be a lot of changes in, you know, accommodations or—in the workplace. Do these states—have these corporations done anything or the states had to make a lot of accommodation changes?

Mr. ISHIMARU. I am not aware of major accommodations or costly accommodations that have had to have been made. It is my understanding that companies are pretty good at figuring out how to provide accommodations to people as we found in other contexts as well.

Mrs. BIGGERT. All right. And then I believe that this bill has something about attorney fees? Is this in—more than what is in the Title VII of Civil Rights?

Mr. ISHIMARU. It is my understanding that this tracks Title VII provisions on attorney's fees.

Mrs. BIGGERT. So there would be no more. Could there be duplication, could a plaintiff actually take a cause to both the civil rights and EEOC?

Mr. ISHIMARU. To the state civil rights agency, or?

Mrs. BIGGERT. Yes.

Mr. ISHIMARU. The way it has worked is that someone could file with both the state agency or the local agency and with the EEOC. One agency or the other would handle it. We call it dual filing. So there is not duplication, no, we have too much work to duplicate our efforts.

Mrs. BIGGERT. Is that included in this legislation? Is that clear?

Mr. ISHIMARU. It is not included in the legislation, but it is also not included in Title VII. We do this as a matter of practice, and we have dual filing relationships with state and local agencies around the country.

Mrs. BIGGERT. Okay. Thank you.

I yield back.

Chairman MILLER. Thank you.

Mr. Payne?

Mr. PAYNE. Thank you very much. I really appreciate your testimony. You know, we in New Jersey are pretty proud of the fact that we have one of the strongest laws against discrimination. Our laws protect against discrimination based on marital status, domestic partnership status, effectual or sexual orientation, gender identity or expression, mental or physical disability including AIDS and HIV-related illnesses.

And so we have really had a very strong program in our state. However in spite of this, we still have incidents continually that come up. And one of the areas that we find the most discrimination, it seems—and I wonder if this is nationwide—is in law enforcement.

We find that law enforcement personnel who finally, in many instances male policemen who—the airport myth that they are transgender or—we find there is a tremendous amount of discrimination against them.

I mean even in instances—cases where backups refused to support a law enforcement, putting his life in jeopardy, a case where they were going to have a raid and the actual law enforcement people in this area of New Jersey beat their colleague then went to do the job that they were assigned to do.

I mean just planned, outright discriminatory, and so, you know, we love our law enforcement people. They are there and they protect us and I suppose, you know, most of the time, I guess, according to who you are, maybe.

What do you find around the country? Do we find that this is—I mean, even though our state troopers in New Jersey at one time allegedly the best in the country, we find a tremendous amount of this race—this sexual discrimination? But we also did in New Jersey of course have strong racial discriminations by our state police people.

A matter of fact just a month ago were released from a decree from the federal government that has been in for 30 years for New Jersey because we are, you know, known for profiling and for—at that time, African Americans but now people of Middle East descent—from the Middle East.

So what is your take on law enforcement in general around the country?

Mr. ISHIMARU. We found generally that law enforcement has its issues. And whether it is on race and gender or disability and we would also assume on sexual orientation and gender identity as well.

It is hard to know the exact parameters of the problems for sexual orientation and gender identity. A number of states provide protections and have dealt with it, but others have not. I would anticipate that it would be in the same rough neighborhood as in the private sector.

Mr. PAYNE. Yes. Have your agencies thought in terms of perhaps having some kind of proactive training or directives or suggestions to law—in New Jersey, it seems that that area has exceeded the rest. That is the only reason I bring it up. And I would imagine it is the same other places. Have you thought in terms of a sort of proactive program that you may have as a suggested plan for nationwide?

Mr. ISHIMARU. Certainly when we have had new laws to enforce, we have created proactive programs to educate employers on what their responsibilities are. And that, we found, pays dividends in the long run. And we would—you know, I would guess we would do the same thing here because it—that would proactively prevent problems from happening.

Mr. PAYNE. Thank you, Mr. Chairman.

Mr. ISHIMARU. Thank you.

Chairman MILLER. Mr. Andrews.

Mr. ANDREWS. Thank you, Mr. Chairman. Thank you, Mr. Chairman for your leadership and your work on this issue. I wanted to address two issues.

The first is disparate impact claims. One of our later expert witnesses this morning will testify that she concludes there is ambiguity as to whether or not this bill permits disparate impact claims

by the protected classes. In your opinion, does it permit those claims?

Mr. ISHIMARU. This is clearly a case where it is unambiguous. I think by the terms of the legislation it excludes disparate impact claims.

Mr. ANDREWS. And if you were, you know, sitting as chair of the EEOC and were brought a disparate impact claim, what is your interpretation that this statute directs you to do with that claim?

Mr. ISHIMARU. As far as the ability of the agency to bring a disparate impact suit?

Mr. ANDREWS. Right.

Mr. ISHIMARU. I would say I worked in the Congress for 10 years, and I know how to read a statute and it says you can't do it. So I wouldn't, and I would instruct our people not to do it. I think——

Mr. ANDREWS. You would tell your people to read the bill, huh?

Mr. ISHIMARU. Read the bill.

Mr. ANDREWS. Okay.

Mr. ISHIMARU. And there is no wiggle room on this. I think I am——

Mr. ANDREWS. By the way—and you can supplement the record for this later if you want. Can you think of a factual example of a disparate impact claim in this category of protected classes? I can't.

Mr. ISHIMARU. You know, it is complicated by the notions of privacy, that——

Mr. ANDREWS. Right.

Mr. ISHIMARU [continuing]. That frankly, you know, we would not want to ask questions about one's sexual orientation on a large scale. And there is language in the bill that would prohibit us from collecting statistics.

Mr. ANDREWS. Yes. I guess what I am wondering is what question that has privacy implications could be asked of people under existing law that could trigger that? Honestly, I can't think of an example of where you could bring a disparate impact claim with this. But I just wanted to get you on the record saying that your interpretation of this bill is that it absolutely prohibits disparate impact claims.

Mr. ISHIMARU. I think it is very clear on its terms that you cannot bring a disparate impact claim.

Mr. ANDREWS. Let us talk about the religious exemption. Another witness this morning will testify later that the religions exemption may be a "mirage," quote/unquote, because of the complicated nature—because if—I am paraphrasing the gentleman's testimony. I am sure he will speak to it directly, but this bill imports the Title VII standard for the religious exemption.

And if I read the gentleman's testimony correctly, he says that because that religious exemption is so convoluted and there are contradictory court decisions about it, therefore there is the possibility of very narrow interpretations here of this religious exemption.

Do you—first of all, do you see any difference whatsoever between the religious exemption in this bill and that existing in Title VII?

Mr. ISHIMARU. I think it parallels the Title VII view of coverage. What this bill does, clearly, is it says if you are exempt under the Title VII definition and the definition of this bill, you aren't covered by the bill at all.

Mr. ANDREWS. So a church or a synagogue that presently has the authority to deny employment to someone on the basis of religion or whatever would still be able to do so here on the basis of sexual orientation or transgender status?

Mr. ISHIMARU. That is right. But Title VII, the "whatever" is——

Mr. ANDREWS. Yes.

Mr. ISHIMARU [continuing]. Limited to just religion, so but here it is no coverage at all. That is my read of the bill.

Mr. ANDREWS. So this is—you are—I think you are reading the bill is, correct me if I am wrong, is there is a broader religious exemption under this bill than exists under Title VII?

Mr. ISHIMARU. It would certainly cover the same group of people. I think that there—I don't see ambiguity there.

Mr. ANDREWS. But a related question, because the premise of the gentleman's testimony is that there is such confusion about the Title VII religious exemption, has any group approached the EEOC about promoting legislation that would rewrite the scope of that religious exemption, in your experience?

Mr. ISHIMARU. Not that I am aware of. I know that last year, the EEOC on a bipartisan and unanimous basis, issued guidance on religious discrimination that was well-received by both the various religious communities out there——

Mr. ANDREWS. During the 8 years of the Bush administration and its various—the Ashcroft attorney generalship—was there any attempt to broaden the religions exemption under Title VII?

Mr. ISHIMARU. Not that I know of.

Mr. ANDREWS. Yes.

I would yield back. Thank you.

Mr. KUCINICH. Thank you very much, Mr. Chairman, and thank you for holding this hearing. I have long been a supporter of the Employment Non-Discrimination Act. When I first came to Congress, I worked with the Human Rights Campaign to help gather support on Capitol Hill and I am glad to see the kind of attendance that we have had at this hearing today with so many members actively engaged in this discussion.

I would like to ask the witness a couple questions. Would you say that for all reported discrimination that the EEOC looks into, that the reported discrimination is just a small reflection of more widespread discrimination that doesn't go reported?

Mr. ISHIMARU. Absolutely. I think it is a small fraction. I think it is very hard to file a complaint. It takes a lot of courage, no matter what your basis is, to come and complain to a federal agency that you have——

Mr. KUCINICH. Let us talk about racial discrimination. If there is racial discrimination, that goes on yet it is not—a lot of it is not reported, right?

Mr. ISHIMARU. Right.

Mr. KUCINICH. And workplace sexual discrimination.

Mr. ISHIMARU. It varies between where you are on the pay scale I think. It depends on what happened to you. It depends on what

community you come from, whether it is valued to go complain or not complain. But I think it is a fraction of the actual activity that goes on. That has been our experience.

Mr. KUCINICH. So the underlying assumption here is that people are, in fact, discriminated against on the basis of their sexual orientation and gender identity and so that is why we need a law, right?

Mr. ISHIMARU. Yes. Yes.

Mr. KUCINICH. But isn't it true that—wouldn't it be true that once a law does pass, that you are basically telling society it is not okay to discriminate and then the kind of more subtle, unofficial forms of discrimination are likely to be addressed in maybe informal, social context. But it says—it is the law sending a signal to society that this kind of discrimination just is not okay.

Mr. ISHIMARU. Certainly, having a statutory framework that makes certain behaviors illegal makes a huge difference. And if you look at the history of Title VII over the last 45 years where—at first Congress passes a law that says discrimination is illegal. Nothing changes at first.

But if you look at the passage of time and if you look at how things have changed, certainly big companies get it. Most companies get it and they want to comply with the law. So they have changed their behaviors and set up systems to be, one, right with the law. And as many businesses have found, it makes good business sense.

Mr. KUCINICH. Are small businesses with 15 or less employees, are they exempt from civil rights laws relating to racial discrimination?

Mr. ISHIMARU. In this bill——

Mr. KUCINICH. No, no, I am——

Mr. ISHIMARU. Right.

Mr. KUCINICH. My question relates to civil rights statutes saying that you can't discriminate on the base of race.

Mr. ISHIMARU. Yes. Yes.

Mr. KUCINICH. Are employers with less than 15 employees, are they exempt from that?

Mr. ISHIMARU. They are exempt.

Mr. KUCINICH. But are there other—there are other legal recourse that somebody could take up, is that correct?

Mr. ISHIMARU. For a smaller——

Mr. KUCINICH. Yes.

Mr. ISHIMARU [continuing]. Employer? There may be recourse under state or local law. And certainly in working with state and local agencies who have that enforcement responsibility, they can bring cases like that.

Mr. KUCINICH. I just wonder, Mr. Chairman and members of the committee, since we acknowledge that more and more of America's commerce is conducted by small businesses—as a matter of fact, we have got such a transformation in our manufacturing base that small businesses increasingly are a large part of our economy. They drive the jobs.

I just wonder if it isn't time for this committee to start looking at whether or not 15—a shop that has 15 employees or less

shouldn't have to abide by these non-discrimination laws. You know, maybe five would be a more reasonable number.

But since there is so many businesses that could go into that sweep, you just start to wonder how many—from a practical standpoint, how many businesses are likely to be covered by this new law that aren't already covered by agreements that some corporations have with their employees.

I raise that issue because I think that one of the deficiencies in civil rights law is when you have an exemption for a class of businesses. In a way that kind of waters down the intent of the law which is to take a broad-based approach towards assuring people's civil liberties. Would you like to comment on that, sir?

Mr. ISHIMARU. Well I don't know the extent of how businesses are set up and the scope that that would cover. That would be something we—we would want to study some more. I know, though, that we were trying as a general matter to try to get widespread compliance with the civil rights laws we enforce, and I think having an atmosphere where businesses generally want to follow civil rights laws is a good thing and has served our country well.

Mr. KUCINICH. I thank the gentlemen.

And Mr. Chairman, thank you, and I want to thank the witnesses as well as all those who are here on behalf of a lifetime of courage, fighting discrimination. Thank you.

Chairman MILLER. Thank you.

Mr. Platts?

Mr. PLATTS. Thank you, Mr. Chairman. First I just want to thank you for holding this hearing on a very important issue where we are focused on trying to make sure every American is treated fairly and not wrongly discriminated against. I thank the witness and I know my colleague from Illinois, Mrs. Biggert, has a follow up on her previous dialogue, so I will yield the balance of my time to her.

Chairman MILLER. Mrs. Biggert?

Mrs. BIGGERT. Thank you, Mr. Chairman. I thank the gentleman for yielding. I just wanted to come back to an issue that we were discussing. And I know that there is testimony Ms. Olson has that will be coming up on the next panel, so I wanted to clarify—and I don't really want to be argumentative because I am a co-sponsor of this bill.

So I think that we just have to get it right, and I think that there are some issues as far as what is in here.

And I think what Ms. Olson has said that Section 8—or Section 12—expands the remedies that would otherwise be available under Title VII by permitting a prevailing party and an administrative proceeding to recover reasonable attorney fees, including expert fees, as part of the cost.

And then she thinks it is unclear who is the prevailing party under ENDA, and employees who receive a finding of substantial evidence from the EEOC or other administrative agencies as described in Section 10, they would arguably be entitled to attorney fees. So this is an expansion of the remedies under Title VII.

Could you respond? I think you said that there was no difference and I think that——

Mr. ISHIMARU. Well, it is my understanding after talking to staff, that the scope of the remedies in this legislation parallels what we can do now under Title VII for federal employees. And it is my understanding that the question of who is a prevailing party would be the same. So I don't see an expansion here. And if there is ambiguity, it may be worth clarifying.

Mrs. BIGGERT. Okay. And I think that that probably is a good idea. There is also—because other employment discrimination statutes such as ADA adopts a Title VII remedy, so I think that, you know, we want to have this, you know, equal to the others.

And then the other issue is that—and a departure contained an ENDA compared to Title VII relates to who is granted the authority and discretion to grant such rewards, and under ENDA, the courts' administrative agencies such as the EEOC are granted authority to award the attorney fees. In a contrast, Title VII appropriately limits them to grant those fees.

And so I guess that is the issue, but again, of the prevailing party. And then for I think that, you know, the committee needs to take a look at that, and some of the other things that we will get to in her testimony. But thanks for that clarification.

I yield back.

Chairman MILLER. Thank you.

Mr. Hare?

Mr. HARE. Thank you, Mr. Chairman, and—thank you, Mr. Chairman, for being here today, and I appreciate the administration's support of the bill. It is long, long overdue from my perspective.

I am not asking you to be Kreskin here, but if you could—you know, and I am not an attorney, and I don't know if that is good or bad today, but yes—but I believe this is a wonderful bill. I believe it puts an end once and for all to discriminating against a certain group of people.

I remember going home to my district when we didn't do this—when we couldn't get this before, and I remember how incredibly disappointed I was in thinking that, you know, here is a group of wonderful people that we are somehow carving out and we are not taking care of and giving them at least an opportunity to be able to be treated like everybody else, which is all they are asking for.

In your opinion, if this bill were signed into law today, which I wish it would be, would you see—do you see a mass of lawsuits being filed in your department, because again, I think a lot of this has been every time we have tried to do something or—and recent history tells us, you know, whether it is the Civil Rights Act or whatever, there was a lot of, "Well, we got to make sure," and, you know, I believe this bill was very well written.

I think—and I agree with my colleague, Mrs. Biggert, that a few things need to be maybe clarified in it, but on balance, I think this bill is very solid. I think it says what it should say.

And I was wondering from your perspective, A, if you would agree with that, and B, is there something in here that isn't strong enough do you think, and I assume that we are going down the right path here because I certainly support this, but do you see this rash of things happening that are going to cause your agency to be overwhelmed?

Mr. ISHIMARU. I certainly don't see a rash. I think it goes to a number of issues. I think one, there is a record when states have enacted laws like there is a record of what has happened, and there has not been a rash of lawsuits being filed.

The second is the whole question of, people don't always file complaints, even if something bad happens to them, and we find that across the board in the work we do. These are—you know, these are difficult issues, and people have to weigh whether coming forward is worth it. And you know, some people will and some people won't, and my guess is that you will not see a rash.

Mr. HARE. And you think the bill goes far enough? You are comfortable with the bill after taking a look at it?

Mr. ISHIMARU. I think the bill certainly is a solid foundation.

Mr. HARE. Well, again, I just want to thank you and the administration for what you have done, because at the end of the day, the last I heard that—and what I have been reading is that we are all supposed to be created equal, and it doesn't exclude anybody. The last time I read it I didn't see any ambiguity in that, and so I think what we need to do is move down the road.

And my hope is that we can get this bill signed, and I appreciate that—you know, you are taking the time to come and applaud our chairman for bringing this hearing back up again because this is something I think is incredibly important to all Americans, not just to a group of individuals that we are trying to help here. But to leave anybody behind does not reflect what I believe where we are as a nation. So I just want to thank you.

Thank you, Mr. Chairman.

Chairman MILLER. Thank you.

Ms. Clarke?

Ms. CLARKE. Thank you very much, Mr. Chairman. Many of my questions have really been asked and answered, but I would like to associate myself with the comments and the sentiments expressed by my colleagues, Chairman Frank, and Congresswoman Baldwin. You know, I am relatively a new member here. I have been here for 2 years and 8½ months, and I consider myself a 21st century member.

And the thought of leaving fellow human beings unprotected from discrimination based on sexual orientation and gender identity seems inhumane. I have just come to that conclusion. I have had that conclusion for quite some time, and certainly was disappointed when we left transgenders out of the legislation when we passed it the first time.

But I just kind of—it is like being in a time warp sometimes, sitting here knowing that a lot of these struggles and fights about our humanity and who we are as a people and how we become productive as a civil society, that we still grapple with those issues today.

This bill is clearly well thought out, and you have answered many of the concerns of my colleagues. I would just like to encourage my colleagues to take heart. We are in a period of enlightenment. Just by the mere fact that you are sitting here today, I think demonstrates that we are moving forward and we have moved forward in so many regards to our collective humanity.

And I want to say, for those who would try to find some reason to maintain the status quo, it is okay to let it go now. We can make this happen.

Thank you very much, Mr. Chairman.

Chairman MILLER. Thank you.

Mr. Polis?

Mr. POLIS. Thank you, Mr. Chairman. As a brief statement, Colorado is one of 19 states that includes sexual orientation as a condition to ban discrimination. We also include gender identity and expression, as do 13 other states. And a lot of the—you know, the concerns have been raised by people about that have not come to pass in either Colorado or the other states that have protections based on gender identity.

This has not been a problem. There has not been issue and all the potential issues that people bring up have been dealt with and not materialized. There has been no substantial issue with frivolous lawsuits, with defining what constitutes gender identity.

You don't find people that are claiming to be transgendered when they are not. You don't find issues with bathrooms. You don't find issues with any of the issues that—that have been raised. And that has been our experience. It has been a very positive one in Colorado, a very mainstream state, as well as the other states that have implemented this.

This is an issue. It is a moral issue for our country to ensure that every American has the opportunity to succeed, regardless of their race, their gender, their sexual orientation, their gender identity, their religion. They have the opportunity to succeed in this country, to succeed based on their merits.

It is also an efficiency issue. Our country as a whole, our economy, suffers from discrimination. Discrimination, quite simply put, is inefficient. It means that somebody who is second-best or third-best fills a position rather than the best candidate, because the employer discriminates based on criteria that do not affect that person's job in the workplace.

Our committee has a tremendous opportunity to promote to the American people and our colleagues that discrimination is simply a by-product of old and dying norms, and it isn't good for our society, our economy, or our nation.

I hope that the tremendous example of our previous panelists, Representative Frank, Representative Baldwin, help underscore the irrationality of discrimination towards LGBT individuals in the workplace. I yield back.

Chairman MILLER. Thank you.

Ms. Fudge?

Ms. FUDGE. Thank you, Mr. Chairman. First, let me thank you, Mr. Chairman, for having this hearing today. I want to thank the panelists and those who will testify.

I want to first say that it is timely that we deal with this in this Congress, and I am certainly hopeful that it will pass. I am very supportive of this legislation, and coming from Ohio, where we have had lots of issues, but we are moving in a direction that I think is very positive, in the same direction that this Congress is now.

I just want to implore my colleagues to do the right thing. Don't even think about all of the other issues that are raised. Do what they know is right. And I think if everybody asks themselves, "What is the proper thing to do?" they will make the right decision and do the right thing and pass this legislation. Thank you so much.

Chairman MILLER. Thank you.

Ms. Chu?

Ms. CHU. Well, I am proud to be an elected member from California, which is one of the 12 states in the nation that has passed laws that protect both gay and lesbian and transgender workers from employment discrimination, and I am very supportive of this legislation as well.

I would like to ask Mr. Ishimaru, what has been the effect of California's passage of this law? Has there been a rash of lawsuits or a requirement for separate facilities for transgender folks?

Mr. ISHIMARU. Not that I am aware of. It seems that the California enforcement agency is able to handle the number of cases that come forward. Again, it informs our estimation of what might happen if a federal law is passed, but the California experience certainly appears to be workable on many levels.

Ms. CHU. Has there been a positive effect of the passage of the law?

Mr. ISHIMARU. Well, I think the positive effect in California is that people are covered. California has broad civil rights coverage. It covers a number of other areas that the federal laws across the board don't cover, and that is something that the California legislature has done over many years. And you know, from my personal point of view, I think that is helpful.

Ms. CHU. Thank you.

Chairman MILLER. Ms. Woolsey?

Ms. WOOLSEY. Thank you, Mr. Chairman, and thank you, Chairman Ishimaru, because your testimony on behalf of this administration is an uplift to most of us. I am proud, and I am really relieved to have a president who embraces national legislation that protects not only gays and lesbians, but also transgender workers.

As you stated, preventing discriminations on the basis of sexual orientation and sexual identity is a matter of basic fairness and it makes good business sense. I, too, have a district in California where workers are protected, and many companies and institutions of higher learning and local governments have policies that specifically prohibit discrimination against their gay, lesbian and transgender workers.

In my own district, which is the Sixth Congressional District just north of the Golden Gate Bridge from San Francisco, we have many companies that have policies that make it possible for all workers to have an easier time.

In fact, in the early 1980s I was the human resources manager of a startup company that—I was employee number six, and 10 years later we had over 800 employees. And of course as a human resources person I developed the personnel policy manual and our policies, and in—actually it was the late 1970s—we included sexual orientation in our EEO statement.

We didn't go so far as to have transgender. I mean, that was 29 years ago. I am not sure we even understood that part of the need, but had we, we would have. So it is good that you are here. It is good that we are going to finally go forward and make this real.

I think I am sort of the cleanup batter here, so I am going to ask you if you would repeat one more time why, in your opinion, are the protections afforded under Title VII and the Civil Rights Act insufficient to protect gays, lesbians and transgender workers? I think that is the only argument people are going to throw at us, that they daresay it is—so would you tell us one more time why we need more?

Mr. ISHIMARU. Well, certainly Title VII by its terms does not include sexual orientation or gender identity. There are a very limited number of situations where we can get at certain issues on the basis of gender. Stereotyping is one of those. Certain sexual harassment issues is another, where there is same-sex harassment.

But it is very limited, and the courts have been very clear that sexual-orientation discrimination and gender identity discrimination as a general matter aren't covered by Title VII. And if Congress wishes us to have enforcement power over that, it needs to pass a new law thus stating the need for legislation.

Ms. WOOLSEY. Thank you very much.

Chairman MILLER. Ms. Hirono?

Ms. HIRONO. Thank you, Mr. Ishimaru. My sense is that in these kinds of discrimination complaints and cases, it is not the easiest thing for the plaintiffs to prevail, and so what does—the language of this bill is clear, but on the other hand, can the employer meet its burden by saying, "I did not take the action based on this discriminatory action, but for some other purposes," and meet their burden?

Mr. ISHIMARU. Well, certainly the framework of this legislation follows Title VII, and under Title VII the employee has the burden of proof, the initial burden of proof. And if they are able to meet that it is just to the employer, the same standards would apply here.

We would anticipate not a different standard, but the same standard that employees and employers have used now for 45 years, so we think a workable standard. We think it is a fair standard. We think over time both the courts, and the Congress when it has considered amendments to Title VII, has found a balance to be workable.

Ms. HIRONO. Yes, and when the burden shifts back to the plaintiffs or the complainant, that is a pretty high burden to show, right, for them, that it really was based on the discriminatory provision and not some other legitimate reason.

Mr. ISHIMARU. It is certainly a high burden. It is not an insurmountable burden, but it is a high burden. And sometimes people make it, sometimes they don't.

Ms. HIRONO. So the concern that this could lead to a plethora of all kinds of actions, I think is really, you know we need to understand how things actually operate in court or in the hearing process to come to the conclusion that that in fact would not be the case.

Mr. ISHIMARU. Certainly our experience in other areas covered by Title VII shows that it is difficult to win.

Ms. HIRONO. Thank you.

Yield back.

Chairman MILLER. Ms. Titus?

Ms. TITUS. Thank you, Mr. Chairman. I am pleased to say that Nevada is one of the 21 states that has a non-discrimination statute with regards to employment. I am happy to have been a cosponsor of that. It doesn't include gender identity however, so we have a ways to go.

As I look at the statistics for Nevada, I see that some of the private sector is doing better than the public sector. Raytheon is in support of this, Harrah's is in support of it, but local governments and the universities don't have policies in place, and the state has a number of cases—just last year a teacher was fired. Could you comment on how the state could do a better job, or kind of how you see Nevada, maybe if you are familiar with our situation?

Mr. ISHIMARU. I am not familiar with the exact situation in Nevada, but certainly, you know, there have been some states who have provided this type of protection. It varies from state to state to how well the protections work, and in the private sector, again, it is a mixed bag of how it is working.

Many companies have taken steps to provide anti-discrimination protections for people, both on the basis of sexual orientation and gender identity, but it is something that cries out, I think, for a federal response across the board so you don't have a patchwork around the country.

Chairman MILLER. Thank you. Thank you very much for your time and your testimony and your expertise, and we look forward to working with you as we advance this legislation. Thank you.

With that, I would like to call our third panel, and if they would come forward, please, and we will put the nameplates at the table.

Our first witness will be, of this panel, will be Vandy Beth Glenn, who worked as an editor of the Office of Legislative Counsel, the Georgia General Assembly, a job which required her to edit bills and resolutions during the annual legislative session. She received her B.A. from the University of Georgia.

Camille Olson is a partner of labor, an employment attorney at Seyfarth Shaw in Chicago, Illinois. Her 20 years of practice, Ms. Olson has represented companies nationwide in all areas of labor and employment law, including employment discrimination. Ms. Olson received her B.A. and J.D. degree from the University of Michigan.

William Eskridge, Jr. is a law professor at Yale Law School. He has written a leading casebook on statutory interpretation as well as an authoritative treatise on sexual orientation in the law. In 2003 he offered a legal brief for the conservative Cato Institute in the landmark gay—gay rights case of Lawrence v. Texas, and Justice Kennedy cited Professor Eskridge's historical research in the court's majority opinion, striking down Texas' discriminatory, anti-gay laws.

Professor Eskridge received his B.A. from Davidson College and M.A. from Harvard University and a J.D. from Yale Law School.

Bradley Sears, the Executive Director of the Williams Institute on sexual orientation law and public policy at the UCLA School of Law, a think-tank dedicated to promoting legal scholarship, public policy analysis, and education programs on sexual orientation law.

After law school, Professor Sears received funding to create the HIV legal checkup project, a legal services program dedicated to empowering people living with HIV to address and prevent legal problems. The following year he served as discrimination and confidentiality attorney for HIV Legal Service Alliance of Los Angeles.

Craig Parshall is the Senior Vice President of the General Counsel of the National Religious Broadcasters. He represents an association of legislative, regulatory and constitutional, excuse me, he represents the association in legislative, regulatory and constitutional issues that implicate religious liberty, free speech and freedom of the press in the Christian broadcasters and communicators.

Prior to working at the National Religious Broadcasters, Mr. Parshall practiced law in the areas of constitutional rights and civil liberties, with a particular focus on freedom of religion and employment law. He received his B.S. degree from Carroll College and a J.D. from Marquette University.

Rabbi David Saperstein is the Director and Counsel of the Religious Action Center of Reform Judaism. Prior to his position, Rabbi Saperstein headed several national religious coalitions and was elected the first chair of the U.S. Commission on International Religious Freedoms in 1999.

Most recently he was appointed by President Barack Obama as a member of the first White House Council on faith-based and neighborhood partnerships. Rabbi Saperstein received his B.S. from Cornell University and J.D. from American University and his MHL Rabbinic organization—Ordination, excuse me—from Hebrew Union College.

Welcome. After those introductions, I am going to take a break here—no, thank you. As you can see, Ms. Glenn, we are going to begin with you. When you start, a green light will go on. You will have 5 minutes to summarize your testimony.

Continue in the way that you are most comfortable doing that. When the orange light goes on, you have 1 minute to sort of sum up. And the red light, we ask you to wrap up.

As you can see, members have a number of questions to be asked. So welcome to the committee. Thank you for joining us, and we look forward to your testimony.

STATEMENT OF VANDY BETH GLENN

Ms. GLENN. Thank you.

Chairman MILLER. We need your microphone on. Thank you.

Ms. GLENN. Thank you for the opportunity to testify today. In fall of 2005 I landed my dream job. After serving as a naval officer for 4 years, I held several jobs that didn't appeal to me very much. Then a friend told me that the Georgia General Assembly had an opening for an editor in the Office of Legislative Counsel, editing bills and resolutions for the annual legislative sessions.

The job was a perfect fit for me. I have a journalism degree from the University of Georgia and a background in writing and editing and the new position allowed me to do what I love, working with

words. Also, I am a Georgia native, and I jumped at the chance to work under the gold dome, playing a part in the legislative mechanism in my home state.

I loved the intensity of working 12-and 14-hour days with the other editors during the sessions, preparing bills for passage. When the General Assembly hired me, I was still living as a man. Since I was a kid growing up in Atlanta, I had known two things for sure. One was that I had an overwhelming awareness that I was a girl, and the other was that I had to keep that a secret.

And so I kept my true gender identity to myself, confiding only in a handful of people over the course of decades and doing my best to build a life as a man. But I couldn't ignore the truth forever, and my awareness that I am a woman never wavered. As I got older I finally began to imagine a life where I could at last be myself.

I was lucky. When I told my friends and family that I am transgender, all of them accepted me, and I found a supportive community in Atlanta. I even told my direct supervisor at the General Assembly that I was beginning in the process of gender transition, and she, too, was supportive and sympathetic.

In the fall of 2007, after I had worked at the Office of Legislative Counsel for 2 years, my name change was nearly finalized, and I was ready to come to work as Vandy Beth Glenn. I told my supervisor that the time had arrived. She in turn told her boss, Sewell Brumby, Legislative Counsel and the head of my office.

On the morning of October 16, 2007, Mr. Brumby summoned me to his office. He asked me if what he heard was true. Did I really intend to come to work as a woman? I told him yes, it was true.

Then Mr. Brumby told me that people would think I was immoral. He told me I would make other people uncomfortable just by being myself. He told me that my transition was unacceptable, and over and over he told me it was inappropriate. Then he fired me. I was escorted back to my desk, told to clean it out and marched out of the building.

My editorial skills had not changed. My work ethic had not changed. I was still ready and willing to burn the midnight oil with my colleagues, making sure every bill was letter-perfect. My commitment to the General Assembly, to its leaders and to Mr. Brumby had not faltered. The only thing that had changed was my gender, and because of that the legislature I had worked so hard for no longer had any use for my skills. I was devastated.

After I was fired, I enlisted the assistance of Lambda Legal, and in July 2008 they filed suit in federal court on my behalf. I am not seeking any money in my lawsuit. I am asking for just one thing—to be given my job back. I love that job. I can do it well, and I never want another transgender person to experience the discrimination I have endured.

In its legal papers, Georgia's attorneys claim that other people's potential prejudices against me were a good enough reason to fire me, but several of my co-workers already knew that I am transgender and they accepted me. And when the state's attorneys asked the judge to dismiss my case, he refused, writing that "the anticipated reactions of others are not a sufficient basis for discrimination."

I am hopeful that the case will ultimately resolve in my favor, but because some judges wrongly exclude transgender employees from existing non-discrimination laws, people like me have to fight each case from scratch in most parts of the country, working to persuade each court to rule in our favor.

No one should ever get fired for the reason I was fired, and no one should have to wonder if the law protects them. Transgender workers like me need a federal law that clearly and unmistakably bans gender identity discrimination.

I hope soon that I will be back at my old desk working on bills, but no piece of legislation I ever worked on means as much to me as the one before you today. We need the Employment Non-Discrimination Act.

[The statement of Ms. Glenn follows:]

Prepared Statement of Vandy Beth Glenn

Thank you for the opportunity to appear here and testify today.

In the fall of 2005, I landed my dream job. After serving in the US Navy for four years, achieving the rank of lieutenant, I held several jobs that didn't appeal to me very much. Then a friend of mine told me that the Georgia General Assembly had an opening for an editor in the Office of Legislative Counsel, editing bills and resolutions during the annual legislative session.

The job was a perfect fit for me: I have a journalism degree from the University of Georgia and a background in writing and editing, and the new position allowed me to do what I love—working with words. Also, I've lived in Georgia for most of my life, and I jumped at the chance to work under the "Gold Dome," playing a part in the legislative mechanism of my home state. I loved the intensity of working 12 or 14-hour days with the other editors during the session, preparing bills for passage.

When the General Assembly hired me, I was still living as a man. Since I was a kid growing up in Atlanta, I had known two things for sure: one was that I had an overwhelming awareness that I was a girl, and the other was that I had to keep that a secret. And so I kept my true gender identity to myself, confiding only in a handful of people over the course of decades, and doing my best to build a life as a man.

But I couldn't ignore the truth forever, and my awareness that I am a woman never wavered. As I got older, I finally began to imagine a life where I could at last be myself. I was lucky: when I told my friends and family that I'm transgender, every single one of them accepted me, and I found a supportive community in Atlanta. I even told my direct supervisor at the General Assembly that I was beginning the process of gender transition, and she too was supportive and sympathetic.

In the fall of 2007, after I had worked in the Office of Legislative Counsel for two years, my name change was nearly finalized and I was ready to come to work as Vandy Beth Glenn. I told my supervisor that the time had arrived. She, in turn, told her boss—Sewell Brumby, legislative counsel and the head of my office. On the morning of October 16, 2007, Mr. Brumby summoned me to his office. He asked me if what he had heard was true—did I really intend to come to work as a woman? I told him yes, it was true. Then Mr. Brumby told me that people would think I was immoral. He told me I'd make other people uncomfortable, just by being myself. He told me that my transition was unacceptable. And, over and over, he told me it was inappropriate. Then he fired me. I was escorted back to my desk, told to clean it out, and marched out of the building.

My editorial skills had not changed. My work ethic had not changed—I was still ready and willing to burn the midnight oil with my colleagues, making sure that every bill was letter-perfect. My commitment to the General Assembly, to its leaders, and to Mr. Brumby had not faltered. The only thing that changed was my gender—and because of that, the legislature I'd worked so hard for no longer had any use for my skills. I was devastated.

After I was fired, I enlisted the assistance of Lambda Legal and, in July 2008, they filed suit in Federal Court on my behalf. I'm not seeking any money in my lawsuit. I'm asking for just one thing: to be given my job back. I love that job. I can do it well. And I never want another transgender person to experience the discrimination I've endured.

In its legal papers, Georgia's attorneys claim that other people's potential prejudices against me were a good enough reason to fire me. But several of my coworkers already knew that I'm transgender, and they accepted me. And when the state's attorneys asked the judge to dismiss my case, he refused, writing that "the anticipated reactions of others are not a sufficient basis for discrimination."

I'm hopeful that the case will ultimately resolve in my favor. But because some judges wrongly exclude transgender employees from existing nondiscrimination laws, people like me have to fight each case from scratch in most parts of the country, working to persuade each court to rule in our favor. No one should ever get fired for the reason I was fired, and no one should have to wonder if the law protects them. Transgender workers like me need a federal law that clearly and unmistakably bans gender identity discrimination.

I was proud to serve my home state of Georgia with a red pen in my hand. I hope that soon I'll be back at my old desk, making sure the i's are dotted and the t's are crossed on every bill. But no piece of legislation I ever worked on means as much to me as the one before you today. We need the Employment Non-Discrimination Act.

Chairman MILLER. Thank you.

Ms. Olson, you are recognized for 5 minutes.

STATEMENT OF CAMILLE A. OLSON, PARTNER, LABOR EMPLOYMENT ATTORNEY, SEYFARTH SHAW LLP

Ms. OLSON. Thank you. Good morning. Thank you, Chairman Miller——

Chairman MILLER. I think your microphone is, I don't think on.

Ms. OLSON. Thank you again. Good morning. Thank you, Chairman Miller, ranking member Kline, and members of the committee. My name is Camille Olson, and I am a partner with Seyfarth Shaw, a national law firm.

I am chairperson of its national complex discrimination litigation practice group, and I also regularly teach equal employment opportunity law in my hometown of Chicago, Illinois at Loyola University School of Law.

I practice and focus on representing employers to ensure that their policies and practices comply with equal employment opportunity and non-harassment policies in their workplaces, as well as laws.

I strongly support equal opportunities in employment, and in particular, ensuring that employment decisions are based upon an individual's qualification for a job and other nondiscriminatory reasons. I believe that fair and consistent application of workplace policies and practices is also instrumental to an employer's success as an employer of choice in the community.

My testimony that I bring to you today is a summary of my legal analysis of certain provisions of H.R. 3017. It is brought to you to highlight some practical uncertainties that I see with its current language.

My testimony is provided in the hopes that it will result in some clarifications of certain provisions of ENDA for the benefit of employees as well as employers, by minimizing confusion and by minimizing litigation over the meaning of certain of its provisions, and also by enabling employers to conform with congressional intent as expressed through ENDA's plain language.

The changes in the current version of ENDA, which is before us today, demonstrate significant examination and debate that has taken place over a number of years concerning the extension of pro-

tections in employment to individuals on the basis of their sexual orientation and their gender identity.

Indeed, my written testimony goes through and catalogues a number of those changes which help provide significant, very helpful clarifications so that employers and employees understand their obligations under the act.

My written testimony, as I mentioned, also highlights six different areas where I believe there is some uncertainty in the current language which could benefit from further clarification. That testimony is divided into two different sections.

First, three areas of clarification with respect to general issues under ENDA, and then three areas of clarification with respect to issues that result primarily with respect to issues of gender identity; let me just summarize very briefly what those six areas are.

In terms of the general areas, and some of these have been discussed earlier today when you heard my name, ENDA should be clarified to eliminate the possibility of a double recovery for claims under Title VII and ENDA based on a common set of facts.

This is because, as set forth in detail in my 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.

Even the complicated issues inherent in certain gender discrimination issues ENDA has been drafted as a standalone bill as opposed to an amendment to Title VII, to address specific issues specific to gender identity claims. Therefore, I believe it is most appropriate to deal with those there.

The second general issue of clarification is an issue that was raised as well earlier, which is the issue of disparate impact claims. As I mention in my testimony on page 11, the issue I am raising is not whether in fact disparate impact claims are actionable under ENDA; it is clear that disparate treatment claims are actionable.

ENDA makes clear that disparate impact claims are not actionable under ENDA. The point that I make in my testimony and that I would ask that you to address in connection with clarification of the bill, is to provide a statutory definition or a reference for the term disparate impact to relate back to Title VII, which is the most well-known definition of disparate impact, the one that is quoted with respect to all of the discrimination laws.

Let me just mention that the other issues that I would like to note is the issue of attorney's fees. I think it has been described by Congresswoman Biggert today, and given my little bit of time here, I will just note that I described it quite distinctly in terms of my written testimony.

On the specific provisions requiring clarification, I would like to mention two in particular. ENDA has two provisions, Sections 8(a)(3) and 8(a)(5) that require employers to modify their existing employment practices under certain circumstances.

These two provisions relate to a shared facility where being seen unclothed is unavoidable and number two, with respect to company policies regarding grooming and dress issues in the workplace.

There are a couple of issues that need to be defined. The issue of what is notice, the issue of what does it mean to have undergone or to be undergoing gender transition. That is the phrase that is

undefined by ENDA and in connection with the various case law, as well as the literature, is defined as a process that may include a variety of steps.

It is critical that employees and employers understand what in fact are the notice requirements and what in fact does that mean?

And then two issues which really do raise cost issues and issues regarding immediate answers that have to—I really believe we can't leave it to the EEOC to describe what congressional intent is.

It is the issue of certain shared facilities and whether those include restrooms where being enclosed is something that is unavoidable. And the second issue is ENDA specifically states that an employer is not required to construct new facilities, and the question is, is an employer required to modify facilities to comply with ENDA?

Thank you very much.

[The statement of Ms. Olson follows:]

Prepared Statement of Camille A. Olson, Partner, Seyfarth Shaw LLP

Good morning, Chairman Miller, Ranking Member Kline, and Members of the Committee. My name is Camille A. Olson, and I am pleased to present this testimony addressing H.R. 3017, the Employment Non-Discrimination Act of 2009 ("H.R. 3017" or "ENDA"). I am a Partner with the law firm of Seyfarth Shaw LLP. Seyfarth Shaw is a national firm with ten 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 twenty years in Chicago, Illinois. 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 company-wide, state-wide, 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, Illinois. I am a frequent lecturer and have published numerous articles and chapters on various employment and discrimination 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 United States 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 non-discriminatory 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]

My purpose in providing this testimony is not to comment positively or negatively on whether this Committee or Congress should enact H.R. 3017 into law as sound public policy. Rather, my testimony is provided as a summary distillation of my legal analysis of certain provisions of H.R. 3017,[4] especially in 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 compounded by certain ambiguities in the current language. As such, this testimony is provided in the hopes that this information will result in clarification of certain H.R. 3017 provisions, as well as clarifications for the benefit of employees and employers alike. If H.R. 3017 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 H.R. 3017'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, H.R. 3017 clearly provides the following:

- H.R. 3017 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]
- H.R. 3017 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]
- H.R. 3017 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]
- H.R. 3017 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]
- H.R. 3017 does not prohibit an employer from enforcing rules and policies that do not intentionally circumvent its purposes.[9]
- H.R. 3017 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 H.R. 3017 is defined in the Defense of Marriage Act, 1 U.S.C. § 7 et seq.
- H.R. 3017 requires that an employee notify the 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]
- H.R. 3017 does not require employers to build new or additional facilities.[12]
- H.R. 3017 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]
- H.R. 3017 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]
- H.R. 3017 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]
- H.R. 3017 requires employers to post notices that describe its provisions.[16]
- H.R. 3017 would be effective six months following the date of its enactment, and it does not apply to conduct occurring prior to its effective date.[17]

However, as drafted, H.R. 3017 creates the following ambiguity and uncertainty:

• Whether Title VII and ENDA will provide duplicate causes of action for sex stereotyping;
• Whether disparate impact claims are available 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]

A number of jurisdictions have enacted legislation prohibiting discrimination based on sexual orientation and/or gender identity. To date, twelve states and the District of Columbia prohibit discrimination based on gender identity and sexual orientation.[26] Twenty 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. In 2007, protections on the basis of gender identity were included for the first time.[29] Although hearings were held, the legislation proposed in 2007 did not garner enough support for passage by 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 United States House of Representatives.[30]

Many of H.R. 3017'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, H.R. 3017 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 H.R. 3017 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 earlier 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. Some examples of those earlier clarifications that are currently part of H.R. 3017 are set forth below:

• ENDA—2007, Section 8(b) specifically allowed states to pass a law or establish a requirement impacting employee benefit provisions notwithstanding the federal scheme preempting such state laws. H.R. 3017 eliminates this language and affirm-

atively clarifies that: "Nothing in this Act shall be construed to require a covered entity to treat an unmarried couple in the same manner as the covered entity treats a married couple for purposes of employee benefits."[32] Accordingly, ENDA of 2009 preserves the Employee Retirement Income Security Act ("ERISA") preemption of the field of regulation of employee benefit plans—an issue that was a source of significant concern in 2007.[33]

• 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.[34] 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. ENDA—2009 includes revised retaliation language that parallels the well established language prohibiting retaliation contained in Title VII.[35]

• 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.[36]

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. H.R. 3017 has been revised to include the word "intentionally."

• ENDA—2007, Section 17 provided that ENDA would take effect sixty days after the date of enactment. H.R. 3017 provides for its effective date to be six months after the date of enactment. This six-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. H.R. 3017 Requires Clarification

As described in Section III.B. above, H.R. 3017 has clarified certain provisions to provide certainty 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[37] and gender identity.[38] 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, 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"?[39] These concepts are overlapping, thus, certain factual situations that some courts have found actionable under Title VII would most assuredly 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 H.R. 3017 for the same alleged wrongful conduct. As such, it is critical that ENDA include language which makes clear that it 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 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 H.R. 3017

Disparate treatment claims are actionable under H.R. 3017.[40] H.R. 3017 prohibits intentional discrimination only.[41]

In contrast, disparate impact claims are not available under H.R. 3017.[42] In other words, H.R. 3017 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.[43] 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 prohibit disparate impact claims. 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 excludes disparate impact claims for sexual orientation and gender identity claims to ensure that congressional intent is clear as to the claims that are exempted from H.R. 3017.

c. The Remedies Available Under H.R. 3017 Should Parallel Those Available Under Title VII

H.R. 3017, 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.[44]

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.[45]

Specifically, H.R. 3017, 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 discrimination statutes, such as the ADA, adopts 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 H.R. 3017's expressed congressional intent.

2. SPECIFIC PROVISIONS REQUIRING CLARIFICATION REGARDING GENDER IDENTITY

Among other protections, H.R. 3017 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."[46] With respect to transgendered individuals, H.R. 3017 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.[47]
>
> [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.[48]

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."[49] 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 obligations 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 H.R. 3017.

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 choose to undergo in their decision to align their bodies with their core gender identity.[50]

For instance, social steps in the process might include asking to be referred to by a different name or different pronouns (i.e., "she" instead of "he" or vice versa).[51] Such steps may also involve an employee using clothing or accessories traditionally worn by individuals of the sex the employee wishes to be perceived as, or taking on mannerisms associated with a particular gender.[52]

Certain employees may also choose to take medical steps to further modify their appearance. Such medical interventions may include hormonal therapies and/or surgery to further modify their physical appearance or attributes.[53] Finally, transitioning individuals may utilize courts or other agencies to achieve legal recognition of their new name and/or gender.[54] 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."[55] 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 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 H.R. 3017 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 may 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.[56]

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.[57]

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 Miller, Ranking Member Kline, 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.

ENDNOTES

[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 1650 persons providing services through employees primarily engaged to work in seven states from coast to coast. 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."

[4] My testimony addresses issues under H.R. 3017 generally, as they apply to private sector employers. It does not specifically address H.R. 3017's provisions relating to religious organizations (Section 6), to the armed forces (Section 7), or to local, state, or federal governments (Section 3(a)(4)((b-d)).

[5] H.R. 3017, Section 4 (a)(1).

[6] H.R. 3017, Section 4(a)(2).

[7] H.R. 3017, Section 4(e).

[8] H.R. 3017, Section 5.

[9] H.R. 3017, Section 8(a)(1).

[10] H.R. 3017 Section 8(b).

[11] H.R. 3017, Section 8(a)(3).

[12] H.R. 3017, Section 8(a)(4).

[13] H.R. 3017, Section 4(f)(1).

[14] H.R. 3017, Section 4(f)(2).

[15] H.R. 3017, Section 8(a)(5).

[16] H.R. 3017, Section 13.

[17] H.R. 3017, 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.

[19] See Pregnancy Discrimination Act of 1978, amending Title VII § 2000e(k).

[20] See Meritor Sav. 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") and Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004) (concluding a transgender plaintiff could bring a claim of sex discrimination claim under Title VII) and Schroer v. Billington, 577 F. Supp. 2d 293 (D.C. Cir. 2008) (employer violated Title VII when 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, Hawaii, 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, 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 Sept. 20, 2009).

[29] H.R. 2015.

[30] H.R. 3685.

[31] See, e.g., H.R. 3017, 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. 3017, Section 8(b).

[33] Compare H.R. 2015, Section 8(b) with H.R. 3017, Section 8(b).

[34] H.R. 2015.

[35] Compare H.R. 2015, Section (b) with H.R. 3017, Section 5.

[36] Compare H.R. 2015, Section 5 with H.R. 3017, Section 5.

[37] Sexual orientation is defined as "homosexuality, heterosexuality, or bisexuality." H.R. 30l7, Section 3(9).

[38] 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." H.R. 3017, Section 3(6).

[39] H.R. 3017, Section 3(6); see also Price Waterhouse, 490 U.S. 228.

[40] H.R. 3017, Section 4(g).

[41] H.R. 3017, Section 8(a)(1).

[42] Id.

[43] 42 U.S.C. § 2000e-2(k).

[44] H.R. 3017, Section 12. Attorney's Fees (emphasis added).

[45] Title VII § 2000e-5(k). Attorney's Fees; Liability of Commission and United States for Costs (emphasis added).

[46] H.R. 3017, Section 4(a)(1).

[47] H.R. 3017, Section 8(a)(3) (emphasis added).

[48] H.R. 3017, Section 8(a)(5) (emphasis added).

[49] Id. at Section 8(a)(3) and 8(a)(5).

[50] 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).

[51] Id.

[52] Id.

[53] Id.

[54] Id.

[55] H.R. 3017, Section 8(a)(3).

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

[57] 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.

Chairman MILLER. Thank you. Mr. Eskridge?

STATEMENT OF WILLIAM ESKRIDGE, JR., JOHN A. GARVER PROFESSOR OF JURISPRUDENCE, YALE LAW SCHOOL

Mr. ESKRIDGE. Thank you, Mr. Chairman. I appreciate your invitation for me to appear at these historic hearings. ENDA, as you know, would provide remedies for sexual orientation and gender identity discrimination in the workplace by state, federal and private employers.

To justify the inclusion of state employees, the Supreme Court tells us that Congress must point to examples of state discrimination violating or implicating constitutional rights. State governments have a long history of discrimination against lesbian, gay, bisexual and transgendered or LGBT employees because of prejudice and erroneous stereotypes.

State exclusionary policies took place in the first half of the 20th century. Legislatures and officials declared sexual and gender minorities unfit for public service because of state-endorsed beliefs that they were first, "degenerate persons,"—I am quoting—"who engaged in immoral and illegal activities."

Second, they were characterized as treacherous and predatory, particularly against children. And third, they were characterized as disruptive influences who would undermine public projects. State discriminatory policies drove most LGBT employees into the closet, where they kept their identity a secret.

Between 1945 and 1969, state and federal governments conducted campaigns to open the closet door and purge these workers from government service. A written statement, which I would like to be introduced into the record, provides an account of the purges at the federal civil service level and in the civil service and public schools of California and Florida.

Usually without due process, employees were dismissed because of their sexual orientation or gender identity. For example, Thomas Surock of California lost his state teaching certificate and his livelihood based upon an alleged 1962 admission that he had homosexual tendencies. The state authorities took that as per se evidence of immorality and predatory proclivities.

By 1969, these policies were being challenged. Medical experts rejected the common stereotypes about homosexuals as scientifically baseless, and argued instead that the harmful pathology was actually homophobia.

At the same time, thousands of gay people came out of their closets and persuaded colleagues and Americans that their private consensual conduct did not merit public censure, that LGBT people are trustworthy workers and their presence is not disruptive.

Accepting these arguments, the majority of states now provide that state employees should not be subject to discrimination because of sexual orientation. And an increasing number have reached the same conclusion with regard to gender identity.

But there remains a significant amount of government discrimination, in part because many Americans continue to believe that such employees are immoral, predatory and disruptive. For example, Colorado voters in 1992 overrode state and municipal directives prohibiting discrimination in state and municipal workplaces.

The arguments made against job rights for gay people included the following, and I am quoting from the official ballot materials, "The homosexual life style is sex-addicted and tragic. Homosexuals are diseased and short-lived, and they want to recruit children and destroy the family."

Even when they are not so explicitly set forth as in the Colorado campaign, these anti-gay tropes of immorality, predation and disruption still motivate state officials to discriminate against sexual and gender minorities.

Consider my own case. I was denied tenure at the University of Virginia's School of Law in 1985 based, in part, upon my sexual orientation. Although I was one of the law school's top teachers, had written several articles, delivered Congressional testimony, and written a path-finding legislation casebook, my petition for ten-

ure was rejected based upon the recommendation of the appointments committee.

That recommendation was probably tainted. For one thing, the committee chair kept me in the dark about my rights to respond to criticisms, and then viciously attacked me when senior faculty confronted him about his own neglect.

Near the end of the process, the chair barged into my office and subjected me to a violent tirade that included charges of back-stabbing that he said he should have expected of a, quote/unquote, "faggot."

Apparently the chair thought that I had complained about his neglect, when in fact I remained clueless even as he spat on me and called me dirty names. During this tirade, the chair never shared with me his committee's criticisms or notice of my rights to respond.

These procedural infractions made a difference in my case, because the committee's report to the faculty was, in fact, filled with factual misstatements and fabrications. Given the name-calling by the chair, the committee's violation of the law school's official procedures and the libelous nature of the report, I believed that my being gay, even though closeted, played an important role in the tenure denial.

Being gay created the hysterical atmosphere, where I was accused of being a troublemaker, for mistakes that the committee made. My tenure experience suggests state employers still discriminate against sexual and gender minorities for the same kinds of reasons that were trumpeted as government orthodoxy for most of the 20th century.

Another lesson of my experience is that discrimination does no one any good. Although I was able to relocate at Georgetown and then Yale, I was sorry to leave Virginia, where both of my grandfathers received their law degrees.

Conversely, Virginia did itself no good by its treatment of me. I think they lost a really good civil procedure and legislation teacher, someone who could have and would have, provided mentorship to feminist as well as gay students.

And a scholar, for the record, who has been more cited in American law reviews than anyone who, in the history of the University of Virginia's Law School, has ever actually gotten tenure. The whole process was a waste.

With ENDA, Congress has an opportunity to take a leadership position to prevent some of the waste of human talent that occurs when state officials harass or exclude qualified LGBT workers who are usually eager, as I was, to contribute to public projects.

Thank you, sir.

[The statement of Mr. Eskridge may be accessed at the following Internet address:]

http://edlabor.house.gov/documents/111/pdf/testimony/20090923WilliamEskridgeWRITTENTestimony.pdf

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Chairman MILLER. Mr. Sears?

STATEMENT OF R. BRADLEY SEARS, EXECUTIVE DIRECTOR, THE WILLIAMS INSTITUTE ON SEXUAL ORIENTATION LAW AND PUBLIC POLICY, UCLA SCHOOL OF LAW

Mr. SEARS. Good morning, Chairman Miller, and members of the committee——

Chairman MILLER. Microphone, please.

Mr. SEARS. Good morning, Chairman Miller, members of the committee. Thank you for allowing me to be here. I am Executive Director of the Williams Institute, which is a research center at UCLA School of Law.

And today I am here to direct the question of whether there has been a widespread pattern of unconstitutional discrimination by state government against LGBT employees. This finding will help support Congress with its authority to provide a private right of action to state employees who suffer discrimination.

My testimony is based on a study that we have conducted for the past 12 months. My co-investigators of the study—the principal co-investigators—are Nan Hunter, who is Professor of Law at Georgetown University Law Center, and Law Fellow Christy Mallory. We have also been assisted by 10 law firms and a number of scholars.

Although the report is lengthy, I am going to focus on four types of evidence we considered. The first are surveys of LGBT employees themselves. The institute has done reviews in the past of private and public employees who have been surveyed. This time we identified 80 surveys which either completely dealt with state and other government employees, or there were substantial parts who were government employees, and we could identify that part.

All of these show that when asked, LGBT employees of state and local governments report high rates of discrimination in hiring and firing and promotion and harassment.

For example, one of the largest of the studies, completely of state employees, was conducted during this past year. It surveyed 1,900 employees of state universities and college. Thirteen percent reported they had experienced discrimination or harassment in the last year alone.

Second, we collected complaints, administrative complaints, from state and local agencies with ordinances or laws that currently prohibit sexual orientation and gender identity discrimination.

Although we contacted over 200 agencies, not all of them responded. Those that did provided us with 430 complaints. To the extent we could tell which were state and which were local employees, 265 out of those complaints came from state employees.

Third, we reviewed studies on the difference in wages between LGBT employees in state government and their heterosexual counterparts. Prior studies in the private sector have shown that gay men earn about 8 percent to 23 percent less than their heterosexual counterparts. These studies confirm the same, that gay men, lesbians and bisexuals earn 8 percent to 29 percent less in the public sector.

Fourth, we compiled a set of documented examples of discrimination based on sexual orientation and gender identity. We collected examples from court cases, from the administrative complaints, academic journals, books, newspapers and community-based organizations. In total, we compiled a set of 300 specific examples

which we believe both document and illustrate the type of discrimination that state employees face.

The record demonstrates that discrimination is widespread in terms of quantity, geography and occupation. Geographically, every state is represented except North Dakota, which has a smaller population. The LGBT employees discriminated against were for every branch of government.

The examples include public employees who help people find jobs, in housing, in health care, teachers and professors, state troopers and prison guards, judges, bus drivers and tax collectors, and even some who work for the DMV.

In many of these cases, courts have found violations of protections of equal rights and free expression and privacy. What is missing in all these cases, is any rational reason for the adverse employment actions. In none of these cases do the employers assert that someone's sexual orientation and gender identity impacted their workplace performance.

The irrationality of the discrimination is vividly indicated by the harassment that many of these workers have been subjected to. With my apologies to the very limited sense of what they are called in the workplace, an officer at a state correctional facility in New York, "pervert" and "homo," a lab technician at a state hospital in Washington, "dyke," an employee in New Mexico's juvenile justice system, "a queer." The language in the report gets worse from there.

What is also striking about these examples is the level of physical violence that accompanies that verbal harassment. A gay employee of the Connecticut State Maintenance Department was tied up by his hands and feet. A firefighter in California had urine put in her mouthwash, and a transgender correction officer in New Hampshire was slammed against a concrete wall. When employees complain about this kind of harassment, they were often told it was their own making, and no action is taken.

The 308 examples in no way should be taken as a complete record of the discrimination against LGBT employees by state and local government. First, as I said, a number of the administrative agencies, most in fact, did not provide us with redacted copies of their complaints.

Second, many cases settle out of court. Many of the strong cases settle before there is any record. Third, LGBT employees are often reluctant to pursue their claims because they don't want to out themselves further in their community and face further discrimination. A report this year by the Transgender Law Center found that 15 percent of those who had experienced discrimination, only the first 15 percent, went on to file a complaint.

For all these reasons, plus the rest of the research that is in our report, we conclude there has been a widespread and persistent pattern of unconstitutional discrimination against LGBT state and government employees.

Thank you.

[The statement of Mr. Sears follows:]

Prepared Statement of R. Bradley Sears, Executive Director, the Williams Institute

Good morning, Chairman Miller and members of the committee. I am the Executive Director of the Williams Institute, a national research center on sexual orientation and gender identity law and public policy at UCLA School of Law.

Today I am here to speak to you about H.R. 3017, the Employment Non-Discrimination Act of 2009, which will prohibit employment discrimination on the basis of sexual orientation and gender identity. Specifically, I am here to address the question of whether there is a widespread pattern of unconstitutional employment discrimination on the basis of sexual orientation and gender identity by state governments. This finding will support Congress in exercising its powers under section 5 of the 14th amendment to provide a private right of action for damages to state government employees who have suffered discrimination.

My testimony is based on a study conducted over the last twelve months by the Williams Institute. My principal co-investigators have been Georgetown Law Center Professor Nan Hunter and Williams Institute Law Fellow Christy Mallory. We have been assisted by eight law firms and a number of scholars from different disciplines in creating a report documenting discrimination for each of the fifty states and a series of papers summarizing our findings. The full text of the completed study will be posted on the Williams Institute web site *http://www.law.ucla.edu/williamsinstitute/home.html.*

Based on this research, we conclude that there has been a widespread and persistent pattern of unconstitutional discrimination by state governments. Although additional types of evidence support our findings and are discussed in the report, I am going to focus on four key sources today.

First, we reviewed surveys of LGBT people about their experiences of discrimination. We identified over eighty surveys in which either all or some of the respondents were public sector employees. All of these surveys found that significant percentages of LGBT public employees reported being fired, denied jobs, denied promotions, or harassed in the workplace. For example, one in five LGB public sector employees in the 2008 General Social Survey reported being discriminated against on the basis of their sexual orientation, and a survey this year of over 640 transgender employees (in both public and private sectors) found that 70% reported experiencing workplace discrimination on the basis of gender identity. Another 2009 survey of more than 1,900 LGBT employees of state university systems nationwide found that more than 13% had experienced discriminatory treatment or harassment during the past year alone.

When we compare this set of studies to prior reviews that the Williams Institute has conducted of employment discrimination surveys, we find no difference between the patterns of employment discrimination against LGBT people in the public sector and in the private sector, and no difference in the patterns of such discrimination against LGBT workers in state versus local government agencies.

Second, we collected data about complaints from state and local administrative agencies charged with enforcing prohibitions against sexual orientation and gender identity discrimination. Although we requested data from twenty state and 203 local agencies, many did not respond, even after repeated requests. The agencies that did respond provided us with 430 administrative complaints of sexual orientation and gender identity discrimination by state and local employers between 1999 and 2007. Although not all states could provide us with data distinguishing between state and local government defendants, at least 265 of these were filed by employees of state government agencies.

Additional evidence suggests that many of these complaints of discrimination are well-founded. Five states provided us information about the dispositions of the claims made by state employees. For four of these states, the combined rate of positive administrative outcomes for the complaints, such as findings of probable cause of discrimination or settlements, averaged 30%. For the fifth state, California, 61% of complainants sought an immediate right to sue letter, which often indicates they have already found counsel to take their cases to court. A review of the dispositions of complaints made to local enforcement agencies found a similar rate of favorable outcomes.

Third, we reviewed studies surveying the differences in wages between LGB employees and their heterosexual counterparts. If, after controlling for factors significant for determining wages such as education, a wage gap exists between people who have different personal characteristics, such as sexual orientation, economists typically conclude that the most likely reason for the wage gap is discrimination. More than twelve studies have shown a significant wage gap, ranging from 10% to 32%, for gay men when compared to heterosexual men. Two recent studies have

found similar wage gaps when looking just at public employees. Together, the studies find that gay men, lesbians, and bisexuals who are government employees earn 8% to 29% less than their heterosexual counterparts. Men in same-sex couples who are state employees earn 8% to 10% less than their married heterosexual counterparts. These studies, too, suggest that sexual orientation discrimination in state government is similar to that in the private sector and other public employment.

Fourth, we compiled a set of documented examples of discrimination based on sexual orientation and gender identity that further supports a finding of a widespread and continuing pattern of unconstitutional discrimination by state and local governments. We collected examples from court opinions, administrative complaints, academic journals, books, newspapers, and community-based organizations. We placed time limits on the study in order to test whether such discrimination is persistent. In total, we have compiled more than 380 specific examples of workplace discrimination, almost all occurring within the last 20 years.

This record demonstrates that discrimination is widespread in terms of quantity, geography, and occupations. The quantity compares favorably to that of past records of public employment discrimination supporting civil rights legislation. Geographically, the examples reach into every state except North Dakota, which has a smaller population. The LGBT employees discriminated against work for every branch of state government: legislatures, judiciaries, and the executive branch. The examples include public employees who help people find jobs, housing, and health care; teachers and professors; state troopers and prison guards; judges, bus drivers and tax collectors; and those who work for museums and for the DMV.

In many of these cases, courts have found violations of rights to equal protection, free expression, and privacy, as well as the impermissible use of sex stereotypes. There are also cases where plaintiffs lose, because judges rule that, in the absence a law like ENDA, state and federal law do not provide a remedy.

What is missing in all of these cases is any rational reason for the adverse employment action, whether or not the law provides a remedy. In none of these cases do employers assert that sexual orientation or gender identity impacts an employee's performance in the workplace. To the contrary, among the examples of public servants who have been discriminated against are a gay faculty member at Louisiana State University who had received a Distinguished Service Award; a transgender sheriff in Oregon who had received a commendation for delivering a baby on the side of a highway, and a lesbian social worker in Mississippi who was told she was one of the best employees at her center helping mentally disabled children.

The irrationality of the discrimination is also vividly indicated by the harassment that many of these workers have been subjected to. With my apologies, here is a very limited sense of what they are called in the workplace: an officer at a state correctional facility in New York, "pervert" and "homo;" a lab technician at a state hospital in Washington, a "dyke;" an employee of New Mexico's Juvenile Justice System, a "queer." The language that you can read in the report gets worse from there. What is also striking about these examples of workplace harassment is the degree to which the words are accompanied with physical violence. A gay employee of the Connecticut State Maintenance Department was tied up by his hands and feet; a firefighter in California had urine put in her mouthwash; a transgender corrections officer in New Hampshire was slammed into a concrete wall; and a transgender librarian at a college in Oklahoma had a flyer circulated about her that said God wanted her to die. When employees complain about this kind of harassment, they are often told that it is of their own making, and no action is taken.

These 380-plus documented examples should in no way be taken as a complete record of discrimination against LGBT people by state and local governments. Based on our research, and on other scholarship, we have concluded that these examples represent just a fraction of the actual discrimination. First, our record does not even completely capture all of the documented instances. For example, of the twenty state enforcement agencies we contacted, only six made available redacted complaints for us to review. Second, several academic studies have shown that state and local administrative agencies often lack the resources, knowledge and willingness to consider sexual orientation and gender identity discrimination complaints. Similarly, legal scholars have noted that courts and judges have often been unreceptive to LGBT plaintiffs and reluctant to write published opinions about them, reducing the number of court opinions and administrative complaints that we would expect to find. Third, many cases settle before an administrative complaint or court case is filed. Unless the parties want the settlement to be public, and the settlement is for a large amount, it is likely to go unreported in the media or academic journals. Fourth, LGBT employees are often reluctant to pursue claims for fear of retaliation or of outing themselves further in their workplace. For example, in a study pub-

lished this month by the Transgender Law Center, only 15% of those who reported that they had experienced some form of discrimination had filed a complaint. Finally, and perhaps most important, numerous studies have documented that as many one-third of LGBT people are not out in the workplace. They try to avoid discrimination by hiding who they are.

In our study, we also considered other forms of evidence of employment discrimination besides these, including similar findings reached by courts and legal scholars; findings of such discrimination by government officials and commissions; the long history of state laws, polices, and practices explicitly discriminating against LGBT employees, and more recent statements showing animus against LGBT people by state and local government officials.

Based on this research as well as the research I have just discussed, we conclude that:

1. there is a widespread and persistent pattern of unconstitutional discrimination against LGBT state government employees, as well as against local government employees;

2. there is no meaningful difference in the pattern and scope of employment discrimination against LGBT people by state governments compared to what is found in the private sector or in federal or local government; and

3. that the list of documented examples that we have compiled far under-represents the actual prevalence of employment discrimination against LGBT people by state and local governments.

Thank you.

Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment

Testimony of Brad Sears on ENDA Before the House Committee on Education and Labor, 9/23/2009

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12. Specific Examples of Employment Discrimination by State and Local Governments
13. Voter Initiatives to Repeal or Prevent Laws Prohibiting Employment Discrimination on the Basis of Sexual Orientation or Gender Identity, 1974-Present
14. Other Indicia of Animus against LGBT People by State and Local Government Officials, 1980-Present
15. Analysis of State Laws and Executive Orders Prohibiting Employment Discrimination on the Basis of Sexual Orientation and Gender Identity

APPENDICES

[50 State Reports]

State				
Alabama	Hawaii	Massachusetts	New Mexico	South Dakota
Alaska	Idaho	Michigan	New York	Tennessee
Arizona	Illinois	Minnesota	North Carolina	Texas
Arkansas	Indiana	Mississippi	North Dakota	Utah
California	Iowa	Missouri	Ohio	Vermont
Colorado	Kansas	Montana	Oklahoma	Virginia
Connecticut	Kentucky	Nebraska	Oregon	Washington
Delaware	Louisiana	Nevada	Pennsylvania	West Virginia
Florida	Maine	New Hampshire	Rhode Island	Wisconsin
Georgia	Maryland	New Jersey	South Carolina	Wyoming

NOTE FROM COMMITTEE

Because of the size of this document, including its appendices of reports on each of the 50 states, "Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment" is not reprinted here in its entirety. However, this document is part of this hearing's record, is hereby incorporated in its entirety by reference, and is kept on file with the Committee on Education and Labor, where it shall be made available for public inspection upon request.

Chairman MILLER. Thank you.

Mr. Parshall?

STATEMENT OF CRAIG PARSHALL, SENIOR VICE PRESIDENT AND GENERAL COUNSEL, NATIONAL RELIGIOUS BROADCASTERS

Mr. PARSHALL. Thank you, Chairman Miller, ranking member Kline and members of the committee. I am Craig Parshall, Senior Vice President and General Counsel of National Religious Broadcasters.

We oppose H.R. 3017, ENDA. It is my considered opinion that ENDA, if passed into law, would impose a substantial and crippling burden on religious organizations. Now, while we are a non-profit association representing a wide number of Christian radio, Christian television and Christian Internet broadcasters, we also represent a wide variety of Christian ministries that are not directly involved in broadcasting, and my written testimony, which I ask to be received into the record here, outlines the breadth of those organizations.

That, I think, gives us a very unique view of the collision between ENDA and the religious liberties of Christian ministries. Now, looking at Section 6, which purports to provide an exemption for religious groups, it is my opinion that unfortunately, the so-called protection may be more of a mirage than a reality.

What it does is Section 6 simply shifts the inquiry back to what they call the "religious discrimination" provisions of Title VII. So to the extent supposedly that an organization would be exempted under Title VII, it would supposedly be exempted under Section 6.

However, Title VII does not exempt religious groups from gender discrimination suits, or for any other category of alleged discrimination other than those categories that are narrowly and strictly defined as based on "religion."

Now courts that would apply Section 6 of ENDA if it is passed into law will be tempted, I believe, to conclude that sexual orientation or gender identity are categories similar to gender or sex under Title VII, and therefore religious groups, regardless of the language of Section 6, will not get a pass under Section 6 of ENDA.

But even aside from this threshold problem, I see additional problems. And that is, by bootstrapping Title VII's religious exemption language into ENDA, Section 6 subjects religious organizations to a crazy quilt of inconsistent court decisions that have been laid down over the years regarding religious exemption under Title VII.

The case law is such that it renders insufficient religious freedom to faith groups in past cases, and has sent really a chilling pall over their activities, not to mention their budgets. I will just mention two cases, non-school cases.

One was the Townley case in the Ninth Circuit, where a small, closely held manufacturing shop, owned by a Christian owner—he had a Christian world view that he wanted to permeate the workplace, so he encouraged Bible study and other activities. He was sued, and he lost because he was held not to qualify as a "religious corporation."

Then we have a Methodist orphans' home that was dedicated to instilling in orphan children Christian beliefs. That, in a Virginia case, was held not to be qualified as a religious corporation.

Next, we look at the legal tests that the courts have employed, and unfortunately they are complex and discordant. The Ninth Circuit has employed a complicated six-factor test. The Third Circuit has employed an even more complex nine-factor test. The Ninth Circuit has construed the religious exemption narrowly under Title VII, Third Circuit has not.

I think that the religious exemption in Section 6 of ENDA would be given a very narrow, cramped interpretation by the courts. In addition, I believe that for-profit faith-based groups, and by the way, we have about 200 radio stations that are Christian, thoroughly Christian, in nature in our association, but are not nonprofit. These, I believe, will be denied any exemption at all because the language in Title VII has been imported directly into Section 6 of ENDA.

The resulting court interpretations involving schools, religious schools, have been just as dismal in their result as the cases that I have mentioned. I think under ENDA schools would meet the same fate, unfortunately.

Christian ministries who are members, as an example, object to the sexual preferences that they believe are in clear violation of the Bible, are standing on a long and well-worn road. The doctrines are prescribed, they believe, in both the Old and New Testament. They have endured for several thousand years.

Now the rights to preach and practice that belief spring from a bill of rights that is 220 years old, and that is based in part on English Common Law that goes back hundreds of years before that. We urge this committee not to jettison the paramount rights of people of faith for a newly invented privilege that has been debated for the last few decades.

If that does happen here, I firmly believe it means we have set ourselves on a very dangerous path, a radical departure from the

basic religious liberties for which our founders risked their lives, their fortunes and their sacred honor.

Thank you.

[The statement of Mr. Parshall follows:]

Prepared Statement of Craig L. Parshall, Senior Vice-President and General Counsel, National Religious Broadcasters

I am Craig Parshall, Senior Vice-President and General Counsel for National Religious Broadcasters. I am appearing today to voice the opposition of my organization, NRB, to H.R. 3017, the Employment Non-Discrimination Act of 2009. It is my considered opinion that H.R. 3017, if passed into law, would impose a substantial and crippling burden on religious organizations, both those who 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 who proclaim a Gospel-orientated message. 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 such as public relations agencies and law firms with an emphasis on media law. Our membership also includes communications-related organizations, such as Christian publishing companies, churches with a media outreach, Christian programmers, preaching and teaching ministries and faith-based charity organizations. NRB also has among its membership well over 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 H.R. 3017 and the religious liberties or faith-based organizations.

H.R. 3017's Religious Exemption Provision may well be a Mirage

H.R. 3017 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, H.R. 3017 does not define what it means by the phrase "religious discrimination provisions" of Title VII. One likely interpretation, though by no means exclusive, is that the phrase would 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). 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.

This distinction is critical: for it is more than feasible 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 does would not qualify for exemption under Title VII for sex discrimination, neither will it receive exemption for "gender identity" discrimination under H.R. 3017. The end result would be that the supposed protections of the Sec. 6 religious "exemption" in H.R. 3017 would prove to be, in the end, only a mirage.

But even aside from the 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, other insurmountable difficulties reside in H.R. 3017.

Sec. 6 Simply Compounds a Crazy Quilt of Inconsistent Court Decisions

By bootstrapping Title VII's religious exemption language into Sec. 6, H.R. 3017 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 non-actionable 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's 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 H.R. 3017 would be given a very narrow, cramped interpretation are substantial. 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, it restricted inter-racial dating on religious grounds). 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 organization will find little comfort under Sec. 6 of H.R. 3017. 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).

On added concern is that H.R. 3017 has adopted wholesale the Title VII exemption language for religious schools which 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 it 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).

Broad and adequate exemptions for religious organizations are constitutionally imperative. Corporation of the Presiding Bishop v. Amos, 483 U.S. 327 (1987) (Title VII religious exemptions are not violative of the Establishment Clause). Moreover, where a law is passed in the area of employment discrimination, and it fails, as H.R. 3017 does here, to adequately exempt religious institutions from its grasp regarding faith-based employment decisions it 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).

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 H.R. 3017 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 bookstores, adoption agencies, counseling centers and Christian drug rehab facilities will also suffer the same fate.

Confusion Regarding the F.C.C.'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 H.R. 3017 supersede the regulations of the F.C.C 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. F.C.C., 498 F. 2d 51, 53 (D.C. Cir. 1974)(F.C.C. 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 F.C.C."). Nothing in the language of H.R. 3017 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 F.C.C.'s definition of a religious broadcaster? The F.C.C. has generated a "totality of the circumstances" test for what is, or is not, a "religious broadcaster" that is different than the Title VII language. H.R. 3017 exponentially increases the uncertainty regarding which law applies. Furthermore, would "gender identity" protections under H.R. 3017 be viewed as the same, or different from the requirement imposed by the F.C.C. 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.

Conclusion

It is clear that some proponents of this form of legislation view Christian objectors to the creation of new "sexual orientation" and "gender identity" rights to be hypocritical and mean-spirited. In the 110th Congress, one witness, a Congressional Representative, noted that he had often listened to religious radio on that subject (styled "an act of self-torture") and was forced to indict Christian dissenters this way: "How can an American who claims to embrace God and uses that theology to

then discriminate against another individual." Hearing Before the Subcommittee on Health, Employment, Labor and Pensions, Committee on Education and Labor, House of Representatives, September 5, 2007, Statement of Hon. Emanuel Cleaver, page 15-16.

The answer to that question lies at the very core of the concept of religious liberty. Neither the Congress nor the courts have jurisdiction over the religious beliefs of people of faith. Holding the faithful in contempt because they advance unpopular religious doctrines itself evidences a form of cultural discrimination. Christian ministries that object to those sexual preferences which are in clear violation of the standards of the Bible are standing on a long and well-worn road. Those doctrines are proscribed in both the Old and New Testaments and have endured for several thousand years. The rights to preach and practice those beliefs spring from a Bill of Rights that is two hundred and twenty years old, and in turn which reach back to hundreds of years of English common law. Against all of that comes H.R. 3017 and similar measures, which can claim to have newly-minted a set of sexual orientation and gender-identity privileges which, at most, are just a few decades old in their very recent cultural currency.

We urge this Committee not to jettison the paramount rights of people of faith. 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.

Chairman MILLER. Mr. Saperstein?

STATEMENT OF RABBI DAVID SAPERSTEIN, DIRECTOR AND COUNSEL, RELIGIOUS ACTION CENTER OF REFORM JUDAISM

Rabbi SAPERSTEIN. Mr. Chairman, minority leader, I thank you for having me here. Members of the committee, my name is Rabbi David Saperstein, I represent the National Reform Jewish Movement, which is the largest segment of American Jewry and I have also, for 30 years, been on the faculty of Georgetown Law School, where I teach church state law and Jewish law.

I join with some 25 national denominations of faith groups in supporting ENDA in a much larger cohort of national denominations of faith groups in favor of the use of the Title VII exemption in this context.

Our belief in ENDA's importance stems from a court teaching shared by an array of faith traditions, Jewish and non-Jewish alike. In the words of Genesis, "God created humans in God's own image. In the image of God, God created them male and female, God created them."

We impose discrimination on all individuals, including gays, lesbian, bisexual, transgender, men and women, for the stamp of the divine is imprinted on the soul of each and every one of us. And we Jews have historical sensitivities raised by the effort to ban job discrimination, for we have been among the quintessential victims of group hatred, persecution and discrimination in Western civilization.

We know all too well the impact of discrimination and second class citizenship, of what it is like to be denied opportunities others have for jobs or other benefits because of who we are. So we feel a keen empathy for those who can still be victimized because of who they are, deprived of opportunities, jobs or advancement because of their identity.

But we also believe that this legislation would be a wise and measured civil rights bill that addresses the scourge of employment

discrimination and upholds the values in which our nation was founded, equality and justice chief among them.

Indeed, the struggle for equality is a defining narrative of America. It is this vision, too, that compels us to support ENDA. ENDA is justice too long denied. It must be enacted, and it must be enacted now.

And it is clear that within our nation's diverse faith traditions, however, there are differing views about homosexuality. Every faith is entitled to its interpretation of its holy text. Every individual entitled to believe in a way of his or her own choosing.

At the same time, the government is and should be free to enact legislation that protects values that differ from some of these beliefs. When that occurs, however, the government should also strive to protect the freedom of religious organizations with differing beliefs to practice their faith as they see fit.

That is why Section 6 of ENDA, the exemption for religious organizations, is an essential part of this legislation. A bill that did not permit houses of worship, seminaries, religious schools, other religious organizations to be guided by the tenets and teachings that embody the essence of their faith, would break with our country's longstanding tradition of religious freedom and pluralism and tolerance and provoke wide-spread opposition.

ENDA simply ensures that workers will be judged and rewarded based on their qualifications and performances rather than on irrelevant and prejudicial factors. At the same time, it protects the right of religious organizations to make their own employment decisions in this sensitive area.

The crafting the religious exemption, to mirror that found in Title VII, has three key advantages. First, consistency and reliability. Since 1964 there has been a religious exemption in Title VII, since 1972 it contained the current language of the exemption.

In the use of Title VII scope of a covered religious organization, so that if a religious organization is exempt from Title VII, the religious discrimination prohibitions, it will be exempt from ENDA's prohibitions.

Since ENDA creates no new test for determining which religious institutions are exempt from its provisions, instead it adopts the long-standing exemptions of Title VII, it will greatly reduce litigation, and reduce confusion amongst employers, employees, policymakers and judges.

Secondly, it enjoys broad-based support in religious communities, not only those who support ENDA in general, but even many who do not support and believe if you are going to pass this bill, this is the way to go.

In 2007, the last time you voted on this, the conference—U.S. Conference of Catholic Bishops, the general conference of Seventh-Day Adventists, the Union of Orthodox Jewish Congregations, issued a statement supporting this exemption.

Although they did not take a position on ENDA, in their endorsement of the very language that you have before you, they wrote they believe "this language provides an indispensable protection of the free exercised rights of religious organizations and strongly support its inclusion in ENDA." I hope you will, too.

Leading evangelical figures, David Gushee, Ron Sider, Joel Hunter have come out in favor of the use of this. In the 2005 Bush administration hiring guide, they talk at length of the effectiveness of this Title VII provision in protecting the rights of religious organizations.

Over and over again those who have had to live with it and work with it have said this is the way it goes. I hope it passes unanimously.

Let me point out that those Title VII exemptions that are available to religious broadcasters as well. And in 1998, the FCC moved from a very limited coverage for those who broadcasted religious messages per se to any religious broadcaster having employees who followed their mission and their beliefs. They were able to come under the same kind of regime as Title VII and they have the same kind of protections.

Even on the question of who is a religious organization, you have a great deal of commonality and agreement. So we know that a lot of the stories of what might be the abuses simply aren't so.

This coverage is needed. It is universally supported. Four hundred and two members including the minority and majority leader of this committee, supported this. The minority and majority leader of the House supported this the last time it was voted on. Vote for it again. It is the right way to go to end discrimination and protect religious freedom.

[The statement of Rabbi Saperstein follows:]

Prepared Statement of Rabbi David Saperstein, Director, Religious Action Center of Reform Judaism

Thank you for inviting me to be here this morning. My name is Rabbi David Saperstein and I represent the national Reform Jewish Movement, the largest segment of American Jewry. I am also an attorney who teaches Jewish law and Church-State law at the Georgetown University Law Center and have addressed free exercise, establishment clause and civil rights legal issues in a number of books and articles.[1]

On behalf of the 900 congregations of the Union for Reform Judaism (with 1.5 million members across North America), and the Central Conference of American Rabbis, with a membership of 1,800 rabbis, I appreciate the opportunity to express our strong support for the Employment Non-Discrimination Act.

Our belief in ENDA's importance stems from a core teaching shared by an array of faith traditions, Jewish and non-Jewish alike. In the words of Genesis, (1:27), "And God created humans in God's own image, in the image of God, God created them; male and female God created them." We oppose discrimination against all individuals, including gay, lesbian, bisexual, and transgender men and women, for the stamp of the divine is imprinted on the souls of each and every one of us.

We Jews have historical sensitivities raised by the effort to ban job discrimination for we have been among the quintessential victims of group hatred, persecution, and discrimination in western civilization. We know all too well the impact of discrimination and second class citizenship, of what it is like to be denied opportunities for jobs or other benefits because of who we are. Even after the Enlightenment began and the promise of equality existed without laws to enforce it, we often were forced to hide our identity, keeping our Judaism in our private lives while remaining ambiguous about who we were in our public lives if we wished to find employment or advancement in the educational, social, political, or business arenas of our societies. So we feel a keen empathy for those who can still be victimized because of who they are, deprived of opportunities, jobs, or advancement because of their identity.

Of course, support for ENDA rooted in biblical text alone is insufficient justification for public policy that applies to Americans of all faiths and no faith. We also believe this legislation to be a wise and measured civil rights bill that addresses the scourge of employment discrimination and upholds the values on which our nation

[1] See e.g. HLR pp 1389-1394

was founded, equality and justice chief among them. Indeed, the struggle for equality is a defining narrative of our nation. From the abolition movement, to the suffrage movement to the civil rights movement to the gay rights movement, women and minorities in this nation have worked tirelessly to achieve equal rights as guaranteed them in the founding visions of the United States. It is this vision too that compels us to support ENDA.

It is clear that within our nation's diversity of faith traditions, there are, however, differing views about homosexuality. Every faith is entitled to its own interpretation of its holy texts, and every individual is entitled to believe in a way of his or her own choosing, as long as those beliefs do not cross the line into actions that violate the fundamental values and the laws that govern our country.

That is why Section 6 of ENDA, the exemption for religious organizations, is an essential part of this legislation. A bill that did not permit houses of worship, seminaries, religious schools and other religious organizations to be guided by the tenets and teachings that embody the core essence of their faith would face widespread opposition. This legislation is not an endorsement of any particular religious viewpoint and it does not interfere with religious beliefs about gay, lesbian, bisexual and transgender people. ENDA simply ensures that workers are judged and rewarded based on their qualifications and performance, rather than on prejudice.

Advantages of Using the Title VII Religious Exemption

This legislation creates a religious exemption that mirrors that found in Title VII of the 1964 Civil Rights Act. This approach holds three key advantages in contrast to those who have argued the religious exemption should be narrower, wider or different than Title VII's.

1. Consistency and Reliability

Since 1964 there has been a religious exemption in Title VII. Since 1972, it has contained the current language of the exemption. This is relatively well-settled law. The answers to many questions that would need to be litigated should a new definition be used are long resolved if the Title VII exemption is used. ENDA uses Title VII's definition of a religious organization, so that if an organization is exempt from Title VII's religious discrimination prohibitions, it will be exempt from ENDA's prohibitions. Claims by some that this exemption goes beyond Title VII are simply erroneous. Since ENDA creates no new tests for religious institutions to follow and instead abides by longstanding provisions of Title VII, it will greatly reduce confusion among employers, employees, policy makers, and judges.

2. Broad Based Support in Religious Communities

The decision to use the Title VII religious exemption in ENDA is also supported by a wide range of religious groups. The U.S. Conference of Catholic Bishops, the General Conference of Seventh Day Adventists, and the Union of Orthodox Jewish Congregations issued a joint statement supporting the exemption the last time this exemption was voted on in 2007, although they did not take a position on ENDA itself. Yet in their endorsement of Section 6, they wrote that they "believe this language provides an indispensable protection of the free exercise rights of religious organizations and strongly support its inclusion in ENDA."[2] Similarly, a wide range of national denominations and faith groups support ENDA itself—including this exemption. The endorsement of so many of our nation's major religious bodies across religious and ideological lines, all in agreement that ENDA's religious exemption protects religious institutions, should weigh heavily with this committee. Amendments that would change this structure would likely break apart that broad-based consensus and should be rejected. Amendments, including carve outs or other forms of broadening the exemption, could likely break apart the consensus and should be rejected. Further, it might well lead to conflicting interpretations of the Title VII exemption itself.

3. Broad Based Political Support

This carefully crafted compromise enjoys widespread support from the civil rights community, the legal community and from Congress. This exact language has been considered by this body before. In 2007, 402 members of this House—Republican and Democrat alike—voted for the religious exemption language that Chairman Miller proposed in an amendment to ENDA on the floor of the House. The current version of ENDA, H.R. 3017, contains the religious exemption that passed on the floor two years ago with the support of Minority Leader Boehner and other leadership of the Republican Party including Reps. Cantor, Blunt, Pence and the Ranking

[2] Joint letter to Hon. George Miller (chairman), Howard "Buck" McKeon (ranking member), House Committee on Education and Labor, U.S. House of Representatives, October 18, 2007

Member on this Committee, John Kline, among members of the leadership on both sides of the aisle.

Claims of Hostile Work Environment

There are still some who argue that this exemption is not enough. Most commonly, the reason given is that reasonable expressions of faith in the workplace will result in an onslaught of lawsuits from gay and lesbian employees who will claim that since the Bible condemns sexual relations between males, other employees who display Bibles or religious verses in their own work area are engaged in creating a "hostile workplace."

The argument is deeply troubling on several grounds. First, as a rabbi, I can affirm that faith is not the express domain of straight Americans. There exists in the gay and lesbian community people of devout belief, who attend church or synagogue or mosque each week, and who rely on their faith for purpose and meaning in their lives. To suggest that such individuals will be offended by appropriate workplace expressions of faith among employees is absurd.

Second, as an attorney, I note that the Supreme Court has made clear that the threshold of what constitutes a hostile workplace is high—that it requires the plaintiff to prove that the workplace was "permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment".[3] Again, because this exemption's language mirrors that in existing law, reasonable expressions of faith will not meet the Court's established standard. In the nearly quarter century of state ENDAs, I know of not a single case in which a hostile work environment claim was upheld for the display of a Bible or religious symbol—and certainly none that were upheld on appeal.

We are long past the point when our laws should permit discrimination against any individual because of their sexual orientation. Just as we do not tolerate behavior that discriminates based on race, gender, national origin or religion, so should we be clear about discrimination based on the characteristic of being gay or lesbian. For many of America's faith traditions, this is a religious value. It is a moral value. And for all of us, it is of great social and economic value, as evidenced by the nearly 90% of Fortune 500 companies that already have policies consistent with ENDA. They have concluded that we cannot send the message that gays, lesbians, bisexuals, and transgender individuals are second-class citizens, undeserving of legal protections, benefits and equal rights. It is time for our laws to reflect these values and allow members of the gay, lesbian, bisexual, and transgender community to live their professional lives without fear of discrimination or the pressure to hide their true identity.

Thank you.

Chairman MILLER. Thank you. Just before I begin my questions, let me make two points. One, that each of you have asked that your written statement be submitted as part of the record. It will be made part of the record from the testimony that we have received from you.

Secondly, the—our second panel went on longer, and I want to just admonish members of the committee to be courteous to other members of the committee because we are going to have to be out of here very close to 12:30.

And now, let me begin just quickly. We spent a lot of early—in the earlier panel we spent a lot of time talking about big employers, small employers and the private sector. But when we listen to Ms. Glenn's testimony and Mr. Sears, the findings of your surveys and studies, and even Mr. Eskridge's testimony. I shouldn't be, but I guess I am quite stunned at how irrational the dismissals can be, and how final they in fact can be.

And the ability of, time and again, of sort of a mid-level person being able to dismiss an individual based upon his or her own as-

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

sumptions without providing any evidence that your co-workers would think you were immoral or whatever it is.

And then, bringing that back to public institutions, to states and state governments, local governments and branches of those entities, I think is really quite stark. In this day and age, you just—I think that most people assume that there is a set of protections out there so you don't have this incredibly arbitrary set of circumstances taking place that, in many instances, has nothing to do with the caliber of your work. Care to comment—I don't want to belabor the point, but——

Mr. SEARS. In doing this research, I was struck by the same thing. My experiences as a HIV-AIDS lawyer in the 1990s, where discrimination was also extremely blatant—people just said, "You are fired because you are HIV positive."

I was surprised to see how frequent that is also with sexual orientation and gender identity. And one of the members mentioned earlier this pattern in police officers which I would extend to public safety officers, firefighters, people who work in corrections. There is definitely a pattern of harassment, of violence, which then also goes unaddressed by supervisors.

Chairman MILLER. Thank you.

Ms. Glenn, in your case there was no question in this individual's mind that he was clearly within their rights just to fire you on the spot.

Ms. GLENN. That is correct.

Chairman MILLER. With no question of your ability and no—even to try to put together a case against the quality of your work.

Ms. GLENN. No, sir. He made it quite clear I was being fired because I am transgendered and I was following the prescribed course of action.

Chairman MILLER. And at that time you were working for the Georgia State Legislature.

Ms. GLENN. Yes, sir.

Chairman MILLER. We need this law.

Ms. Olson, I—again, we are running out of time here, but on page 12 of your testimony, you raised the questions about the prevailing party. And I just wish, if you might consider submitting language that you think is necessary there, that would be helpful.

Okay, then we will get back to you, because I am missing the point here. So maybe I am just thick, but—hold down the applause.

Ms. OLSON. You mean you want me to do it right now?

Chairman MILLER. No. When you—if you would submit it in writing, language, I would appreciate that.

Mr. Kline?

Mr. KLINE. Thank you, Mr. Chairman, and thanks to all members of the panel today, excellent witnesses.

Ms. Olson, let me start with you if I might and go to the issue of attorney's fees, where this has arisen. That it looks like in H.R. 3017 we are going to award attorney fees on the basis of administrative decisions.

It seems to me this might simply increase the weight according to administrative decisions, might put you if you were representing a client at a disadvantage when weighing the risks of proceeding with the defense and you might be more inclined to recommend a

settlement to your employer-client. Can you address this issue of how attorney fees are addressed in 3017 for us please?

Ms. OLSON. Yes, thank you very much. ENDA specifically states that it does not intend to provide different remedies for attorney's fees and those that are available under Title VII, but yet it has a provision that in fact does that.

So that ENDA states that the procedures and remedies should be applicable, those that we see in Title VII but it says that there will be an availability of attorney's fees with respect to somebody who is a prevailing party in administrative proceeding.

And that in connection with that administrative proceeding, the administrative officer, for example, the EEOC with respect to private employers, will have the authority to actually grant those attorney's fees.

An administrative proceeding before the EEOC is supposed to be an investigative and conciliatory proceeding. It is a proceeding where the rules of evidence don't apply and where employers and employees share information with the intent to hopefully be able to resolve issues without litigation.

With respect to Title VII, with respect to the American with Disabilities Act and with respect to all other federal employment discrimination legislation, there is no right for the EEOC to actually make an award of attorney's fees in connection with any of its administrative proceedings.

And in fact the note is that substantial evidence if issued by the EEOC is not reviewable by a court and is not required to be based on any written, reasoned decisions. Therefore, the due process rights of a prevailing party, if one would be defined as such in that kind of proceeding, would not be present.

So I think it would be inappropriate—I am not sure that is really what was intended. This may be a provision in ENDA that just needs some more work.

Mr. KLINE. Yes, okay, thank you very much. That is following up on the Chairman Miller's question and so some suggestions from you might be very useful for the committee. I just wanted to sort of get that out there that this is something different that is being brought forward here.

Mr. Parshall, you and the Rabbi have some differences here on whether you think that there are adequate protections for religious institutions, for those practicing their religious faith, for those involved in religious broadcasting in schools and others.

In your testimony, you referenced the Montrose Christian School Corporation case, which involved the faith-based employment decisions of religious institution in violation of the Free Exercise Clause of the First Amendment.

Can you take the remaining time that I have here—what you need before the light turns red to elaborate on that case and the need for broad and adequate exemptions?

Mr. PARSHALL. Thank you, Mr. Ranking Member. The Montrose case was a case that I tried both from trial level up to the Court of Special Appeals in Maryland all the way to the high court, which in Maryland was called the Court of Appeals, their version of the state supreme court.

And it shows how things can go awry regardless of the best intentions of drafters of legislation. There was a county ordinance in Montgomery County that paralleled much of Title VII, not all of it, but much of it, but didn't make adequate provision for religious organizations.

And so the ACLU represented a handful of individuals who were unable to continue their employment because they didn't share the same doctrinal beliefs of a private Christian school, a school that didn't take any taxpayer money. It was fully funded by private donations and by tuition by parents who wanted their children to get a Christian education.

There was suit at the trial level, and I tried to make a First Amendment argument to two different judges in two different trials for two different plaintiffs. We lost both cases. Now, again, it seems self evident to us that the rights of religious organizations should give them autonomy to make religious, ecclesiastical decisions about what the doctrine of beliefs of their staff were.

But the arguments were well they didn't teach Bible classes and we had to prove that it was a bona fide occupational qualification and we weren't able to meet that test.

So the result was that we had two trial verdicts, two juries, whose instructions were not permitted to go into First Amendment considerations, and we were penalized hundreds of thousands of dollars in damages for each of these plaintiffs against this Christian school.

It would have folded up. It would have been bankrupted had we not pursued, at great cost to them and inconvenience over the course of years, first the Special Court of Appeals and then finally we got a unanimous verdict from the Court of Appeals in Maryland stating that they had not made adequate provision for exempting a religious organization.

All, again, despite the conventional wisdom that would have said we—it never should have gotten that far.

Mr. KLINE. Thank you very much. I yield back.

Chairman MILLER. Mr. Kildee?

Mr. KILDEE. Dr. Eskridge, do you think that sexual orientation is or ought to be a suspect classification under the Supreme Court precedents discussing levels of equal protection scrutiny? And how about gender identity, is it a suspect classification?

Mr. ESKRIDGE. Mr. Kildee, thank you for the question. I want to combine that with the chairman's points. The Supreme Court has never ruled one way or the other on whether sexual orientation is a suspect classification the way race is or even a suspect classification the way sex is under the Equal Protection Clause of the U.S. Constitution.

This committee, of course, can consider that issue. My own opinion as a scholar is that based upon the Supreme Court's announced test for whether a classification is a suspect one, sexual orientation would qualify.

The main Supreme Court test, which is examined in some detail in my written testimony, is whether or not there has been a pattern of irrational discrimination against a group based upon that classification and that it does not ordinarily serve public purposes.

And I think that links back into the Chairman's question because Mr. Chairman, I think one reason why we still see such pervasive discrimination today, part of it is emotional and part of it is cognitive and part of it is moral.

Emotionally, a lot of the discrimination occurs because people have gut feelings that are emotionally addressed to lesbian, gay, bisexual and transgendered Americans. Secondly, cognitively, the states taught us in most of the 20th century that these Americans were disloyal and not to be trusted and were disruptive, and so many people internalized that.

As the testimony today has shown, that is irrational. It does not serve public goals and as Representatives Frank and Baldwin suggested, it actually undermines public goals. So I would suggest that at some point in the future, the Supreme Court ought and actually will hold that it is a suspect classification.

Gender identity might be a suspect classification now although the Supreme Court has never held such. Consider this thought experiment, under Title VII, discrimination based upon religion is only disallowed, yes.

The Supreme Court would say the same under the Equal Protection Clause but they don't have to because of the Free Exercise Clause. Now if you discriminated in employment against someone because she is a Jew, religiously, that would obviously be a violation of the Equal Protection Clause and it would be a violation of Title VII.

But what if you discriminated against someone who was a Jew who had converted to Christianity? Would that not also be discrimination based upon religion? So the argument would be—the Supreme Court I think will address this at some distant point in the future, that discrimination based upon gender identity is a form of sex discrimination or at least related to it such as would make it fall under the quasi-suspect classification jurisprudence of the Supreme Court.

Mr. KILDEE. Isn't that true also historically that once the Supreme Court makes a correct decision in matters of human dignity, that helps educate the citizenry, does it not? I mean, the citizenry very often catches up with the Supreme Court after they uphold people's rights.

Mr. ESKRIDGE. Representative Kildee, I agree with that and I would go one step further. I believe it is even more important in terms of signaling to the people and educating the people for Congress to take that step. I think you all are the heroes.

I think you all are the big players and you all are the big players enormously and that is what we teach at the Yale Law School, that we should not chastise the courts. The courts have very limited power. You all have the power and you all also have the wisdom to be moral as well as legislative leaders in America.

Mr. KILDEE. And I would want to do that and hope that the Supreme Court agrees with us. Thank you very much.

Mr. ESKRIDGE. They should, your Honor.

Chairman MILLER. Mrs. Biggert?

Mrs. BIGGERT. Thank you, Mr. Chairman, and I would like to thank all the witnesses for their testimony today.

And I have a question for Ms. Olson. Thank you for being here and your legal expertise, I think, is very helpful on this issue.

The ADA, Americans with Disabilities Act, protects not only qualified individuals with disabilities but also those who are "regarded as" having a disability. And H.R. 3017 in contrast would provide protection based on an employee's sexual orientation and/or gender identity, whether actual or perceived.

Can you tell us your view, is there a difference between the "regarded as" test under ADA and the perceived tests under—as set forth in this bill? And is one preferable to the other?

Ms. OLSON. Thank you very much, Representative Biggert. With respect to the question as to whether there is a difference, I think that if you look at the "regarded as" definition under the ADA, employers have seen that as of January 1st of this year, that that definition in itself changed as a result of the Americans with Disabilities Act Amendments Act.

So I think there is some flux and some change with respect to the particular definition of "regarded as." And I believe that each of these definitions are going to be, by their nature, defined a little bit differently depending on the actual protected status that it really relates to.

With respect to the issue as is one term better than the other regarded as versus perceived, my understanding is with respect to the use of the word perceived in ENDA, that it was used because it traps more often—actually the state legislation on this issue, which is more often than not uses the language perceived as opposed to regarded as.

I don't see a significant difference between those two in the abstract in terms of their application of a particular issue.

Mrs. BIGGERT. Thank you. Then do you provide us with any insight on why ENDA is written as a standalone bill? I mean, we have been talking about, you know, it was Title VII law. Should it be incorporated into that? And if we wanted—we seem to want consistency. Would it make sense to incorporate those provisions into Title VII?

Ms. OLSON. You know, it is a very interesting question because I think in many, many ways, employers, employees have been, I think—folks that have a taken a look at this and worked on it, have wanted to borrow heavily from Title VII so that there is an established language that employers and employees are used to and are able to apply to this particular issue in the workplace.

And I believe that is why you see so much back and forth in referencing to Title VII. And I think that is appropriate because I think the less uncertainty there is regarding language, the more employers are going to be able to understand their rights and obligations and apply them in the workplace and I think that is what everybody wants.

With respect to why separate, the Americans with Disabilities Act is separate as well. And you might look at it and you might think about the fact that when you look at Title VII, Title VII is a non-discrimination statute where reverse discrimination also for example is actionable.

If you look at ENDA, there are many things in ENDA that are different than Title VII. For example, we talked a little bit earlier

about the issue of disparate impact and that fact that those claims would not be actionable under ENDA. And so that would be one difference.

Also, it is inappropriate to collect information regarding human sexual orientation and gender identity under ENDA while it isn't with respect to Title VII, so that is another difference. There is also a difference with respect to ENDA not requiring or permitting preferential treatment.

Also, if you look at the unique issues that come up, and I think the two that are addressed in ENDA with respect to gender identity, the issue of shared facilities and neutral policies of grooming and dress policies, are two that will raise a number of issues. And those are—I mean, if you think of me as a practitioner, most of my time on these issues is spent trying to answer employer's questions regarding what is the appropriate way to treat requests with respect to modifications of those policies because of a transgendered employee or someone who is going through a transition.

And having specific guidance and statutory guidance that is then interpreted by the EEOC but it is not set by the EEOC. The question as to whether employers are obligated to modify, modifications can cost money.

Bathroom facilities for example or any facility, it is something that Congress should direct up front, I believe, employers as to what the answer is so there is no ambiguity, so that the answers can quickly be made, and that employers and employees can comply appropriately with it.

So in terms of the overall answer, I think it is appropriate for it to be separate although I believe it is appropriate that to the extent we are borrowing from Title VII, whether it is the remedy section or whether it is a section of the definition of disparate impact, that we are very clear so that we absolutely know what each other is talking about.

Mrs. BIGGERT. Thank you very much.

Chairman MILLER. Thank you.

Mr. Payne?

Mr. PAYNE. Thank you very much. Professor Eskridge, when you were going through the trauma at the University of Virginia, were there any groups that came to your defense or any what about your colleagues or faculty persons or your group maybe that represents employees. What happened there? What occurred, any support by and large?

Mr. ESKRIDGE. Well in my particular case, the answer to that is zero. A number—probably hundreds of students were very upset that I was being treated this way, although I don't think they were outraged by sexual orientation discrimination because I was an excellent teacher of both procedure and legislation and actually international business transactions.

So that upset the students. A number of faculty members were very upset that the committee had blatantly disregarded the law school's established procedures. The University of Virginia probably prides itself on being procedurally correct in most cases. They take procedure very seriously and they didn't follow it.

And then there were a very few faculty members who were able to perceive exactly what was going and gave me a lot of support

emotionally. And they were the ones who said you need to leave as quickly as possible because I actually literally did feel physically unsafe at the University of Virginia.

Today, the problem is not as severe as what I faced, at least at the University of Virginia. It is in other locales, where you basically have no support groups. There is no one, either the state legislature or the national legislature signaling to these institutions that this is no longer acceptable conduct.

And I think that is very important. Most states do not protect gender identity. Many states do not protect sexual orientation against public discrimination. And it is very important for Congress to fill those gaps but also to provide a national signal, even in these other jurisdictions, where there is some protection as a matter of law.

Mr. PAYNE. It seems like, you know, the university, that is supposed to be the most liberal kind of environment where First Amendment rights are, you know, people should be able to speak out some. So I am a little shocked that this occurred. But why didn't you sue the University of Virginia back in 1986 when this was occurring?

Mr. ESKRIDGE. Well, Representative Payne, I agree with you. I actually think universities are much better workplaces even in the 1980s and today. That this could happen to someone who is very literate, educated, articulate and overqualified as I was indicates that this really could happen to anybody.

Did I consider suing? I certainly did. I believed at the very least I had a state libel suit against the law school for promulgating factual misstatements. So a libel suit, you would want to show that there is a reckless disregard for facts, and I believe I had them cold on that.

But I certainly didn't consider suing based upon the Constitution in 1985 because I didn't think that I would win. This was right on the verge of Bowers v. Hardwick, which soon enough confirmed my intuitions.

There was no state statute. There was no Virginia order saying that public discrimination was illegal. And there still might not be. In 2002, Governor Warner issued an executive order saying that there should not be in public institutions sexual orientation discrimination.

But that order has been possibly nullified by the attorney general and by a recent court decision involving a case of sexual orientation discrimination where the court said no, this executive order is null and void and in any event provides no remedies.

So this is a situation—not only were there no legal remedies but not even talking point remedies. What I would have wanted would have not been a lawsuit but would have been a civil conversation, maybe under auspices of the EEOC.

Conciliation is what I would have wanted, where we could have confronted this issue head on and worked out some situation where an apology was issued. I could have moved on or even optimally, I could have even stayed at the University of Virginia but I think that was not possible after the outburst that I described.

Mr. PAYNE. Well, I certainly think the University of Virginia certainly the loser in that and just listening to you, I think that it

would be a privilege to have had you as a professor of law at any university, so I think that they have suffered and Yale, where you are now is certainly benefiting.

I yield back, thank you.

Mr. ESKRIDGE. Thank you.

Mr. ANDREWS [presiding]. I thank my friend for yielding. The Chair recognizes himself. One of the things that I know we want to do into this bill is to be sure that any person is protected, irrespective of whom his or her employer is.

And you know, it is important to know for the record that both Ms. Glenn and Professor Eskridge at the time of their discriminatory experiences were public employees. It is very important we think that we lay the predicate for the exercise of our constitutional authority to cover those public employees.

And Professor Sears, I would like to ask you some questions. First of all, your institution has conducted an extensive study of the question of discrimination against public employees over the last number of years, is that correct?

Mr. SEARS. Correct.

Mr. ANDREWS. And you will be entering that into the record of this hearing?

Mr. SEARS. Yes.

Mr. ANDREWS. Is it your conclusion based upon that extensive research that the research shows that there is a widespread pattern of unconstitutional employment discrimination on the basis of sexual orientation and gender identity by state governments and their local jurisdictions?

Mr. SEARS. Yes, it is, sir.

Mr. ANDREWS. I want to walk you through some of the basis of that conclusion if we could. My understanding is that you did first of all some analysis of findings by various state legislatures, state commissions, other bodies of state governments, and it is my understanding that there were 29 examples of such findings in 17 states, is that correct?

Mr. SEARS. Yes it is.

Mr. ANDREWS. With respect to presentations to Congress, it is my understanding that although the research I don't think is comprehensive, there are at least 67 examples put before congressional committees and other subdivisions of this institution, is that correct?

Mr. SEARS. That is correct.

Mr. ANDREWS. I want to ask if you could characterize your findings on the issue of survey data. If I understand this correctly, you found over 80 surveys that were done where questions relevant to this discussion were uncovered. Can you characterize those surveys for us?

Mr. SEARS. Yes. I think all of the surveys showed a substantial amount of discrimination in the public sector. The surveys we focused on for this review were 80 surveys either were totally of public employees or there was a substantial part.

I mentioned in one of my testimony, another survey, which is a nationally random sample is the Journal of Social Survey, the Williams Institute actually entered actually entered a question on sex-

ual orientation in the 2008 survey and a module about discrimination.

And it showed about 20 percent of government employees who identified as LGB, there was not a gender identity question, had experienced discrimination. "Police Quarterly" last year in 2008 published a survey of both state and local law enforcement that showed similar rates of discrimination.

Mr. ANDREWS. But let me ask you about two of those surveys that you made reference to. My understanding is there was a 2009 survey where the sample was more than 1,900 LGBT, employees of state university systems. And could you tell us what that survey found, and that was a sample of 1,900, all of whom were public employees, correct?

Mr. SEARS. Correct.

Mr. ANDREWS. What did that survey find?

Mr. SEARS. Well, first of all, let me thank Professor Sue Rankin from Pennsylvania who has done an incredible amount of work this year to get this research conducted in this last 12 months. She actually had two different studies, this one actually dealt with a survey in 2009 of state university and college employees, faculty, staff, administrators, asking if they have been discriminated or harassed in the workplace and then on what basis.

Of the LGBT employees, 19 percent they have said they have been discriminated or harassed and then 70 percent of those said it was on the basis of sexual orientation or gender identity. One study I haven't mentioned is a kind of meta-analysis that she has done, also completed just this year.

Over the last decade, she has completed these campus climate surveys in a number of state institutions. From 2006 to 2009, she completed 41, all of public institutions and those, too, show a high rate of discrimination.

Mr. ANDREWS. Let me also just close in the time I have left with this question, a devil's advocate question. The precise number of claims that you have uncovered is relatively low. Do you think it is true or false that a substantial number of claims that could be brought have not been brought for a variety of reasons over the years and if so, what are those reasons?

Mr. SEARS. I think this probably is just the tip of the iceberg of what is out there. One major gap here is we contacted the 20 states who currently prohibit sexual orientation discrimination and asked them for redacted copies of their complaint and only six complied with that.

So there is a large body of information, that is why you see such terrific records for New Mexico and Wisconsin because they have great enforcement agencies.

And I think the other most important factor is that LGBT people are reluctant to pursue their claims in the face of administrative agencies that might not be receptive, courts that might not be receptive and they have to make the choice whether to out themselves further in their community to pursue the claim.

Mr. ANDREWS. I thank you. I see my time has expired. Are there minority questioners at this time? The Chair would recognize—is it Ms. Woolsey?

Ms. Woolsey for 5 minutes.

Ms. WOOLSEY. Thank you, Mr. Chairman. I have chapter two of my Lynn Woolsey human resources story. I decided it was time to leave this wonderful company that I worked to help start after 10 years. So in the 1980s, wanting to work with more than one employer and bring good personnel policies to them, I started my own human resources consulting firm working with mostly high tech companies.

Among other areas of human resources, I often assisted with recruiting for hard to fill positions for my clients. Well, I had a material director position to fill and to help my client fill and I had the perfect fit, but oops, I sent him a transgender person and this was in the 1980s.

I didn't go ahead and say, guess what, I am sending you a unique individual. That was not my place. I sent them the perfect fit. Well lucky for me my business was strong and I could survive the loss of that employer and that client and I did.

So chapter three, I decided I needed to be on a bigger stage if I wanted to make real change because I wasn't going to do it employer by employer, person by person. So I ran for Congress, elected in 1993.

I have been on this committee for the last 16 years. This is my ninth term. And I am ready as well as my constituents to stop talking about this and to pass ENDA. No more judging individuals on their sexuality, no more deciding how others should live and how they should love and basing employment decisions on that.

It is time. It is time that we passed ENDA and it is time that we get this behind us. So let us go, gang. I yield back.

Mr. ANDREWS. The gentlelady yields back.

The Chair recognizes the gentleman from Texas, Mr. Hinojosa, for 5 minutes.

Mr. HINOJOSA. Thank you, Mr. Chairman.

My first question is to Professor William Eskridge. In your testimony, you indicate that state and local governments have had a long history of discrimination against lesbian, gay, bisexual and transgendered employees. You cite examples in several states, including Texas. Can you elaborate on the case that you discussed in Texas—or that cover on Texas?

Mr. ESKRIDGE. A specific example from Texas?

Mr. HINOJOSA. Yes.

Mr. ESKRIDGE. There is not one discussed in my statement——

Mr. HINOJOSA. I didn't find it.

Mr. ESKRIDGE [continuing]. From Texas but there are a number of litigated examples from Texas. And I am sure Brad Sears has others. One example from Texas that I do know about involved in the 1980s I believe, a police officer, a very well qualified police officer. And it was one the major cities, either Dallas——

Mr. SEARS. Dallas.

Mr. ESKRIDGE [continuing]. Or Houston. And they had a policy of apparently per se exclusion of police officers who were openly or even closetly lesbian or gay, if they could identify it. She sued and at no point in the litigation am I aware, that the Dallas Police Department adduced any kind of state or employment reason not to hire her. Yet this exclusion was litigated to the hilt by that department. And she ultimately did prevail in the Texas court systems.

Mr. SEARS. Yes. If I could add to this, this policy in Dallas was actually litigated a couple of times and the only thing that they argued was—underpinning the policy of not having gay police officer was the state sodomy law that you would be in a conflict to both be enforcing a law and be in violation of it.

States continued to have sodomy laws up until 2003, when they were struck down. A lot of the states have had their laws declared unconstitutional and have also kept them on the books even after some legislative consideration.

And I think it is one of the links between local enforcement and state law is that the state laws on sodomy and criminalization of same sex behavior really underpin the discrimination that was happening at the local level.

Mr. ESKRIDGE. I also have this experience from Texas, and I would certainly defer to Texans such as yourself, Representative, and that is that my—one of my recent books is called "Dishonorable Passion, Sodomy Law in America from 1861 to 2003" and I devote an entire chapter to the Lawrence case which, as you know, arose in Texas and resulted in the Supreme Court's invalidation of your homosexual sodomy law.

In the process, I went to Texas for a number of interviews and spoke to people who worked for the state government, including lesbian and gay individuals who worked for the state government. Not a single one of them was out. They all felt that it was necessary for them to remain in the closet if they wanted to keep their jobs.

And that is an element of this that we have not emphasized today, that the discrimination is not just based upon a classification that is fishy and suspect, it is. It is not just that people are denied their due process, they are.

People are also denied fundamental free speech rights to identify themselves as they really are. And so apparently, even in the new millennium, at least based upon my experience in Texas, a lot, probably still most of the lesbian, gay, bisexual and transgender employees still feel that they cannot identify themselves in the public setting and not be disciplined by their employers.

Mr. HINOJOSA. Thank you, Professor. That leads me to the second question to Brad Sears. Some critics of the ENDA suggest that there will be a flood of litigation if this bill is adopted. Your findings indicate that significant amount of discrimination against the lesbian, gay, bisexual, transgender people is happening in the workplace.

So my question would be, do you believe that employers could face considerably more lawsuits under ENDA than under comparable civil rights laws such as Title VII or the Americans with Disabilities Act, ADA?

Mr. SEARS. I do not believe that. There is a significant amount of discrimination against LGB people. That population is substantial but not a huge population.

So we have actually looked at all the states that have prohibited sexual orientation and gender identity discrimination and compared the rates of filing of complaints with the state administrative agency based on sexual orientation, which we had the most data

for, between that and gender identity, sex and race, and we find the rates on a population basis are very comparable.

They all range between 5,000 and 10,000 people making complaints to 7,000 to 10,000 on those different bases because you have a smaller population of LGB people, it really doesn't add that much to the administrative enforcement burden on the——

Mr. ANDREWS. The gentleman's time has expired.

The Chair recognizes the gentleman from Pennsylvania, Mr. Platts, for 5 minutes.

Mr. PLATTS. Thank you, Mr. Chairman. I will be very brief. Again, thank the committee for holding this important hearing. Apologize to our witnesses with trying to be in five places at once around here. I am only able to come back for a few minutes.

But I just want to thank each of you, as a co-sponsor of the legislation, appreciate each of you being here and sharing your insights and especially thank you for your written testimony because of not being able to hear most of your testimony here today, that is very helpful to me. So just appreciate your efforts and being a part of this hearing.

And Mr. Chairman, thank you and yield back.

Mr. ANDREWS. Thank you, Mr. Platts, for your leadership and support on this issue. It is very much appreciated.

The Chair recognizes the gentleman from Massachusetts, Mr. Tierney, for 5 minutes.

Mr. TIERNEY. I thank the Chair.

And Professor Sears, I understand that this committee is not the first committee in Congress to sort of document discrimination against the LGBT community by government employers.

Your report says that, and I quote here, "In total, of the 67 specific examples of employment discrimination against LGBT people by public employers, have been presented to Congress in prior years, including discrimination involving 13 state employees, 14 teachers, 12 public safety officers, 2 other local employees and 26 federal employees."

Now, many of these prior hearings were actually conducted by Senator Edward M. Kennedy, Ted Kennedy from my home state of Massachusetts. He has been a great champion of this particular legislation that we are considering here today.

And so I was wondering if you would please tell us more about Senator Kennedy's role in creating a sound congressional record of discrimination, the one that we are building on here today?

Mr. SEARS. Yes, thank you. I think Senator Kennedy took a very admirable and appreciated role in taking the lead on ENDA and also need to—made sure to include, in the hearings that he led, both discussions of discrimination against public employees and that they included a lot of personal stories of witnesses who are public employees.

Three come to mind in which he was either called a witness or he shared their stories later. One was a postal worker who was a federal government employee in Detroit, Ernest Dillon who was discriminated on the basis of his sexual orientation in dealing with the mail. It was just completely irrational that it would have any basis with his job performance to deal with the mail, with his co-

workers, with anything. And he was harassed and fired from that job.

The second one—and there was a discussion about whether people who are perceived to be LGBT—was a story he told about a firefighter in Oregon who was not actually LGBT, but when there was an initiative in Oregon to prevent any sort of protections in employment for LGBT people, this firefighter went to a rally to show his support.

That was seen on TV. It was seen by his co-workers and he experienced harassment, hate mail and some trumped-up charges to be removed, and that is another story that Senator Kennedy shared.

And finally, there was a story about a really talented law student from Arizona who wanted to work for the attorney general's office there. He applied once, made it in like the top two for the cut, applied again, was on the phone with the guy who was going to hire him.

The guy was like "I am going to call your references now and that means we are ready to hire you." He disclosed that he was gay and he got a rejection letter 3 weeks earlier. So I think Senator Kennedy took a leadership role and made sure that the face and voices of public employees were heard in discussion of ENDA.

Mr. TIERNEY. As he did in so many issues of this nature, so I thank you for putting that on the record, and I yield back, Mr. Chairman.

Mr. ANDREWS. I thank my friend for yielding.

And the Chair recognizes the gentleman from Ohio, Mr. Kucinich, for 5 minutes.

Mr. KUCINICH. Thank you very much, Mr. Chairman.

I would like to start with Ms. Glenn. I want to go over your testimony here. In the encounter that you had with Sewell Brumby, the legislative counsel you disclosed to him that you were going to be expressing yourself as your true self, as a woman, and he did not accept that, right? He said it was unacceptable?

Ms. GLENN. Yes, sir.

Mr. KUCINICH. And he further said it was inappropriate?

Ms. GLENN. Yes, sir.

Mr. KUCINICH. Now, I want to go to Professor Eskridge because you raised the point that I thought it was important that we not jump over this too quickly.

Ms. Glenn was fired—to reduce it to its fundamental aspect—she was fired because she was expressing herself. I want that to sink in here, self-expression.

Now, freedom of speech is expression, correct? The expression of speech, they are controvertible, right? Why have you—are you familiar with any cases where someone has won a First Amendment case—saying that it is, in the case of Ms. Glenn, that she has a First Amendment right to self-expression? What about that?

Mr. ESKRIDGE. There are a number of cases where this is litigated. It is usually more successfully litigated in state courts than in federal courts. And there are some cases where the courts have recognized such claims.

I am not sure I can remember them right off the top of my head, but there is a case in Massachusetts, to take the gentleman who just asked the question prior to you. I think it was the UNIX case?

Mr. KUCINICH. Mr. Tierney.

Mr. ESKRIDGE. There was a case in Massachusetts where a transgendered student I think in a high school wanted to express her gender identity and who she was. The school didn't allow it and, under the Massachusetts Constitution, the lower court did recognize that as a cognizable freedom of expression claim.

Mr. KUCINICH. Now, I want to go back to the federal aspect of this, but I am looking at the Georgia Constitution and its preamble talked about promoting the interests and happiness of the citizens. In paragraph one, "Life, liberty and property, no person shall be deprived of life, liberty or property." Seems a job could be considered property.

Paragraph three talks about freedom of conscience, paragraph five talks about freedom of speech, "No law should be passed to curtail or restrain freedom of speech."

Now, it—you raise the question about the recourse that people would have under state law. I want to go back to our own U.S. Constitution here. Why wouldn't the First Amendment strictly prohibit anyone from discriminating against someone on the basis of freedom of expression?

Mr. ESKRIDGE. Representative Kucinich, you have asked a deep and important question and here is the answer to that. The literal answer to that is cultural. The judges read the First Amendment through cultural lenses, and a cultural lens that views a transsexual individual as disruptive, as untrustworthy, as rebellious, as uncooperative, is going to be reluctant to read the First Amendment to protect that individual.

So that is why I say, that we teach at the Yale Law School that you all are the moral leaders in American government. It is not the U.S. Supreme Court. You all have to establish the moral leadership on these kinds of issues.

Mr. KUCINICH. But a strict interpretation of the First Amendment—you know, and I carry a Constitution with me. I am kind of a strict constructionist.

A strict interpretation would say that Ms. Glenn would her rights would be protected because if Ms. Glenn's rights aren't protected then any citizen in our society could be discriminated against on a basis of their expression because each person has a different expression of self, expression of personality, expression of language patterns, unless what we are doing is creating a legal system where everybody has to be the same. Wow.

So I think, when we are entertaining this issue of ENDA, Mr. Chairman, and, you know, I have notice the methodical way in which you got into some of the questions about the discriminatory data, the data that proves discrimination, when we are looking at ENDA, ENDA is really a lens into who we are as a nation.

Do we believe enough in freedom that everyone can be free to be who he or she is? That is really the deep question that we are faced with here as a nation.

I thank you.

Mr. ANDREWS. I thank the Gentleman. Just ask the members that the Chairman of the full committee is planning on having a caucus of Democratic members as soon as this hearing is over, which he would hope would be rather quickly.

So all the members will be recognized that wish to be recognized, but with that in mind—it is frankly dealing with the health care issue, so the members will have an opportunity to do that.

Recognize my friend from New Jersey, Mr. Holt.

Mr. HOLT. I thank the Chairman and I thank the witnesses.

As the chairman is well aware, in New Jersey, we have a fully inclusive employment non-discrimination law that protects against discrimination on the basis of gender identity as well as sexual orientation.

And many companies, Johnson & Johnson, Merck, Prudential, prohibit employment discrimination and they find it is really to their benefit, it is a matter of corporative competitiveness, it is good for their companies as well as good for the economy, not to mention the right thing to do.

Some people still haven't caught on to these benefits yet, and I hear from constituents who say that the proposed legislation here would grant special consideration on the basis of sexual orientation.

Professor Eskridge, could you quickly address that? Does this grant special consideration?

Mr. ESKRIDGE. Representative Holt, the answer to that is no. For example, this bill would prevent a gay bookstore, for example, from discriminating against a possible employee because she or he is straight. What is good for the goose is good for the gander, and I assume that the supporters of the bill are fully comfortable with that.

Now, here is what is going on, though, with the rhetoric of special rights. Whenever minority groups, particularly one that has been despised, is elevated to a position of equality, there is a tendency—and this is not a question of dishonesty or whatnot—it is just a tendency for the mainstream to see that they are getting special rights.

We saw this at the U.S. Supreme Court level in Romer v. Evans which struck down the Colorado Amendment Two that had been adopted in 1992. The majority, by Justice Kennedy, said that what Amendment Two would take away from gay people in terms of non-discrimination rights is assumed by everybody else as just a matter of course.

The defense, by Justice Scalia, argued that this was special legislation and special rights that gay people were seeking, and all Amendment Two was doing was to revoke those special rights.

Mr. HOLT. Thank you. Mr. Sears, just to underscore the point that we are not talking about a few or even many legal cases, we are talking about systemic problems here that is to be addressed, can you say anything about the effects on employment rates or unemployment rates and salaries for, let us say, transgendered individuals?

Mr. SEARS. Yes. Let me start by saying that our institute does a lot of analysis of data and there are so few government surveys and other large surveys that ask questions about transgender status that we are really hampered in our ability to do a lot of analysis.

There have been two really tremendous surveys, the largest of their kind done this year, one by the Transgender Law Center in

California, the other by the National Center for Transgender Equality and the task force here in D.C., which have large samples.

They have samples that include public employees, and they show high rates of discrimination but what they also show are alarming rates, unbelievable rates of unemployment and poverty. And I think, if you look at those large surveys plus probably 20 to 30 smaller community-based surveys that have been done, that has been consistent throughout the transgender community.

That while a lot of LGB people get fired from positions, the problem with gender identity is getting through the door and, if you don't get through the door, you don't have an income; you don't have a job.

Mr. HOLT. If you could be sure to provide for us any references about those studies. And then really quickly, as you have looked at these things, have you found many examples of heterosexuals discriminated against because of perceptions of homosexuality?

Mr. SEARS. Yes, our examples do include heterosexuals. They come to the cases in three ways. The first would be on the basis of "perceived to be gay." Under the case in the example, two guys in Illinois who worked for the Department of Health, they go on a fishing trip, one is married, one is gay.

The married one comes back to the office and is pestered constantly about whether or not he is gay. There are horrific facts dealing with sexual harassment. It is taken before court and he loses because it is considered not actionable under Title VII.

The second is association claims. There is a case I couldn't believe, in Tennessee, where a superintendent was asked to speak at a convention held by a church where predominately the members were gay, lesbian, bisexual and transgender.

He didn't know that. He accepted the invitation. He then couldn't attend, but it was reported in the newspaper that he did speak there. There were many complaints made to his school board. He addressed that by writing two different articles for the paper correcting the inaccuracies.

And he was terminated—or he was not hired again, nonetheless. And he won his case, in the Circuit Court, and his argument was "I personally don't even endorse homosexuality, but I have a constitutional right to associate with whoever I want, including LGBT people."

The third type of case are retaliation cases and there was a witness at an ENDA hearing a few years ago who hired a lesbian at a radiology department in Washington. That lesbian became harassed. She made complaints, to protect her employee, to the hospital. The lesbian employee was terminated, as well as the supervisor and Nan Miguel spoke here a few years ago about her experience.

So perception, association and retaliation claims are mainly how people come——

Mr. HOLT. Thank you.

Mr. ANDREWS. Gentleman's time has expired.

The Chair recognizes the Gentleman from Illinois, Mr. Hare.

Mr. HARE. Thank you, Mr. Chairman.

I will—just a question, Mr. Parshall and a comment. I am trying to understand why your organization has such a different interpre-

tation than the U.S. Conference of Catholic Bishops, the Union of Orthodox Jewish Congregations and the General Conference of the Seventh Day Adventist Church regarding really this exemption.

I mean, what is it that you see that these folks don't see?

Mr. PARSHALL. I think we have taken a little bit more realistic and closer look at the history of difficulty that religious groups have had qualifying. I mentioned the Montrose Christian School case and the difficulty we had to try to articulate to the trial courts there what the nature of religious liberties are.

I think also it is not self-evident. The problem with Section 6 is not self-evident. In fact, it took me several readings before I realized that the difficulty is that you have an apples and oranges paradigm.

Title VII is really made up two parts in terms of its exemptions. You have to be a religious corporation, association, society, educational institution, so that defines you in terms of your organizational status.

But then the second part is you have to make certain decisions or actions with respect to persons of a particular religion and that is kind of an action or a conduct prong of this. So that is the oranges.

Now, the apples here are sexual orientation and gender. They do not fit when you use a religion paradigm to compare it to sexual orientation. So in other words what I am saying is the mechanism used doesn't fit.

At first glance it would and you simply say, "Well, if you are exempt under Title VII, you are exempt here." But the analysis is not that easy. For instance if, let us say, you had a Lutheran orphanage and you had a homosexual man who said he was a Lutheran and he is not hired. Was that discrimination based on religion or based on homosexuality?

So in other words, the exemption will be very difficult to apply, and I fear and I predict, that the courts will, as the tendency has been in a number of cases recently that in a conflict between the general laws of discrimination dealing with sexual orientation and religious liberties will lose.

Mr. HARE. Well, let me just say this, you use some—and I will finish on this—I am going to anger my chair—you use phrases like a mirage, quoting, "get a pass" and "a crazy quilt," but one of the things that I think troubled me was when you said this was a violation of the Bible. Just from my perspective, and I don't want to get into biblical debate here——

Mr. PARSHALL. Sure.

Mr. HARE [continuing]. But I have to tell you—there was a great man 2,000 years ago in that Bible and the people that he was closest to were the people that were the biggest outcasts in society. And you know, we keep hearing about this.

And I think it is the same person, I could be wrong, I don't read it every single day, but I don't think I am mistaken when he said, "Whatsoever you do to the least of my people that you do to me." And I quoted this at the first ENDA hearing that we had.

And I have to tell you the testimony that we have heard from Ms. Glenn and Professor Eskridge today, the treatment that they had is, to me, appalling.

And I have to tell you, Ms. Glenn, I hope you take it to them on this lawsuit, I hope you get your job back, you deserve it. The way you were treated was absolutely horrendous. And I just wanted to ask you one thing. What did your co-workers say when they found out that you were being fired? Did you get any feedback from them?

Ms. GLENN. I was rushed out the door before I had a chance to talk to any of them. I have remained friends with some of them since then and they are as supportive now as they were then.

Mr. HARE. They rushed you out the door—were they afraid you were going to steal something on the way out, too or——

Ms. GLENN. Apparently.

Mr. HARE. Well, I will tell you one thing they can't steal, they can't steal your courage and they can't steal what is right and I appreciate everybody coming today.

Thank you, Mr. Chairman. I yield back.

Mr. ANDREWS. Thank you, Mr. Hare.

The Chair recognizes Mr. Polis.

Mr. POLIS. Thank you, Mr. Chairman. I want to thank you as well as Chairman Miller for holding this important hearing today as well as your leadership on this bill as well as in past Congresses. This is an issue that is of great personal importance to me as well as philosophical importance to me and the residents of my congressional district.

And I want to thank you and Chairman Miller on both of those levels, personal and philosophical, for your leadership.

I am proud to sit here today representing a state that has in place employment protections for gays, lesbians, bisexual and transgender individuals, following a law that signed into law in 2007 by Governor Ritter.

However, our state's history, unfortunately, includes a more offensive time of legalized discrimination and prejudice through the passage of Colorado's infamous Amendment Two. The fact that a discriminatory law can be passed at the state level specifically targeting local nondiscrimination ordinances and seeks to attack the professions, prosperity and personal lives of innocent individuals, speaks to the overwhelming need for federal legislation that guarantees all individuals access to equal employment rights under the law.

My question for Professor Eskridge, I know that during Colorado's consideration of Amendment Two, the inflammatory and particularly prejudiced arguments that were used by proponents played a significant role in the outcome.

I was hoping you could share with us examples of these inflammatory and prejudiced arguments that you researched from Colorado and from other states, where these arguments and inciting of irrational fears have had a significant influence.

Mr. ESKRIDGE. Representative Polis, I appreciate that question coming from a son of Colorado. In 1992, as you say, Amendment Two was a hotly contested amendment. My sources, by the way are not just Internet research but main sources are the official ballot materials that were prepared in support of Amendment Two that were promulgated to the voters.

And a book written by Stephen Bransford who was a leading strategist, and his book speaks specifically to what the moderates were trying to do in those ballot materials, and Bransford brags that the extremist arguments were left out.

Okay. Now, the materials by the way are reproduced as an appendix to William Eskridge and Nan Hunter's case book on sexuality, gender and the law. So they can be accessed literally.

The kinds of arguments that were used were homosexuals, using their language, are diseased. The materials stated that the average gay man lives to the age of 42, only that because of disease, but that the average lesbian makes it to 45.

Okay, well, I have already eclipsed that, maybe you have not. I have already beaten the record and I am very proud of that. That is obvious nonsense. The materials say that gay people are predatory. The materials say "target your children," that homosexuals are after your children.

They say that gay people are trying to destroy the family. They say that gay people are trying to destroy the church. They say that gay people are trying to seek special rights and don't deserve those rights because they are not similarly situated to other disadvantaged groups.

The materials go on—and these are the moderate materials. Stephen Bransford says these were the moderate arguments, the responsible arguments that were accepted rather than the nutty or radical arguments.

And the materials are saturated with open appeals to anti-gay and anti-lesbian prejudice. They are saturated with open invocations of stereotypes that are deeply erroneous. These stereotypes have never had one ounce of factual support.

And in my statement I cite you the empirical studies that demonstrate that in terms of abuse of children, this is not a lesbian problem. It is not an openly gay man problem. It is a man problem, et cetera.

Mr. POLIS. Thank you. You know, as a member of Congress who happens to be of the Jewish faith, I see a lot of similarities to caricatures of Jews through history as predatory against children, of setting the institution of church and the tradition of anti-Semitism that continues to leave its legacy to this day, a lot of similarities in terms of the stereotyping that has occurred here.

A follow-up question for Professor Sears, I know that Colorado isn't the only state to pass this kind of measure and I wanted to ask if you could provide additional examples to those that Professor Eskridge cited?

Mr. SEARS. Yes. The Supreme Court, in the Romer decision which declared Amendment Two unconstitutional, Justice Kennedy wrote that this effort was just—a literal violation of equal protection. It was inexplicable to accept a law based on animus and hostility towards a community. But there have been 115 such efforts from 1974 to the present.

After 1996, when Romer was decided, there have been several dozen efforts to either repeal laws that have been passed to protect LGBT people in the workplace or to block them just like Amendment Two from being asked.

So these initiatives continue, and I think it is one thing that really marks discrimination against LG people is that there is an ongoing persistent effort to repeal those laws, to block them and even to enact into law, in doing so, discriminatory statements about LGBT people.

Mr. ANDREWS. Gentleman's time has expired, thank you.

The Chair recognizes Mr. Tonko.

Mr. TONKO. Thank you, Chair. Let me thank the panel for participating here today. The information is helpful. I represent a congressional district in upstate New York and so, Professor Sears, I would like to ask of a report—I noted in your report that there was a situation in upstate New York, where a city employee, a gay employee was suspended for wearing a baseball cap with a rainbow flag.

Mr. SEARS. Yes.

Mr. TONKO. And I understand from your report also, that the employer's rules did not prohibit the wearing of baseball caps. So could you further comment on that case for me, please?

Mr. SEARS. Yes. This was someone who worked for the highway system of New York and he was working in that city. He wore a baseball cap which actually had a ribbon on it. Half of the ribbon was red to show compassion towards people with HIV and the other half was a rainbow flag. He was told he couldn't wear it and discriminatory action pursued from that.

He was represented and I think it was a case where the discrimination was so blatant that the city eventually apologized because there had been no policy against wearing hats, it was just his identification again with LGB people. His First Amendment rights to expression were so clearly violated that they apologized for doing that.

Mr. TONKO. What do you interpret or what would that suggest about the intersection of First Amendment rights and discrimination against the LGBT community?

Mr. SEARS. I think in these cases—there are a number of First Amendment cases. They deal with an expression to a piece of clothing. Discrimination that is triggered by attending an event or a rally and someone in someone's community sees that and that is the basis, discrimination for saying that you are gay when asked by other people in your workplace.

The case that I mentioned in Tennessee, there is a right to free association protected by the First Amendment. All of these are influence cases.

I think what is very true about discrimination on the basis of sexual orientation and gender identity is that there are these equal protection issues that we see readily. There are also due process issues which we have discussed and First Amendment issues. It is really a cluster of constitutional rights that are implicated.

Mr. TONKO. It is rather interesting that this was, again, was a municipal situation, a local city government——

Mr. SEARS. Right.

Mr. TONKO [continuing]. Is in the midst of that case, so.

Mr. SEARS. Yes, yes. I mean the other case about New York which I was happy to come across was an opinion by Justice Sotomayor dealing with another cluster of cases I wasn't aware of

until this study, which is—there is several cases dealing with inmates who have jobs in prisons and that is important as a way to rehabilitate and getting skills when they leave. And they are fired or harassed or inmates are told about their sexuality and gender identity and they are threatened in that way.

And Justice Sotomayor had a case when she was a district judge where there was a motion to dismiss the case because the prison said the fact that somebody with sexual orientation implicated mess hall security.

And she wrote, "A person's sexual orientation standing alone is not reasonably, rationally or self-evidently implicate mess hall security." There was just no way to make the connection. I think that shows the irrationality of the discrimination.

Mr. TONKO. Thank you so much.

Mr. ANDREWS. The gentleman's time has expired.

The Chair recognizes the senior Republican for any closing remarks he has today.

Mr. KLINE. Thank you, Mr. Chairman. I want to thank—I am sorry.

Mr. ANDREWS. Oh, I am sorry.

The gentlelady from California. I apologize. My eye didn't wander quite that far. Excuse me.

Ms. CHU. Well, I want to thank the whole panel for being here and, in particular, I want to thank Professor Sears who comes from my own state of California and is bringing to us the work of the Williams Institute which has done such outstanding research on LGBT issues.

And it has led to the passage of laws in California to prohibit discrimination against gay and lesbian transgendered individuals, which I was proud to vote on, when I was in the state assembly.

I found your report on the consequence of employment discrimination on the wages of LGBT workers to be very disturbing and that is that LGB workers earn 8 to 29 percent less than their heterosexual counterparts.

Do you have any data or anecdotal evidence with regard to the effect of employment discrimination on other factors such as employee morale, career longevity or career success?

Mr. SEARS. Yes. From other reports we have done, not this one, we have collected information about how discrimination on the basis of sexual orientation and identity impact kind of the bottom line of businesses.

And some of those impacts is that it has shown that people who aren't out in the workplace have lower morale, lower productivity, they are not free to be who they are. The idea of networking is a threat instead of a way to get ahead and companies lose because of that.

I think that is also true in the public sector. I mean, I think Representative Payne mentioned these cases, which there are several of around the country, where someone is on a police force or a firefighter and the people around them don't back them up.

That is not only a loss of that person, that means that whatever emergency is being addressed is being filtered through this lens of discrimination which inhibits the most effective response.

Ms. CHU. And you also state that LGBT employees are reluctant to pursue claims for fear of retaliation or outing themselves. Do you have any projection as to the proportion of the reported to unreported claims?

Mr. SEARS. Yes, there are several studies. I mentioned one of them earlier by the Transgender Law Center that showed of those people who had experienced discrimination about 15 percent actually filed a complaint, so 85 percent did not.

That is kind of in the high end of the scale of what we see in the studies, but we typically see some one-third to a high percentage like that not pursuing it because they don't want out themselves within the community.

And in some cases because there is no law, this is not inked on the books, what are they going to pursue, and fear about receptivity of the complaint by the administration, agencies and courts.

One thing California has done that the only other state has done is New Jersey, is a survey of the judiciary and how do LGBT people feel about the consequences, when they bring a claim in the California court system and the New Jersey system. Both found about 50 percent don't feel like their case is adequately heard based on their sexual orientation or gender identity.

Ms. CHU. Thank you.

I yield back my time.

Mr. ANDREWS. Thank you. Again, I apologize.

The Chair recognizes the senior Republican member.

Mr. KLINE. Thank you, Mr. Chairman. Again, I want to thank all the panelists for being here, for your testimony, for your frank answers to our questions.

A couple of points, I have been making a point, since I have been on this committee that we are in the business of writing law here and making statute, and we need to be as clear as possible in—when we do that, to rid ourselves, to alleviate the problem of interpretation and the rule makers.

And so I want to thank you, particularly Ms. Olson, for your comments on that and we are looking forward to you providing some more information to help clear up that and alleviate some of those problems.

And then, in general—I noticed last time, in the 110th Congress and again it came up this time and will continue to come up, because this is not just an employment issue but it is also, clearly, a very emotional issue.

And we have heard testimony from witnesses, both in the last Congress and this Congress and the statements from our colleague sometimes referring to their religion, their theology mandating that they either vote for or against this legislation, and we need to be mindful of that.

We heard today, for example, Mr. Hare quoting the Bible. We have heard others certainly talking about the strict admonishments in the both the Old and the New Testaments, certainly Paul's letters against homosexual acts, so that is going to continue to be part of this debate, no doubt.

And I hope that we are very clear, as we go forward, in protecting the religious freedoms that Mr. Parshall was talking about as we work on what is fundamentally employment law.

And so I thank you, Mr. Chairman, for your time and I yield back.

Mr. ANDREWS. I thank you. I thank each of the witnesses from each of the panels for their participation, their research, their preparation. It has been very valuable to the deliberations of the committee and we thank you.

You know, some of the earliest settlers who came to North America from Europe and engaged with those who were already there in a rather ugly style very often, came here because they wanted to live in a place where no one could tell you how to worship or what your philosophy ought to be, and one of the core principles that have governed this country since then as we have clung very closely to that philosophy.

I agree with my friend that this is not about someone's interpretation of their personal theology. It is about a very basic principle in American law, a very basic aspiration of American law, which is merit, which is that your ability to get a job, rise up the ladder, excel in our profession should be about your skills, your motivation and your work ethic.

It should not be about your worship, the color of your skin, your gender, and we believe strongly it should never be about your sexual orientation or that you are a member of the transgender community.

I think there is almost unanimity in this Congress for the proposition that who gets hired and promoted should be on basis of merit; probably is close to unanimity for that proposition.

I know there would be some of us who would disagree as to whether this statute is necessary to achieve that objective. I think it emphatically is and I look forward to the debate within the committee and on the floor forthcoming so that we can each express our views and the House can work its will.

Ladies and gentlemen, you have been very helpful in helping us reach those conclusions. We thank you very much. Without objection, members will have 14 days to submit additional materials or questions for the hearing record.

Without objection, the hearing is adjourned.

[The statement of Ms. Chu follows:]

Prepared Statement of Hon. Judy Chu, a Representative in Congress From the State of California

The United States of America made great strides in the last century to provide rights and protections to our most disadvantaged communities. Laws were made that made limited the workday and made it illegal for companies to profit off of child labor. Women were given the right to vote and their opportunities to thrive in our society continue to grow. The Civil Rights Act codified Martin Luther King Jr.'s dream by ensuring that all people of color could go about their lives free from persecution.

But the fight is not over. The 21st Century will be known for ensuring that every individual no matter what they look like, how they dress or who they love is equally protected in every way. This bill, the Employment Non-Discrimination Act (ENDA), is a big step toward equality for all. Individuals around the country, and many in California, have been through the most difficult and emotional situations because they found themselves harassed at work, given poor performance reviews, even terminated because of who they were.

There are countless acts of discrimination in the workplace, they happen every day to Americans of every type. But most of these individuals have a recourse, someone they can turn to to right these wrongs and set things right—the Federal

Government. Members of the LGBT community are without a strong advocate, but they need and deserve protection just as much.

When I was in the Assembly, I fought for this protection and the rights of this often neglected community. When asked by my constituents and my opponents why I support the LGBT community, I describe my experience as Chair of the State Assembly's Select Committee on Hate Crimes, where I held hearings on hate crimes in both the Asian-American and the LGBT community. Kenny Chiu was a 17 year old Taiwanese American who was stabbed to death 26 times in the driveway of his own home by his neo-nazi neighbor * * * just for being Asian-American. Matthew Shepherd was only 21 years old when he was dragged from a bar, beaten, tied to a split-rail fence like a scarecrow and left to die in the cold of the night—just for being gay. I cannot fight for the civil rights of one group without fighting for the civil rights of the other. Things will not change until people stand up and say strongly and unflinchingly that we will not tolerate making anybody in America a second class citizen.

California was one of the first states in the nation to pass employment protections for both homosexuals and transgender workers. I am proud to have voted for in favor of both of these laws as an Assemblywoman and look forward to the day I can cast my vote on the House Floor to provide these same protections to everyone, when we can all stand side by side as truly equal Americans.

[Additional submissions of Mr. Kline follow:]

Prepared Statement of the Educational & Legal Institute, Traditional Values Coalition

A Sexual Anarchist Testifies At ENDA Hearing

October 9, 2009—Yale Law School Professor William N. Eskridge provided testimony at the ENDA (H.R. 3017) hearing on September 23 before the House Committee on Education and Labor in the House of Representatives. Republicans had two panelists to testify against ENDA; Democrats had seven.

Eskridge claims that the Employment Non-Discrimination Act (ENDA) must be passed in order to protect lesbian, gay, bisexual and transgender employees from workplace discrimination—especially in state the local governments. According to Eskridge, "ENDA abrogates the states' Eleventh Amendment immunity, pursuant to Congress's authority to enforce the Fourteenth Amendment. The Supreme Court has said that Congress has Fourteenth Amendment authority to create a remedy for state violations of constitutional rights and to establish prophylactic rules to head off harder-to-discern constitutional violations. The 11th Amendment to the U.S. Constitution provides a certain degree of sovereign immunity for states. ENDA would undermine this amendment and give the federal government power to use the 14th Amendment against the states in employment matters.

In plain English, Eskridge wants to use ENDA to violate the right of states and local governments to set their own employment policies.

During a portion of his ENDA testimony, he referred to the effort of citizens in Colorado to keep LGBT individuals from receiving special rights in Colorado law. He noted that:

The arguments in favor of the constitutional initiative included the following: so-called "homosexuals" are promiscuous ("[t]heir lifestyle is sex-addicted and tragic") and consumed by venereal disease (according to the official Amendment 2 ballot materials, the average gay man dies at 42 years old, the lesbian at age 45); they are predatory, seeking to invade decent people's houses and schools, take away their jobs, recruit their children, and "destroy the family;" and Coloradans should undo "special rights" given by some communities to "homosexuals and lesbians" that disrupt traditional family values and good institutions such as churches. The sponsors of the initiative believed that these were "moderate" arguments—but in fact they are open appeals to anti-gay prejudice and invoke deeply erroneous stereotypes of LGBT people as diseased, predatory, and disruptive.

Even when they are not so explicitly set forth as they were recently in the Colorado campaign, these anti-gay tropes—immorality, predation, and disruption—still motivate state officials to discriminate against sexual and gender minorities

In his spoken testimony, he denied that any of these Amendment 2 claims were true. However, he misstated the facts. Here are the facts—from medical journals and other reputable resources.

- Average gay man dies at 42; lesbians die at 45.
- The gay lifestyle is sex-addicted and tragic.
- Gays are consumed by venereal diseases.

- Gays are predatory.
- Gays and public school children.
- Gays want to destroy the family.
- Gays want to disrupt good institutions such as the church.

Professor Eskridge wrote an amicus brief for the Lawrence v. Texas case that became the philosophical justification for the Supreme Court to overturn all state laws against sodomy in 2003.

Eskridge is author of Dishonorable Passions, a history of sodomy laws in the United States from 1861 to 2003. In 2003, the Supreme Court issued its Lawrence v. Texas decision. He is a long-time activist on behalf of LGBT individuals who engage in sexual behaviors that have resulted in the spread of venereal diseases and AIDS not only among gays, but bisexuals who have spread AIDS into the heterosexual community.

Eskridge is not only an LGBT activist but an advocate for the abolition of the concept of marriage altogether. He has support Sweden's efforts to normalize homosexuality and polyamory—the sexual arrangement that includes any number of males or females in a sexual arrangement. Eskridge warns against "fetishizing" the institution of marriage as a one-man, one-woman union.

Professor Eskridge is also author of Gaylaw: Challenging the Apartheid of the Closet. In it, he criticizes laws against prostitution, sado-masochism, pornography, and some forms of intergenerational sex (sex with minors).

According to Eskridge, "* * * most adolescents are ready for sex and have had sex by aged fifteen but are still not mature decisionmakers; intergenerational sex within a family can be extremely disruptive, but legal intervention may deepen rather than alleviate the disruption." (Gaylaw, page 267)

Eskridge thinks that sex with pre-teens should be illegal, but he's not overly concerned about: An adolescent girl who has sex with a related male adult; a teenage girl who has sex with a male adult outside of the family; an adolescent boy who has sex with a related adult; or an adolescent boy who has sex with an adult outside of the family. (Page 267)

Eskridge claims that criminalization of incest and intergenerational sex "allows sex-negative groups to oppose spending state money on sex education and victim-centered therapies without admitting that they are beggaring a solution." (Page 270)

In short, Eskridge is a sexual anarchist who favors adult-teen sex and the abolition of certain laws that regulating sexual activities between adults and teenagers.

Eskridge compares religious liberty to sexual orientation and believes the Constitution protects a person's sexual orientation in the same way that it protects religious liberty. He claims that the Due Process and Equal Protection Clauses of the Constitution should be used to invalidate all laws that "discriminate" against sexual orientation.

In Eskridge's 1997 essay in the Yale Law Journal, "A Jurisprudence of 'coming out,': religion, homosexuality, and collisions of liberty and equality in American public law," he once again compares religion to sexual orienatation. He writes:

Although the law has most often been deployed as an instrument of suppression, there is now a public law concensus to preserve and protect the autonomy of religious and ethnic subcultures, as well as the ability of their members to self-identify without penalty. One thesis of this Essay is that this vaunted public law consensus should be extended to sexual orientation minorities as well.

Eskridge that the "religion clauses of the First Amendment as they have been developed in the last generation are a model for the state's treatment of sexuality."

He continues to place sexual orientation on the same level as religion and believes both are protected by the Constitution.

But, what happens when religion clashes with the gay agenda? Eskridge believes the law should be changed to include "gaylegal" concepts of jurisprudence.

He also believes that the government has a duty to reduce "historical discrimination" that justifies burdens on the First Amendment.

He cited the 1983 Bob Jones University case that gave the IRS the power to strip the university of its exemption as a charitable institution because it forbade interracial dating.

This and other cases are used by Eskridge to argue that it's okay to violate religious freedom when discrimination is involved. He uses this argument to promote the idea that "sexual orientation" discrimination claims will trump religious freedom claims. When religious freedom clashes with the gay agenda, the gay agenda should win, according to Eskridge.

Yet, Eskridge also says: "That the state as employer ought not discriminate on the basis of sexual orientation in its own employment and contracting policies, perhaps as a matter of constitutional law, does not mean that the state also must require private institutions to follow the same non-discrimination policy. When the

state seeks to censor my expression or discriminate against me, I am on strong constitutional ground in resisting; when the state seeks to impose my expression on your turf or to silence your opposition to open homosexuality, I am on much weaker constitutional ground. The continuum from nuclear family to the regulatory state parallels a continuum of defensible imposition of public equality goals, with the state being most defensible and the family being least."

ENDA, however, would impose these pro-LBGT anti-discrimination policies not only on privately-run businesses, but on Christian-run businesses as well.

His gaylaw ideas would routinely trump religious freedom in favor of imposing the LGBT agenda on any business with more than 15 employees.

This is the philosophy of the Democrats' "expert witness" who testified on behalf of ENDA on September 23, 2009 in the House of Representatives.

Special Report of the Traditional Values Coalition, Educational & Legal Institute

H.R. 3017, the Employment Non-Discrimination Act (ENDA)

ENDA will force employers with 15 or more employees to implement the homosexual/transgender radical agenda in businesses across the nation.

Fall 2009—Once again, homosexual legislator Barney Frank (D-MA) has introduced the "inclusive" H.R. 3017, the Employment Non-Discrimination Act (ENDA) to create federally-protected minority status for homosexuals and transgenders in employment.

Democrats held a three-hour hearing on ENDA on September 23.

Republicans had two witnesses testifying about the problems with ENDA. They were an employment law attorney and religious liberties attorney.

Democrats had the rest of the panelists: A male-to-female transgender person; the Chairman of the Equal Employment Opportunity Commission, a gay researcher, a gay law professor; a liberal Jewish leader; and gay activists (pretending to represent the people in their districts) Rep. Barney Frank (D-MA) and Rep. Tammy Baldwin (D-WI).

The hearing was an orchestrated propaganda event promoting the gay lifestyle and Gender Identity Disorders.

Incrementalism As A Strategy

The LGBT (lesbian, bisexual, gay, transgender) movement is using what is called "incrementalism" in order to gain its objectives. One advocate of this incrementalism is lesbian lawyer Chai Feldblum, who was the primary author of ENDA. She has been picked by President Obama to serve on the Equal Employment Opportunity Commission (EEOC), the federal agency that will enforce ENDA against American businessmen and Christian leaders. At this writing, she is not yet confirmed. Feldblum believes that the gay agenda should trump religious liberties.

Feldblum has written that incrementalism is the best way to achieve LGBT objectives. They are willing to put meaningless religious exemptions into ENDA. They are doing this to neutralize the opposition. They will return later to remove whatever exemptions were in the bill. The tactic is used so that they can get the votes from uninformed legislators to pass ENDA. Then, they will demand more at a later time.

Chai Feldblum has openly stated: "* * * when push comes to shove, when religious liberty and sexual liberty conflict, I'm having a hard time coming up with any case in which religious liberty should win." (Maggie Gallagher, "Banned in Boston: The coming conflict between same-sex marriage and religious liberty," 5/15/2008)

Once Feldblum is on the EEOC, she can be expected to implement her ideas against religious liberty. She will enforce ENDA with a vengeance.

ENDA is proposing newly invented rights for individuals who engage in a variety of bizarre sex acts. ENDA pits constitutional rights of religious freedom and free speech against individuals who cross-dress or engage in dangerous sexual activities.

Openly gay John Berry runs Office of Personnel Management, which is the federal government's personnel agency. He recently gave a speech at a LGBT conference and said that ENDA is the most important piece of legislation the LGBT movement can get passed. He told his audience:

The most important thing we can do right now is we got to * * * secure the passage of the Employment Non-Discrimination Act * * * I believe that if we all concentrate our efforts where it needs to be concentrated, which is on the House of Representatives and the United States Senate, we can get the job done."

If we can get ENDA enacted and signed into law, it is only a matter of time before all the rest happens. It is the keystone that holds up the whole bunch, and so we need to focus our energies and attention there.

ENDA, (H.R. 3017) includes coverage of "gender identity." The term "gender identity" is code for drag queens, transvestites, and transsexuals. The umbrella term "transgender" is used to describe these individuals. H.R. 3017 describes "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."

ENDA describes "sexual orientation" as homosexuality, bisexuality and heterosexuality, but also adds "gender identity" as a protected class. This is code for someone who thinks he's the opposite sex or likes to wear opposite sex clothing. It also includes she-males, individuals who undergo only half of a sex-change operation. They are male from the waist down and female from the waist up.

By making "gender identity" a federally-protected class under the law, this normalizes what are mental illnesses, known as a Gender Identity Disorder and/or Transvestic Fetishism. It elevates what a person "thinks" he is over what he actually is.

Congress should not be passing a law that affirms special minority protections for individuals who believe they are trapped in opposite sex bodies. This mental disorder is a treatable condition, not a fixed identity that must be accorded federally-protected class status.

Congress is equating this mental disorder to being equal to African-American or Hispanic under the law. If ENDA passes, the Civil Rights Act of 1964 will be amended to include gays, lesbians, bisexuals, cross-dressers, and she-males under the law.

During the hearing, no one discussed GID; they only discussed "gender identity" as if this were a normal variation of sexuality. It isn't. It is a mental disorder, still listed in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM-IV-TR).

Dr. Paul McHugh has been a critic of the idea that GID is normal and that so-called sex changes are normal and medically necessary. He became the psychiatrist-in-chief at Johns Hopkins University in 1975 and put an end to the practice of providing sex-change operations for patients. Writing in his essay, Surgical Sex for First Things in 2004, McHugh observed: "We have wasted scientific and technical resources and damaged our professional credibility by collaborating with madness rather than trying to study, cure, and ultimately prevent it [GID]."

Dr. McHugh believes that psychiatrists are collaborating with a mental illness by approving sex change operations on individuals. The problem is one of the mind, not the body. A person who has a gender identity disorder needs therapy, not surgery. Mutilating your body is the ultimate act of self-hatred.

YouTube—ENDA Testimony from Rep. John Kline (R-MN)

YouTube—ENDA Lawyer Camille Olson

YouTube—William Eskridge on Gender Identity

YouTube—Gay law professor testifying at ENDA hearing, September 23, 2009

YouTube—Craig Parshall Part 1—ENDA Hearing

YouTube—ENDA Testimony—Olson & Parshall

YouTube—ENDA—Rep. Dennis Kucinich

YouTube—ENDA—Rep. Kucinich wants gay/transgender bill to cover companies with 5 or more employees

YouTube—ENDA Hearing—Acting Chairman Of EEOC Speaks In Support of ENDA

YouTube—ENDA Bradley Sears

Lawyer Notes Problems With 'Gender Identity' In ENDA

During the September 23rd hearing, one panelist was a lawyer who pointed out serious problems with ENDA as it relates to gender identity (Gender Identity Disorder).

Camille A. Olson, with the firm of Seyfarth Shaw LLP, noted that, as written, ENDA fails to define if an employer is required to modify existing restrooms and shower facilities to deal with transgender employees (those who have "undergone" or are "undergoing gender transition).

Olson also points out that ENDA doesn't define what it means for a person to have "undergone" or who is "undergoing" gender transition. These terms can mean anything.

Does a man who dresses like a woman but has not had a sex change meet the criteria for "undergoing" transition? If so, does he get to use the women's restrooms?

A She-Male is a mentally disordered person who "undergoes" only half of a sex change operation. Typically this is a male who takes hormones to grow breasts but maintains his male sex organs. Gay/Tranny porn sites are filled with grotesque photos and videos of She-Males engaged in disgusting sexual antics.

How is a business to handle a She-Male? What restrooms or shower facilities will they use?

News Stories Illustrate Problems With Protecting 'Gender Identity'

A so-called 'transgender' teenager in Texas won the right to wear girl's clothing to school. Rodney Evans, who calls himself Rochelle, was a 15-year-old at Eastern Hills High School in Fort Worth, Texas. Evans fought for the right to wear make-up, fake breasts and women's jeans to school. In a Dallas News (May 19, 2007) interview, Evans told the reporter: "There was never a day when I was Rochelle for the whole day. I love makeup. I started wearing makeup because it helped to complete me more. It made me feel more like a girl. With the help of makeup, you can create your own kind of life."

The article quotes Simon Aronoff, who served at the time as deputy director of the National Center for Transgender Equality in Washington, DC: "Transgender teens are demanding acceptance in all facets of society including school." (Aronoff is a young woman who thinks she's a man. She came out to her parents as a lesbian as a teenager, but is now taking male hormones and sports a goatee.)

How will businesses deal with Rodney Evans when he enters the work force? He claims that there was "never a day when I was Rochelle for the whole day." If Evans can determine his "gender identity" from day to day, how will his behavior impact employment policies if ENDA passes?

Will Evans be a woman on Mondays, Wednesdays and Fridays at work and a man on Tuesdays and Thursdays? What restrooms will Evans use if he doesn't undergo a sex change operation? What shower facilities? Will businesses have to provide separate facilities for him? If Evans applies to a school to become the women's gym coach, will the school have to hire him?

A second story out of Duke University also illustrates the problems of providing federal protection for the ephemeral term "gender identity."

In August, 2007, the Duke University Chronicle reported that a young gender-confused male student at Duke University (who thinks he's a woman) was given permission to use the women's restroom at a dorm on campus. The man has not yet had a so-called "sex change" operation. (Even if he did have the operation, he would still be genetically a male, not a female.)

Lee Chauncey, a father of one of the female students said he was outraged by Duke's willingness to permit this man to use a woman's restroom. He contacted Duke University officials and the national media over this situation. (The gender-confused young man was eventually moved off campus.)

Chauncey told a local ABC affiliate that he didn't think it was appropriate to have a man living like a woman and using women's "shower and bathroom facilities."

This incident at Duke University is a microcosm of the social chaos that will result if ENDA is passed. ENDA, by providing federally-protected status for "gender identity," will be creating not only a third sex, but will be normalizing a whole range of bizarre sexual orientations.

A third story out of Seattle also shows the serious problems that will be created by ENDA. Transgender women invade men's restrooms at Seattle mall.

On August 31, 2007 at a Seattle mall, two women who are taking male hormones were kicked out of a men's restroom. They were attending a Gender Odyssey Conference at the Washington State Convention and Trade Center and were staging a "pee-in" at the 4th floor bathrooms. This was clearly a set-up.

Washington state passed a "sexual orientation" and "gender identity" protection law in 2006. These gender confused women filed a lawsuit against the mall to test the law.

According to Sean (who only wanted her last name used), "Peeing is basic. Anyone who feels a need to use a bathroom should be able to do so without something [sic] rapping on the stall while your pants are down around your ankle." Sean and her friend Simon want to use whatever restrooms they choose.

If ENDA passes, businesses will be forced to permit "transitioning" men and women to use opposite sex restrooms. Or, face EEOC lawsuits.

Attorney Fees Problem & Due Process Violated

During the Q&A session, Republican Representative John Kline (MN) questioned Ms. Olson about the attorney fees and fines that can be levied by the Equal Employment Opportunity Commission (EEOC) under ENDA.

Olson pointed out that ENDA says that it doesn't intend to deal with attorney fees in any way other than what is available under Title 7 of the Civil Rights Act of 1964, however, it does just that.

ENDA says that procedures and remedies will permit the EEOC to levy fines and grant attorney fees to the alleged victim of sexual orientation or gender identity discrimination. According to Olson, the EEOC is supposed to be an investigative body where the rules of evidence do not apply and where employees and employers share information with the hope to be able to resolve issues without litigation.

Olson notes that all other employment anti-discrimination laws give the EEOC no power to grant attorney fees in connection with any of its administrative proceedings. Under ENDA, the decision of the EEOC is not reviewable by a court and does not have to be based on any written, reasoned decision. Due process is being violated by ENDA.

Rep. Biggert Interviews EEOC Chairman

During the hearing Rep. Judy Biggert (IL) interviewed Stuart Ishimaru about attorney fees and fines. Biggert is a co-sponsor of ENDA. Ishimaru claims that ENDA permits the EEOC to do what they are already permitted to do under Title 7 for federal employees. He denies that ENDA has any of the concerns expressed by Camille Olson.

Biggert admitted that ENDA grants power to the EEOC to grant attorney fees—a power not given under other anti-discrimination legislation.

ENDA Will Normalize 'Transgender' Teachers & Students

The passage of ENDA will help promote Gender Identity Disorders among teachers and students. Students will be forced to accept the idea of having "transgender" or cross-dressing teachers in their classrooms.

Students at a high school in Batavia, New York faced this in 2006. The earth sciences teacher decided he was a woman and began wearing dresses to class. Students and parents who thought this was abnormal were vilified by school officials. Students were forbidden from opting out of his class. In addition, the students had to refer to him as "Mrs."

A similar outrage occurred in 2008 in Vacaville, California. In an elementary school, a music teacher decided she was really a man and began teaching children as a man at the start of the school year. Parental objections were rejected and students were forced to be taught by a gender confused woman pretending to be a man.

In addition, sexual anarchist pediatricians are now claiming that children who are gender confused are really just being who they were meant to be. Pediatricians are suggesting that children who think they are the opposite sex should be given hormones to prevent puberty—so they can choose what sex they want to be!

Children who cross-dress will be considered "normal" in schools and anyone objecting will be considered a bigot.

ENDA will make it illegal for any parent to object to having their children taught by cross-dressers, transsexuals or she-males.

Will these gender confused individuals be swimming coaches, football coaches—and freely access opposite sex restrooms and shower facilities?

Transgender activists are actually pushing for a "restroom revolution" that will impact every school and business in America!

ENDA Includes Misleading Definition Of 'Sexual Orientation'

Under ENDA, "sexual orientation" is loosely defined as "homosexuality, bisexuality, or heterosexuality" in Section 3: Definitions. This makes homosexual and bisexual behaviors on an equal par with heterosexuality, which has been the norm throughout human history. Behaviors like homosexuality, bisexuality, and cross-dressing are expressions of gender identity confusion and should not be equated with heterosexuality as being "normal."

However, in Section 4, Employment Discrimination Prohibited, ENDA says that an employer cannot discriminate against an employee "because of such individual's actual or perceived sexual orientation or gender identity."

The inclusion of "perceived" in the definition of sexual orientation in ENDA is a recipe for legal disaster for businesses. There is no condition of sexual abnormality that may not be perceived to fall within one of these categories, including all those excluded by the ADA [Americans with Disabilities Act]: transvestism, transexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders, and sexual behavior disorders. Without containing an explicit exclusion, persons with these conditions will have a certain degree of protection under ENDA.

In fact, the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM) lists at least 30+ sexual orientations, which includes in-

cest, pedophilia, and coprophilia (sexual pleasure from feces). Individuals who engage in these activities can claim protection under ENDA under Section 4.

"Gender identity" is described in Section 3 as "the gender-related identity, appearance, or mannerisms or other gender-related characteristics or an individual, with or without regard to the individual's designated sex at birth." This vaguely-worded definition can mean someone who:

- cross-dresses
- is undergoing a sex change operation
- thinks he or she is the opposite sex without a sex change operation
- lives as a she-male. These are sexually-confused individuals who undergo only a partial sex change operation. Usually males, they are female from the waist up and male from the waist down.

If an employee who is "undergoing" or "has undergone" a so-called sex change operation can wear a dress to work because this is his supposed "gender identity," he can expect to be protected by ENDA. It will prove to be a nightmare for employers and normal employees who will be forced to remain silent as their cross-dressing co-workers press for the right to wear dresses to work. Employer or employees who believe that this person is mentally disordered will eventually be forced into reeducation classes to encourage them to affirm homosexuality, bisexuality and transsexualism.

ENDA and Restrooms/Shower Facilities

Section 8 of ENDA lays out rules for how an employer must treat a person who has a different "gender identity" than his or her biological sex. The concept of "gender identity" is misleading. Transgender activists think that they're normal. What gay, lesbians, bisexuals, transgender activists and Congressional sponsors of this bill are not saying is that "gender identity" is actually a Gender Identity Disorder, which is still considered a mental condition by the American Psychiatric Association. Transgender activists who have helped craft this latest version of ENDA, assert that having a sex change operation is a perfectly legitimate way of dealing with individuals who are supposedly trapped in the wrong body.

In veiled language, Section 8 (3) describes how employers will be permitted to establish policies on shower rooms and restrooms for "gender identity" individuals. It states that employers must "provide reasonable access to adequate facilities that are not inconsistent with the employee's gender identity as established by the employer at the time of employment or upon notification to the employer that the employee has undergone or is undergoing gender transition, whichever is later."

A plain reading of this section means that an employer must make restroom and shower facilities available to a transgender individual that is consistent with what sex he thinks he is—even if he's not yet had a sex change operation. In short, if a man thinks he's a woman, he must be given access to women's restrooms and shower facilities—or the business may be forced to modify separate restrooms and shower facilities for a person who thinks he's the opposite sex or is going through a so-called sex change operation.

As Camille Olson notes, ENDA is vague on whether or not it will force businesses to modify existing restrooms or shower facilities. Section 8 says: "Nothing in this Act shall be construed to require the construction of new or additional facilities," but it says nothing about forcing businesses to modify existing facilities.

Either way, ENDA will be a legal and construction nightmare for businesses that will be forced to provide "adequate facilities" to these seriously confused individuals.

Section 8 (5) deals with "Dress and Grooming Standards." The section states that the employer must permit "any employee who has undergone gender transition prior to the time of employment, and any employee who has notified the employer that the employee has undergone or is undergoing gender transition after the time of employment," to "adhere to the same dress or grooming standards for the gender to which the employee has transitioned or is transitioning."

In plain English, this means that an employer must permit a so-called transgender employee to wear clothing that reflects his chosen sex, not his biological sex. A man choosing to wear women's clothing is protected under ENDA.

Since "gender identity" is a state of mind in ENDA, a person who thinks he's the opposite sex but doesn't want to have a sex change operation, would undoubtedly be protected by ENDA by claiming the "actual or perceived" section of the bill. This would permit a man to use a woman's restroom or shower because he "thinks" he's a woman.

Under ENDA, someone like Rodney Evans will be free to pick whatever restroom he wishes to use under the "gender identity" protection section.

This is not a flight of fantasy. This is already happening on college campuses around the nation. The Duke University and Seattle mall cases are good examples.

In October, 2002, for example, a student group calling itself, "The Restroom Revolution," at the University of Massachusetts, began demanding that the university establish unisex restrooms for so-called "transgendered" students. This is what businesses will face if ENDA is passed.

In June, 2001 a Latino AIDS Agency sued its former landlord for discrimination because the landlord was forcing a transgendered male to use the men's restroom instead of the women's restroom. The ACLU was defending the "right" of this man to use a woman's restroom because he thinks he's a woman. ENDA will result in endless litigation over restroom facilities.

In 2005, a man who calls himself a "male-bodied woman" and uses the name Pauline Park, won a lawsuit against the city of New York over the use of restrooms. Park's lawsuit permits any individual to use whatever restroom he wishes, depending on his "gender identity."

Phony Religious Exemption in ENDA

ENDA is legislation ostensibly designed to forbid "discrimination" against a person's "sexual orientation" or "gender identity." The bill covers any employer who is engaged in interstate commerce or has 15 or more employees.

During the September 23rd hearing, Rep. Dennis Kucinich (D-OH) proposed that the exemption for employers be reduced to companies having only 5 or more employees. He thinks the exemption for 15 is too large. No Democrat challenged him on his desire to have ENDA cover nearly every business, school, and Christian company in America.

ENDA provides a supposed "religious exemption" for religious denominations or organizations operated by religious denominations—but not other non-profit Christian or other religious organizations. The bill says in Section 6, "Exemption for Religious Organizations" that "This Act shall not apply to a corporation, association, educational institution, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Acts 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))."

This is a phony religious exemption. It is legal gibberish designed to fool legislators into thinking Section 6 protects religious freedom.

ENDA would impose a substantial and crippling burden on religious organizations, both those who are non-profit groups, as well as faith-based institutions and enterprises which operate commercially.

The religious exemption in ENDA gives a false sense of security. The courts will decide that discrimination against homosexuals and transgendered persons is equal to discrimination against a person because of his race. Once this happens, there will be no exemption in the law for religious groups.

ENDA already refuses to protect religious entities not directly affiliated with a church or denomination such as counselors, Christian camps, day camps, publishers, TV and radio stations.

ENDA will require businesses to eliminate viewpoints that are contrary to the promotion of the LGBT agenda. This will be done to eliminate a "hostile work environment" for the newly-protected classes of cross-dressers, transsexuals, she-males, lesbians, gays, and bisexuals.

This will inevitably result in the suppression of free speech by Christians and religious practices such as discussing biblical morality with co-workers or discussing such topics as traditional marriage. The human resources department will function as the thought police to make sure LGBT employees aren't offended.

ENDA will pit religious employees against activist homosexuals and transgenders in the workplace. The employer will be caught in the middle, trying to balance free speech, freedom of religion issues with the requirements of ENDA.

The employer will have to choose between suppressing the ability of employees to express their religious viewpoints, for which they have relatively little protection in the workplace (religious speech is far less protected then religious observances), and risking costly claims from homosexuals under ENDA's broad language. Most likely, the employer will impose a rule on the workplace that, in effect, allows no criticism of homosexual or bisexual lifestyles, even among peers.

ENDA forbids any employer from failing to hire or to fire any individual because of his "actual or perceived sexual orientation or gender identity" (Section 4). It will also forbid an employer from taking any action against an employee because of the sexual orientation of a person he may associate with outside of work. (Section 4[e].)

Advocates Of ENDA Claim Discrimination Impacts Incomes Of LGBT Persons

Bradley Sears, Executive Director of the Williams Institute at UCLA, testified in favor of ENDA (H.R. 3017) at the ENDA hearing.

The Williams Institute is described as a "national research center on sexual orientation and gender identity law and policy." It is named after gay millionaire Charles R. Williams and LGBT agenda financier, who has given the institute more than $11 million since 2001.

In reality, the Williams Institute is a propaganda arm of the lesbian, bisexual, gay, transgender (LGBT) movement designed to use research to push forward LGBT political and cultural objectives. It's goal is to legalize gay marriage nationwide, pass ENDA, force acceptance of the LGBT agenda in public schools, and overturn the ban on gays serving openly in the military and more.

Its research is deliberately biased and designed to achieve these goals. It cannot be trusted to give legislators an accurate picture of the lifestyle or employment problems encountered by gays, lesbians, bisexuals, cross-dressers, drag queens or transsexuals.

In 2008, the Williams Institute participated in a National Gay and Lesbian Task Force (NGLTF) conference. Leaders from the institute led workshops, which included "Using Research to Pass LGBT Anti-Discrimination Laws."

The NGLTF also sponsored a workshop titled "Using the Thinking: How research has a role to play in the fight for LGBT equality."

Clearly, the Williams Institute exists to push the lesbian, gay, bisexual, and transgender agenda by using "research" as a weapon for cultural change.

Sears' Vacuous Testimony

At no point during Sears' testimony, did he bother to define what "sexual orientation" or "gender identity" actually mean. And, no legislator challenged him to define these terms.

Lesbian Congresswoman Tammy Baldwin (D-WI) also avoided defining "sexual orientation" when she was pushing for passage of so-called "hate crime" legislation back in May 2009. Like Baldwin, Sears doesn't want to be pinned down by a clear definition of terms.

By ignoring clear scientific definitions of these terms, legislators are simply permitting themselves to be used by LGBT activists to impose a radical sex agenda on all businesses, schools and non-profits with more than 15 employees.

A gender identity is actually a Gender Identity Disorder (GID), a mental condition still listed in the American Psychiatric Association's Diagnostic and Statistical Manual Of Mental Disorders (DSM-IV-TR).

There is Gender Dysphoria, where the person believes he is trapped in an opposite sex body; then there is Transvestic Fetishism, where the person dresses in opposite sex clothing, but doesn't necessarily want to undergo a so-called sex change.

Will ENDA cover cross-dressers (heterosexuals who dress in opposite sex clothing); drag queens (gays); transsexuals (those who have undergone a sex change); and she-males (those who undergo a partial sex change but keep their male sex organs?

The Williams Institute treats homosexual behaviors as safe and GID as merely self-expression instead of a mental condition. Homosexuals are, as a group, far more likely to suffer from serious diseases than their heterosexual counterparts. The evidence is overwhelming. And, individuals who think they are trapped in opposite sex bodies, are truly troubled and clearly mentally disordered. They need professional psychiatric help not surgery.

Sears' Plays With Statistics

During his testimony, Bradley Sears made the following claims:

- A survey of more than 646 transgender employees found that 70% faced workplace discrimination against their gender identity.
- 13% of 1,900 LGBT employees at state universities had experienced discrimination or harassment during 2008.
- Eleven state government agencies provided 430 cases of administrative complaints of sexual orientation and gender identity discrimination between 1999 and 2007. Requests for data were made to 20 state agencies and 203 local agencies. Most did not respond. Of the 430 cases, approximately 265 were filed by employees of state and government agencies.
- Wage gaps between heterosexual men and gay men is between 10% to 32%.
- Studies show that gay men, bisexuals and lesbians who are government employees earn 8% to 29% less than their heterosexual counterparts.
- Gay men who have partners and work for state governments earn 8% to 10% less than their heterosexual counterparts.
- The Williams Institute found more than 380 examples of workplace discrimination in state and local governments over the past 20 years.

From this brief summary, Sears claims there is widespread and systematic discrimination against LGBT individuals in state and local governments—and only ENDA can solve the problem.

Out of 20 states, there were a mere 265 discrimination cases between 1999 and 2007. Were these name-calling? And, during a 20-year period, the institute found 380 examples of workplace discrimination in state and local governments. Bradley Sears claims that these statistics show "that discrimination is widespread in terms of quantity, geography, and occupations."

Sears is wrong. These statistics show that discrimination against LGBT individuals is minor in state and local agencies and that there is no need for federal intervention in every business in America with more than 15 employees.

In the Williams Institute report, it is claimed that a 2009 survey of 646 transgender employees, 11% of whom were public sector employees, 70% of them "had experienced workplace discrimination related to their gender identity." What does this mean? What kind of workplace discrimination? There were 71 public sector transgenders and 70% of these experienced workplace discrimination. So, 49 transgenders were victims of workplace discrimination in public sector jobs. If this is true, then why were they discriminated against and who were these people?

Were they transsexuals, drag queens, she-males or cross-dressers? We don't know. Were they men using women's restrooms? Were they wearing women's underwear or engaging in obscene sex talk at work? Were they sexual predators? Were they called names? In short, these Williams Institute factoids are meaningless. They tell us nothing of value.

In his written testimony, Sears hedged on the completeness of his research report, saying that "we have concluded that these examples represent just a fraction of the actual discrimination." That's a convenient way of avoiding the fact that his research findings are minor and his conclusions are questionable. Any reputable researcher analyzing this information would conclude that his samplings are too small to reach any conclusion about "widespread" discrimination.

Poverty-Stricken Gays & Cross-Dressers?

One of the main goals of the Williams Institute report is to portray LGBT individuals as being denied gainful employment or advancement in the work place—especially in state and local governments. The underlying assertion is that LGBT individuals are being treated like African-Americans in the South before the Civil Rights Movement. As such, they earn less than heterosexuals and are promoted less frequently.

Chapter 11 of the Williams Institute report purports to analyze the "Wage Gap between LGB Public Employees and Their Co-Workers."

The Institute claims to have discovered a significant pay gap for gay men when compared to heterosexual men who have the "same productive characteristics." According to the Institute, "Depending on the study, gay and bisexual men earn 10% to 32% less than similarly qualified heterosexual men. Lesbians generally earn the same or more than heterosexual women, but lesbians earn less than either heterosexual or gay men."

Yet, these statistics don't seem to square with gay or gay-supportive marketing studies that have shown how well educated and affluent LGBT people are:

- The National Gay & Lesbian Chamber of Commerce notes that LGBT individuals were likely to spend $800 more on business and leisure travel during the summer of 2009 than their heterosexual counterparts.
- The National Gay & Lesbian Chamber of Commerce claims there are 1.2 million LGBT business owners in the U.S.
- Market researchers state that the LGBT consumers have "deep pockets" and their buying power "is growing."
    - In 2006, lesbian and gay travelers took a projected total of 53.2 million leisure trips, spending an estimated $40 billion. Another GLBT travel study says that the GLBT population is 5% and its estimated travel market is $65 billion annually.
    - Gays & lesbians are spending between $40-$65 billion year on travel. (harrisinteractive.com, 2007 & ASTAnetwork, Summer 2007)
    - Gay Wired Media claims that gay adults are 6-7% of the population with total buying power of $723 billion.
- 14% of gay and lesbian adults are planning overseas travel compared to only 7% of heterosexual adults (harrisinteractive.com, 2007)
- Annual household income for gays and lesbians for 2007-2008 is $80,000. (communitymarketinginc.com)

Gay Incomes Don't Justify ENDA

Compare the household income of gays and lesbians of $80,000 a year to the median income of blacks, Asians and Hispanics. U.S. Census statistics for 2008 (published on September 11, 2009) show that the median income for blacks was $34,218; for Hispanics it was $37,913; for Asians it was $65,637. Median income for non-Hispanic white households was $55,530.

The Williams Institute would have us believe that LGBT men and women are homeless, living in refrigerator boxes and eating out of dumpsters at the back of restaurants in our inner cities.

ENDA Will Encourage Lawsuits

States, universities and local communities that have already passed "sexual orientation" laws are already beginning to feel the severe economic impact of these laws.

• In July 2007, Fresno State University was fined $5.8 million by a jury for its alleged discrimination against a lesbian volleyball coach, Lindy Vivas. She claimed she was the victim of sexual orientation discrimination because she was a feminist activist and lesbian.

• In April 2007, a homosexual couple filed a lawsuit against the Rochester Athletic Club for refusing to grant them a family membership. The couple claimed that the club was violating the state's Minnesota Human Rights Act and "sexual orientation" discrimination law.

• In July 2007, a jury in Los Angeles awarded a lesbian firefighter $6.2 million in a sexual orientation/harassment case. Lesbian Brenda Lee claimed she was harassed because she's a black lesbian.

• In April 2006, a homosexual group, Colorado Legal Initiatives Project filed a lawsuit on behalf of homosexual Richard James Miller against his company, AIMCO. The lawsuit claimed he was the victim of sexual orientation discrimination. Denver has a sexual orientation policy.

• The decision of the EEOC is not reviewable by a court and does not have to be based on any written, reasoned decision.

These are just a few of the cases that have been fueled by "sexual orientation" ordinances passed by states and cities.

Once ENDA is passed, it will unleash a veritable flood of such cases in businesses, colleges, non-profit organizations and churches. The cost of litigation will potentially destroy many businesses—especially smaller businesses—without the resources to fight against well-funded homosexual legal groups.

Here are important points to consider about ENDA's impact on businesses:

• The cost of defending—and winning one discrimination case can be enough to break a small company. Most small companies do not have insurance that covers discrimination claims.

• The Law of Unintended Consequences dictates that even laws intentionally limited in scope become expanded by the courts, with consequences never intended by Congress.

• ENDA is not a simple inclusion of sexual orientation into federal discrimination law.

• ENDA is broader than any federal discrimination law ever passed, both in its definition of discrimination and its protection of different categories of persons.

• Employers will have difficulty defending themselves against ENDA claims because the protected class is not based on a known characteristic, may be based on a behavior one can opt into and out of, and is subject to interpretation.

• Employers will be caught in the crossfire between homosexual activist staffers and employees with deeply held religious, moral, or traditional beliefs against homosexual behavior.

• Employers will have great difficulty in enforcing existing anti-harassment rules once homosexuality becomes a protected category.

• Employers will be unable to identify and prevent hostile work environments due to sexual orientation, without invading the privacy of employees.

Equal Employment Opportunity Commission Will Be Involved

During the September 23rd hearing, Stuart Ishimaru testified in support of ENDA. Ishimaru is acting head of the Equal Employment Opportunity Commission (EEOC), a federal bureaucracy that enforces anti-discrimination workplace policies against employers.

If confirmed, Ishimaru may soon be joined on the EEOC by lesbian activist lawyer and college professor Chai Feldblum, who wrote the ENDA legislation. Feldblum will ruthlessly enforce ENDA against businesses and religious entities if she is confirmed for this key post.

Ishimaru began his written statement at the ENDA hearing this way:

Mr. Chairman and members of the House Education and Labor Committee, thank you for the opportunity to appear before you at this important hearing. It is a privilege to represent the Obama Administration and the EEOC at the first hearing this Congress to consider ENDA, to voice the Administration's strong support for legislation that prohibits discrimination on the basis of sexual orientation and gender identity. This legislation will provide sorely needed and long overdue federal protection for lesbian, gay, bisexual, and transgender (LGBT) individuals, who unfortunately still face widespread employment discrimination.

During the Q&A session of the hearing, Ishimaru made it clear that he looked forward to crafting government regulations that would enforce ENDA!

In short, it would be the pro-gay, pro-transgender EEOC that would serve as the enforcer for any lawsuits arising from ENDA. The biased EEOC is set up to be judge, jury and enforcer.

ENDA Is Based on a Faulty Premise

One underlying assumption of ENDA is that the 'sexual orientation' considered in this bill is 'fixed,' 'normal,' and 'healthy' in the context of American life and human action. It isn't. ENDA, however, attempts to impose a federal gag order on the crucial question about whether or not homosexual activity is voluntary and whether or not homosexuality has scandalous social consequences.

ENDA is based upon the faulty premise that homosexuality is normal and that individuals are "born gay." And, now they're saying that individuals are born bisexual or trapped in the body of the wrong sex. This "born gay" premise has recently been exposed to be a fraud by none other than homosexual researchers themselves who have admitted there is no scientific proof that a homosexual "gene" or "brain" exist.

Psychologists with the National Association for Research and Therapy of Homosexuality (NARTH) have recently published "The Innate-Immutable Argument Finds No Basis in Science," which quotes homosexual researchers and philosophers on the "born gay" theory.

In this article, NARTH quotes homosexual researcher Dean Hamer, "There is not a single master gene that makes people gay. * * * I don't think we will ever be able to predict who will be gay." Homosexual researcher Simon LeVay who studied hypothalmic differences between heterosexual and homosexual brains noted: "I didn't show that gay men are born that way, the most common mistake people make in interpreting my work. Nor did I locate a gay center in the brain."

NARTH also quotes lesbian activist and philosopher Camile Paglia who had the most blunt words about homosexuality: "Homosexuality is not 'normal.' On the contrary, it is a challenge to the norm * * * Nature exists whether academics like it or not. And in nature, procreation is the single relentless rule. That is the norm. Our sexual bodies were designed for reproduction * * * No one is born gay. The idea is ridiculous. * * * homosexuality is an adaptation, not an inborn trait."

Homosexuality is a behavior and a lifestyle choice. It is not genetically-based nor is it a healthy way to live. AIDS and sexually-transmitted diseases running rampant among this population are clear evidence that this lifestyle choice is not one to be protected nor encouraged by our culture. The federal government has no right to force America's businesses, public schools , and non-profits to support a poor, unsafe lifestyle choice.

Individuals who consider themselves "transgendered" have a mental condition known as Gender Identity Disorder (GID), also called Gender Dysphoria. These individuals are in need of psychiatric, psychological or spiritual counseling so they will stop rejecting their birth sex. A mental condition cannot be effectively treated by surgery nor should it be.

To put a "gender identity" protection into federal law is to affirm that these individuals are normal and must be protected and accommodated by businesses and non-profit organizations. A serious mental condition must not be accorded specially-protected minority status under the law—nor should American businesses be forced to bend to the wishes of individuals with a treatable mental condition.

TVC's report, "A Gender Identity Disorder Goes Mainstream" describes the radical transgender agenda and its goal of overturning all concepts of male and female in our culture. Dr. Paul McHugh's essay, "Surgical Sex" describes the failure of surgery to deal with what is a mental problem.

Conclusion

If ENDA is signed into law, the homosexual/transgender movement will have won a major victory. They will have accomplished a long-term goal of having "sexual ori-

entation" and "gender identity" given federally-protected minority status under the law.

Once this happens, efforts to oppose the LGBT will be considered a violation of federal law.

More serious consequences will ensue. Christians and other religious faiths will be forced to violate their Constitutionally-protected and firmly-held religious beliefs to bend to the will of homosexual and transgender activists. Freedom of religion will be suppressed by ruthless homosexual/transgender activists.

Every public school in America will be a target if ENDA is passed. The LGBT agenda will be implemented as early as in Head Start, pre-school and Kindergarten.

Freedom of speech will be targeted as well. Once homosexuals and gender confused individuals have minority status under federal law, criticism of their behaviors will be considered discriminatory and will be punished. The efforts to pass "hate crime" legislation will increase. So-called "Hate speech" will be considered outside the protection of the First Amendment. Lesbian, bisexual, gay, transgenders are arguing that "hate speech," (anything critical of LGBT) provokes "hate crimes" and thus can be banned.

What homosexuals are actually targeting is "truth speech" from those who understand the dangers of homosexual sex and the impact that this behavior will have on children and the future of families in America. Transgender activists are, likewise, smearing those who tell the truth about their mental condition as being "transphobic."

Congress, in the words of Dr. Paul McHugh, is collaborating with madness by considering passage of ENDA.

Neither homosexual behaviors nor the mental condition of gender confused individuals should have federally-protected minority status.

ADDITIONAL RESOURCES

If You Hate America You Have a Lawyer—Chai Feldblum
The Agenda: The Homosexual Plan To Change America by Rev. Louis P. Sheldon
A Gender Identity Disorder Goes Mainstream
What Is A Sexual Orientation?
Summary Of "Peeing In Peace"
Intersex Report
Homosexuality 101
TVC Legislative Analysis of HR 2232
TVC Special Report S. 1105
Surgical Sex by Dr. Paul McHugh
The Overhauling Of Straight America

[Whereupon, at 1:12 p.m., the committee was adjourned.]

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