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SENATE

{ REPORT
{ 107-341

EMPLOYMENT NON-DISCRIMINATION ACT OF 2001

NOVEMBER 15, 2002.—Ordered to be printed

Mr. KENNEDY, from the Committee on Health, Education, Labor,
and Pensions, submitted the following

R E P O R T

together with

MINORITY VIEWS

[To accompany S. 1284]

The Committee on Health, Education, Labor, and Pensions, to which was referred the bill (S. 1284) to prohibit employment discrimination on the basis of sexual orientation, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill (as amended) do pass.

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I. INTRODUCTION

On April 24, 2002, the Committee on Health, Education, Labor, and Pensions, by voice vote, favorably reported S. 1284, the Employment Non-Discrimination Act with an amendment in the na-

ture of a substitute and two amendments offered by Senator Collins.

The bill is co-sponsored by Senators Kennedy, Specter, Jeffords, Lieberman, Daschle, Akaka, Baucus, Bayh, Biden, Bingaman, Breaux, Boxer, Cantwell, Carnahan, Carper, Chafee, Cleland, Clinton, Collins, Corzine, Dayton, Dodd, Durbin, Edwards, Feingold, Feinstein, Harkin, Inouye, Kerry, Kohl, Landrieu, Leahy, Levin, Mikulski, Murray, Nelson of Florida, Reed, Reid, Sarbanes, Schumer, Smith of Oregon, Stabenow, Torricelli, Wellstone, and Wyden.

II. SUMMARY OF LEGISLATION

The purpose of the Employment Non-Discrimination Act of 2001 is to prohibit employers, including government employers, employment agencies, labor organizations, and joint labor-management committees, from discriminating in employment or employment opportunities on the basis of sexual orientation. Employment opportunities include hiring, firing, compensation and other terms, conditions, or privileges of employment or union membership.

The Act does not require employers to provide benefits to their employees or their domestic partners, or to collect statistics. It expressly prohibits the Equal Employment Opportunity Commission ("EEOC") from collecting statistics and does not require the collection of statistics by any employer. The Act also prohibits the imposition of affirmative action and the adoption of quotas or granting of preferential treatment to an individual by any employer. Religious organizations including religious corporations, associations, societies, or educational institutions—are exempt from coverage under ENDA. The relationship between the armed services and its uniformed service members is also not subject to the Act.

III. HEARINGS

S. 2238, The Employment Non-Discrimination Act of 1994, was introduced on June 23, 1994. A hearing was held on July 29, 1994.

On July 29, 1994, the following persons presented testimony: The Honorable Claiborne Pell, U.S. Senator from the State of Rhode Island; The Honorable Jeff Bingaman, U.S. Senator from the State of New Mexico; Ms. Cheryl Summerville, Bremen, Georgia; Ernest Dillon, Detroit, Michigan; Mr. Justin Dart, Jr., Chairman, President Bush's Committee on Employment of People with Disabilities; Warren Phillips, former publisher, The Wall Street Journal, and former CEO and Chairman, Dow Jones & Company, Inc; Steven Coulter, Vice-President, Pacific Bell; and Richard Womack, Director of Civil Rights, AFL-CIO; Mr. Joseph E. Broadus, George Mason School of Law; Robert H. Knight, Family Research Council; and Chai Feldblum, Georgetown University Law Center, on behalf of Leadership Conference on Civil Rights.

Written statements were provided by: Mr. Philippe Kahn, President, Chairman, and CEO, Borland, International; Leadership Conference on Civil Rights, Washington, D.C.; Mr. Deval Patrick, Assistant Attorney General, Department of Justice; The Honorable John Chafee, U.S. Senator from the State of Rhode Island; The Honorable Barry Goldwater, U.S. Senator from the State of Arizona; Reverend Edmond Browning, Presiding Bishop, Episcopal Church; Mrs. Coretta Scott King, President, Martin Luther King

Jr., Center for Non-Violent Social Change; Ms. Mary Frances Berry, Chairperson, U.S. Commission on Civil Rights; and Mr. Anthony Carnevale, Chair, National Commission on Employment Policy.

S. 869, The Employment Non-Discrimination Act of 1997 was introduced on June 10, 1997. A hearing was held on the bill on October 23, 1997.

On October 23, 1997, the following persons and organizations presented testimony: Ms. Kendall Hamilton, Oklahoma City, Oklahoma; Mr. David N. Horowitz, Phoenix, Arizona; Raymond W. Smith, Chairman of the Board and CEO, Bell Atlantic Corporation, Arlington, Virginia; Mr. Thomas J. Grote, Chief Operating Officer, Donato's Pizza, Blacklick, Ohio; Mr. Herbert D. Valentine, Executive Presbyter, Baltimore Presbytery, Moderator of the 203rd General Assembly, the Presbyterian Church (USA); National Council of the Churches of Christ in the U.S.A.; Mr. Oliver Thomas, Special Counsel for Civil and Religious Liberties; Ms. Chai Feldblum, Associate Professor of Law, Georgetown University Law Center; American Civil Liberties Union; Ann McBride, President, Common Cause; America Psychological Association; Elizabeth Birch, Executive Director, Human Rights Campaign; PFLAG, Parents, Families, and Friends of Lesbians and Gays.

S. 1284, The Employment Non-Discrimination Act of 2001, was introduced on July 31, 2001. A hearing was held on the bill on February 27, 2002.

On February 27, 2002, the following persons presented testimony: Mr. Charles K. Gifford, President and CEO FleetBoston Financial, Boston, Massachusetts; Lucy Billingsley, Partner, Billingsley Company, Carrollton, Texas; Robert L. Berman, Director of Human Resources and Vice President, Eastman Kodak Company, Rochester, New York; Richard Womack, Director, Department of Civil Rights, AFL-CIO, Washington, D.C.; Lawrence Lane, Long Island, New York; and Matthew Coles, Director, National Lesbian and Gay Rights Project, American Civil Liberties Union, New York, New York.

Written statements were provided by: The American Psychological Association; Kim Wisckol, Vice-President and Director of Human Resources of the Consumer Business Association, Hewlett-Packard Company; Elizabeth Birch, Executive Director, Human Rights Campaign; and the Honorable Patty Murray, U.S. Senator from the State of Washington.

A letter was provided from the President of New Balance Athletic Shoe, Inc., James Davis, to Senators Kennedy and Gregg, dated April 18, 2002.

IV. COST ESTIMATE

U.S. CONGRESS,
 CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 13, 2002.

Hon. EDWARD M. KENNEDY,
*Chairman, Committee on Health, Education, Labor, and Pensions,
 U.S. Senate, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for S. 1284, the Employment Non-Discrimination Act of 2002.

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

Sincerely,

BARRY B. ANDERSON
 (For Dan L. Crippen, Director).

Enclosure.

S. 1284—Employment Non-Discrimination Act of 2002

Summary: S. 1284 would prohibit employment discrimination based on sexual orientation. Assuming appropriation of the necessary amounts, CBO estimates that implementing S. 1284 would cost \$22 million over the 2003–2007 period for the Equal Employment Opportunity Commission (EEOC) to handle additional discrimination cases. This estimate assumes adjustments for anticipated inflation. The bill could affect direct spending, so pay-as-you-go procedures would apply, but we estimate that any such effects would be less than \$500,000 annually.

S. 1284 would prohibit state, local, and tribal governments from discriminating against employees and applicants for employment based on sexual orientation, and it would require those governments to post notices regarding such prohibitions. Those requirements would be intergovernmental mandates as defined in the Unfunded Mandates Reform Act (UMRA). However, CBO estimates that the costs of complying with those mandates would not be significant and would not exceed the threshold established in UMRA (\$58 million in 2002, adjusted annually for inflation).

The bill also would impose a number of mandates on private-sector employers, employment agencies, and labor organizations. CBO estimates that the direct cost of those requirements would not exceed the annual threshold specified in UMRA (\$115 million in 2002, adjusted annually for inflation) in any of the first five years the mandates would be effective.

Estimated Cost to the Federal Government: The estimated budgetary impact of S. 1284 is shown in the following table. For this estimate, CBO assumes that the necessary amounts will be appropriated by the start of each fiscal year and that outlays will follow the historical spending pattern of these activities. The costs of this legislation fall within budget function 750 (administration of justice).

| | By Fiscal Year, in Millions of Dollars | | | | | |
|--|--|------|------|------|------|------|
| | 2002 | 2003 | 2004 | 2005 | 2006 | 2007 |
| SPENDING SUBJECT TO APPROPRIATION ^a | | | | | | |
| EEOC Spending Under Current Law: | | | | | | |
| Estimated authorization Level ^b | 311 | 325 | 336 | 348 | 360 | 373 |
| Estimated Outlays | 310 | 324 | 335 | 347 | 359 | 372 |
| Proposed Changes: | | | | | | |
| Estimated Authorization Level ^b | 0 | 4 | 5 | 5 | 5 | 5 |
| Estimated Outlays | 0 | 3 | 4 | 5 | 5 | 5 |
| EEOC Spending Under S. 1284: | | | | | | |
| Estimated Authorization Level ^b | 311 | 329 | 341 | 353 | 365 | 378 |
| Estimated Outlays | 310 | 327 | 339 | 352 | 364 | 377 |

^a In addition to the bill's discretionary cost, S. 1284 could affect direct spending, but CBO estimates that any such effects would be less than \$500,000 annually.

^b The 2002 level is the amount appropriated for that year for the EEOC. The estimated authorization levels for 2003 through 2007 are CBO baseline estimates, assuming adjustments for anticipated inflation.

The EEOC expects that implementing S. 1284 would increase its annual caseload (currently about 80,000 cases) by 5-to-7 percent and would require an additional 60 to 90 staff. CBO estimates that the costs to hire an additional 75 employees would reach \$5 million annually by fiscal year 2004, subject to the appropriation of the necessary amounts. CBO expects that enacting S. 1284 also would increase the workload for a few other agencies, such as the Merit Systems Protection Board, but any increase in costs for the agencies would not be significant because of the small number of additional cases.

The additional cases resulting from S. 1284 also would increase the workload of the Department of Justice's Civil rights Division and the Federal judiciary. However, CBO estimates that increased costs for these agencies would not be significant because of the relatively small number of cases referred to them.

Pay-as-You-Go Considerations: The Balanced Budget and Emerging Deficit Control Act specifies pay-as-you-go procedures for legislation affecting direct spending and receipts. Enacting S. 1284 could increase payments from the Treasury's Judgment Fund for settlements against federal agencies in discrimination cases based on sexual orientation. However, CBO estimates that any increases in direct spending would be less than \$500,000 annually.

Estimated Impact on State, Local, and Tribal Governments: S. 1284 would prohibit state, local, and tribal governments from discriminating against employees and applicants for employment based on sexual orientation, and it would require those governments to post notices regarding such prohibitions. Those requirements would be intergovernmental mandates as defined in UMRA. The costs of the mandates would include the costs of posting notices and modifying employment procedures to avoid discriminatory practices. CBO assumes that the costs of notices would likely be relatively minor and would probably be made in the course of other routine updates. Similarly, changes to employment procedures likely would build on practices such as ongoing training and personnel manual updates. Thus, CBO estimates that compliance costs would not be significant and would not exceed the threshold established in UMRA (\$58 million 2002, adjusted annually for inflation).

By accepting federal financial assistance for any program, states would waive their sovereign immunity under the 11th Amendment and would be subject to suit for discriminatory practices. Because

UMRA excludes conditions of federal assistance from the definition of an intergovernmental mandate, the costs resulting from any potential suits would not be the result of complying with an intergovernmental mandate as defined in UMRA. In any event, the number of such cases likely would be very small, and states would not be subject to any punitive damages.

Estimated Impact on the Private Sector: The bill would impose a number of mandates on private-sector employers, employment agencies, and labor organizations by requiring them not to discriminate against workers on the basis of sexual orientation and by requiring them to post notices of the new law where they would be accessible to workers. The direct cost of complying with the mandates would equal the value of the resources used by employers and other affected entities to become familiar with the new law, the cost of posting notices, and the cost, if any, of modifying their employment procedures to conform with the new rules. CBO estimates that the aggregate amount of this direct cost would not exceed the annual threshold specified in UMRA (\$115 million in 2002, adjusted annually for inflation) in any of the first five years the mandates would be effective.

Estimate Prepared by: Federal Costs, Impact on State, Local, and Tribal Government, Impact on the Private Sector.

Estimate Approved by: Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

V. REGULATORY IMPACT STATEMENT

The act prohibits employers (including government employers), employment agencies, labor organizations, and joint labor-management committees from engaging in intentional discrimination in employment on the basis of sexual orientation. The act's requirements and enforcement mechanisms are similar to those found in Title VII, and accordingly, its impact on individuals and businesses is similar. The direct impact would equal the value of the resources used by employers and others to become familiar with the law, post notices, and, if necessary, modify employment procedures to conform with the requirements of the Act.

VI. APPLICATION OF LAW TO THE LEGISLATIVE BRANCH

Section 102(b)(3) of Public Law 104–1, the Congressional Accountability Act (CAA), requires a description of the application of the bill to the legislative branch. Consistent with the CAA's mandate that civil rights laws be applied to the legislative branch, S. 1284 prohibits employers—including those in the legislative branch—from engaging in intentional discrimination in employment on the basis of sexual orientation.

VII. SECTION-BY-SECTION ANALYSIS

SEC. 1. SHORT TITLE

This section of the bill designates that act as the “Employment Non-Discrimination Act.”

SEC. 2. PURPOSES

The purpose of the act is to provide a comprehensive Federal prohibition on employment discrimination on the basis of sexual orientation, to provide meaningful remedies against such discrimination, and to invoke congressional powers, including those pursuant to the 14th Amendment of the Constitution, as well as the Commerce Clause and the Spending Clause.

SEC. 3. DEFINITIONS

This section provides the definitions of key terms used in the act, most of which come directly from existing Federal civil rights laws, primarily Title VII of the Civil Rights Act of 1964 (“Title VII”). The act defines “sexual orientation” as homosexuality, bisexuality or heterosexuality, whether the orientation is real or perceived.

SEC. 4. DISCRIMINATION PROHIBITED

This section makes clear that the act is intended to address intentional sexual orientation discrimination in employment and does not provide a cause of action for disparate impact claims. Most of the definitions and statutory language are drawn from Title VII.

ENDA prohibits employers, employment agencies, labor organizations, and joint labor-management committees from discriminating in employment or employment opportunities on the basis of sexual orientation. Employment opportunities include hiring, firing, compensation and other terms, conditions, or privileges of employment or union membership. Like a similar provision of the Americans with Disabilities Act and consistent with case law under Title VII, this section prohibits discrimination based on the sexual orientation of someone with whom an employee associates.

Importantly, ENDA does not require employers to justify neutral practices that may result in a disparate impact against people of a particular sexual orientation. As a result, the disparate impact claim available under Title VII is not available under this act.

SEC. 5. RETALIATION PROHIBITED

This section prohibits retaliation against individuals because they oppose any practice prohibited by the act, or participate in an investigation or other proceeding authorized by the act. This section is modeled directly on Title VII’s retaliation prohibition, and retaliation claims under the act should be treated like similar claims under Title VII.

SEC. 6. BENEFITS

This section makes it clear that the act does not require employers to provide benefits to their employees’ domestic partners.

SEC. 7. COLLECTION OF STATISTICS PROHIBITED

This section of the act expressly prohibits the EEOC from collecting statistics on sexual orientation and from requiring employers to collect such statistics. The collection of statistics would require employers to engage in invasive administrative procedures not intended by the Act.

SEC. 8. QUOTAS AND PREFERENTIAL TREATMENT PROHIBITED

This section sets forth the act's prohibition on quotas and preferential treatment based on sexual orientation. The act also prohibits orders or consent decrees that include quotas or preferential treatment based on sexual orientation.

SEC. 9. RELIGIOUS EXEMPTION

This section exempts religious organizations from the scope of the act. Religious organizations include religious corporations, associations, or societies, and educational institutions substantially owned, managed, controlled or supported by religious organizations or whose curriculum is directed to the propagation of a religion.

SEC. 10. NONAPPLICATION TO MEMBERS OF THE ARMED FORCES;
VETERANS' PREFERENCES

This section makes clear the act's inapplicability to the relationship between the United States government and uniformed members of the Armed Forces. The act does not affect current law on gay men, lesbians, and bisexuals in the military. Like Title VII, Section 10 further provides that the act does not repeal or modify any other law that gives special preferences to veterans.

SEC. 11. CONSTRUCTION

This section clarifies that the act does not affect an employer's authority to regulate employee conduct to the same extent currently allowed under law. The act only requires that employer rules and policies be sexual orientation-neutral in design and implementation.

This section also clarifies that nothing in the Act shall be construed to infringe upon the First Amendment associational rights conferred on nonprofit, voluntary membership organizations by the Constitution.

SEC. 12. ENFORCEMENT

This section authorizes the same enforcement powers, procedures and remedies that currently exist in Federal employment law, with the exception of the explicit prohibition of affirmative action on the basis of sexual orientation contained in subsection (d). All individual relief that is available under Title VII is available under ENDA, except there is no cause of action for a disparate impact claim.

SEC. 13. STATE AND FEDERAL IMMUNITY

This section would waive the States' Eleventh Amendment immunity from suit for sexual orientation discrimination against employees or applicants within any State program or activity that receives Federal financial assistance. This section also provides that if the Federal Government or the States violate this act, they are subject to the same action and remedies as other employers, except that punitive damages are not available.

SEC. 14. ATTORNEY'S FEES

This section is identical to the attorney's fees provisions in Title VII. Accordingly, a successful party, other than the EEOC or the United States, is entitled to attorneys' fees and litigation expenses.

SEC. 15. POSTING NOTICES

This section sets forth a covered entity's duty to post notices describing the requirements of the law.

SEC. 16. REGULATIONS

This section authorizes, but does not require, the issuance of regulations to enforce the act.

SEC. 17. RELATIONSHIP TO OTHER LAWS

This section preserves provisions in other Federal, State, or local laws that currently provide protection from discrimination.

SEC. 18. SEVERABILITY

This section ensures that if one or more provisions of the act are held invalid by a court, the balance of the act remains in effect.

SEC. 19. EFFECTIVE DATE

This section provides that ENDA shall take effect sixty days after its enactment and does not apply retroactively.

VIII. SUMMARY OF COMMITTEE ACTION

The committee met to consider S. 1284 on April 24, 2002. The committee, by voice vote, adopted an amendment in the nature of a substitute proposed by Senator Kennedy and Senator Jeffords. The Kennedy-Jeffords amendment clarified that only disparate treatment claims may be brought under the act.

The committee, by voice vote, also adopted two amendments offered by Senator Collins. The first amendment replaced the "Retaliation and Coercion Prohibited" section with a "Retaliation Prohibited" section which tracks the anti-retaliation language used in Title VII. The second amendment replaced the "NonPrivate Conduct" subsection with an "Employer Rules and Policies" subsection which makes it clear that employers may adopt rules and policies that are designed for and uniformly applied to all individuals regardless of sexual orientation.

By voice vote, the committee voted to report S. 1284, as amended, favorably to the full Senate.

IX. NEED FOR THE LEGISLATION

A. HISTORICAL OVERVIEW OF SEXUAL ORIENTATION DISCRIMINATION IN EMPLOYMENT

The problem of sexual orientation discrimination in the workplace is wide-spread and well-documented.¹ The history of sexual

¹ See generally Russell J. Davis, *Refusal to Hire, or Dismissal From Employment, On Account of Plaintiff's Sexual Lifestyle or Sexual Preference as a Violation of Federal Constitution or Federal Civil Rights Statutes*, 42 A.L.R. Fed. 189 (2002); Robin Cheryl Miller, *Federal and State*

orientation discrimination in American employment represents the sum of half a century's worth of severe anti-gay bias in State-sanctioned, as well as private employment contexts. In the 1940's and 50's, evidence began to emerge of a pattern of anti-gay discrimination in both public and private employment contexts. Such discrimination was a matter of policy in many areas of federal employment, and in many police forces, fire departments, schools, and public agencies of our country. Laws prevented gay and lesbian people from obtaining security clearances for federal employment—a State of affairs that lasted until an Executive Order prohibited sexual orientation discrimination in the security clearance process in 1995—and many law enforcement agencies and schools, in particular, made homosexuality a disqualifier for employment. Even where no government policies mandated sexual orientation discrimination, unchecked private anti-gay biases cost thousands of dedicated and talented lesbian, gay, and bisexual American workers their careers in the latter half of the twentieth century.

Throughout the 1960's and 70's, discrimination based on sexual orientation in employment, as well as other facets of American life, gained visibility through events such as the Stonewall uprising of 1969, and the ensuing political discourse on the civil rights of gay and lesbian Americans. Americans began to see the inequalities faced by gay and lesbian Americans in the employment context and elsewhere, and the need for comprehensive civil rights legislation guaranteeing equality without regard to sexual orientation became apparent. As Congress battled to address discrimination based on race, sex, religion and national origin at the height of the modern civil rights movement, many Americans began to develop a growing awareness of an injustice left unaddressed by the passage of the Civil Rights Act of 1964—that of sexual orientation discrimination. By the end of the 1960's, a nascent movement developed to address this injustice under Federal law.

In 1975, Congresswoman Bella Abzug introduced the first legislation to address sexual orientation discrimination in America. However, in the 27 years since that bill was introduced, Congress has left this pressing civil rights issue unaddressed. Severe discrimination continued through the 1970's, 80's, 90's and into the twenty-first century, with private anti-gay biases fortified by the lack of a Federal pronouncement on sexual orientation discrimination with courts rendered virtually powerless to remedy the injustice for want of a Federal cause of action.

Ample evidence has been presented to this Committee to show that intentional employment discrimination on the basis of sexual orientation causes harm to individual employees. It puts them at an economic disadvantage by threatening job security and by fostering an oppressive work environment in which gay, lesbian, and bisexual employees fear that their sexual orientation may be revealed to the detriment of their careers. As long as tens of thou-

Constitutional Provisions As Prohibiting Discrimination in Employment on the Basis of Gay, Lesbian or Bisexual Orientation or Conduct, 96 A.L.R. 5th 391 (2002); The Human Rights Campaign, *Documenting Discrimination* (2001); William D. Rubenstein, *Do Gay Rights Matter?: An Empirical Assessment*, 75 S. Cal. L. Rev. 65 (2001); John D'Emelio, *Sexual Politics, and Sexual Communities: The Making of a Homosexual Minority in the United States* (1998); Lisa Keen and Suzanne Goldberg, *Strangers to the Law: Gay People on Trial* (1998); David K. Johnson, *Homosexual Citizens: Washington's Gay Community Confronts the Civil Service*, *Washington History*, Fall/Winter 1994–95; Patricia A. Cain, *Litigating for Lesbian and Gay Rights: A Legal History*, 79 Val L. Rev. 1551 (1993).

sands of people go to work each day with fear in their hearts—fear not only for themselves and their individual welfare, but also for their continued ability to provide for the families they love—our nation is failing to live up to its promise of basic fairness and dignity for all.

States, municipalities, and private companies have recognized this problem and have begun to institute policies to address sexual orientation discrimination in the workplace. But due to the limited number of jurisdictions in which they are applicable and the lack of uniformity from State to State, these developments, while laudable, do not provide a comprehensive solution to the problem of sexual orientation discrimination in employment.

Accordingly, courts have chastised Congress for failing to provide a statutory cause of action to accommodate the many cases of sexual orientation discrimination they are forced to dismiss—despite compelling facts—for want of a Federal law under which these claims may be brought. *See, e.g. Bibby v. Philadelphia Coca-Cola Bottling Co.*, 2001 U.S. App. LEXIS 17075 (3rd Cir. 2001), in which the Third Circuit Court of Appeals laments, (Harassment on the basis of sexual orientation has no place in our society. Congress has not yet seen fit, however to provide protection against such harassment. (*See also Higgins v. New Balance Athletic Shoe, Inc.*, 21 F. Supp. 2d 66 (D. Me. 1998), which called upon Congress for a remedial response to workplace discrimination against gay men and lesbians. Congressional action to prohibit discrimination based on sexual orientation is long overdue by any standard and should be a priority of the 107th Congress.

The consequence of Congress' failure to take a stance on anti-gay discrimination in the workplace is a tacit endorsement by the Federal Government of anti-gay bias. By failing to provide recourse for sexual orientation discrimination in employment—the very essence of economic security—Congress has effectively given its nod of approval to a regime of second class citizenship for gay, lesbian, and bisexual Americans.

B. THE PROBLEM CONTINUES TODAY

Employment discrimination based on sexual orientation continues in America's workplaces today, and thousands of people experience harassment and adverse employment action based on their sexual orientation.

The problem of sexual orientation discrimination in the workplace is wide-spread and well-documented. Gay, lesbian, bisexual and heterosexual Americans can be fired from their jobs, refused work, paid less and otherwise subjected to employment discrimination because of their sexual orientation with no recourse under Federal law. Sexual orientation discrimination occurs in major corporations, small businesses, public agencies, schools, fire departments, retail stores and warehouses. It affects executives with six-figure salaries and people who wait tables and work at minimum wage. Discrimination based on sexual orientation affects individuals of all income and skill levels, ages, races, and religions.

The lack of basic protections leaves millions of hardworking, tax-paying people vulnerable to unfair treatment. The following are just a few examples of the discrimination faced by lesbian and gay

people, and heterosexual people perceived to be gay, in every region of the country.

- Cheryl Summerville began working as a cook for a Cracker Barrel Country Store in Douglasville, Georgia in 1987. She was well-liked at work and had recently purchased a home where she lived with her partner and her son. In February 1991, the company adopted an official policy to fire any employee who “failed to demonstrate normal heterosexual values.” Summerville’s supervisor, who knew that she was a lesbian, initially told her the firm’s new policy apply to her because she did not interact with customers in her job. The regional manager, however, strictly enforced the policy. Summerville asked to be treated like the other gay employees and was fired February 16, 1991. Her official separation notice read: “This employee is being terminated due to violation of company policy. The employee is gay.” After drawing negative publicity and picketing by civil rights groups, the restaurant chain rescinded its official anti-gay policy, but has not rehired the many employees fired on that basis.

- “T.B.” began working as a sales representative for a large home furnishings company in 1993. After compiling a stellar sales record in North and South Carolina during his first nine months of work, T.B. received a raise and was transferred to Washington, D.C., to revitalize the depressed sales market in this area. Despite his outstanding performance, T.B. was “outed” by a co-worker and subjected to demeaning threats and anti-gay slurs. He was eventually fired, as was a sympathetic colleague believed to be helping T.B. with his case.

- In 1993, Nan Miguel, the heterosexual manager of a hospital radiology department in Washington, interviewed a well-qualified candidate for a technician position in her department. After the interview, one of the hospital technologists commented that the candidate was obviously gay. Subsequently, the medical director approached Miguel and suggested that she not hire the young woman because she was gay. Despite this advice, Miguel hired the young woman, but the medical director was rude to the new employee and made anti-gay remarks about her. Miguel stood up for her employee and refused to fire her. For this, both Miguel and the technician were fired.

- Dwayne Simonton worked for the U.S. Postal Service from 1984 to 1995. In 1987, when co-workers discovered he was gay, Simonton became the target of ridicule and harassment. Co-workers and supervisors threatened him, yelled obscenities at him and placed notes on the bathroom walls with his name and the names of celebrities who had died of AIDS. He was subjected to fiercely abusive language and anti-gay epithets, was physically assaulted twice, and was so upset by the persistent torment that he eventually suffered a heart attack. His suit for sexual orientation discrimination was dismissed by a Federal judge because Title VII does not provide a cause of action for sexual orientation discrimination. *Simonton v. Runyon*, 232 F.3d 33 (2nd Cir. 2000).

Despite efforts at the State, local and corporate level to address employment discrimination based on sexual orientation, the absence of a Federal law allows discrimination to go unchecked in workplaces around the country. The stories above are not isolated

incidents but are typical of the experiences of gay and lesbian, as well as heterosexual Americans in many workplaces today.

C. EXISTING LAWS ARE NOT COMPREHENSIVE

Only 12 States and the District of Columbia currently prohibit employment discrimination based on sexual orientation. By passing the Employment Non-Discrimination Act, Congress will provide a comprehensive response to discrimination previously unaddressed by the Federal Government. As with the Civil Rights Act of 1964, the act will extend protection to those who live in States and localities that provide no protection against employment discrimination based on sexual orientation.

Congress has acted to pass Federal laws when some or all of the states have also prohibited similar discrimination. For example, several States had some form of civil rights law prohibiting racial discrimination in 1964. Yet, Congress recognized the need for Federal protection because of the large number of States that offered no protection against racial discrimination. Similarly, Congress passed the Americans with Disabilities Act although several States provided some protection to individuals with disabilities prior to 1990. Regardless of State action, civil rights have traditionally been considered a matter of national interest. As Congress understood over 100 years ago, when it passed the first civil rights laws against discrimination, uniform standards are needed to reinforce our national commitment to equality.

In addition, Federal Courts of Appeal have been unanimous in concluding that discrimination based solely upon sexual orientation is not actionable under Title VII's sex discrimination prohibition. For more than two decades plaintiffs have attempted to bring sexual orientation claims under Title VII's sex discrimination provision, but such a claim has never succeeded at the Federal appeals court level. Unless sexual orientation discrimination takes the form of sex-stereotyping or same-sex harassment, such discrimination is not recognized as actionable under Title VII as currently interpreted by the courts. Federal district and appellate courts are clear on this point and indicate the degree to which courts' hands are tied when it comes to remedying workplace discrimination based on sexual orientation under Title VII.

The first sexual orientation employment discrimination cases raised under Title VII emerged in the 1970's. As early as 1979, the Fifth Circuit Court of Appeals ruled that "discharge for homosexuality is not prohibited by Title VII." *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Circuit 1979). The same year, the Ninth Circuit Court of Appeals came to a similar conclusion, stating that "Title VII's prohibition of 'sex' discrimination applies only to discrimination on the basis of gender and should not be judicially extended to include sexual preference such as homosexuality." *DeSantis v. Pacific Telephone and Telegraph Co., Inc.*, 608 F.2d 327, 329-30 (9th Circuit 1979). Ten years later, in 1989, the Eighth Circuit Court of Appeals clearly stated its opinion that "Title VII does not prohibit discrimination against homosexuals." *Williamson v. A.G. Edwards and Sons, Inc.*, 876 F.2d 69, 70 (8th Circuit 1989).

In considering a sexual orientation discrimination suit brought under Title VII, the Eleventh Circuit Court of Appeals found as follows. "Finally, we address concerns raised by the appellee regard-

ing the implication of this case for the law regarding discrimination based on sexual orientation. BVP argues that to hold in favor of the appellant is, in effect, to protect against discrimination on the basis of sexual orientation. The short but complete answer to this argument is to make clear the narrowness of our holding today. We do not hold that discrimination based on sexual orientation is actionable . . . We note that the EEOC has also drawn a distinction between [what is] actionable as gender discrimination, and discrimination because of sexual orientation.” *Fredette v. BVP Management Associates*, 112 F.3d 1503, 1510 (11th Cir. 1997), citing EEOC Compliance Manual (CCH) § 615.2(b)(3) (1987).

The last decade has witnessed a continuation of the Federal appeals courts’ refusal to recognize sexual orientation discrimination claims under Title VII. In reference to demeaning anti-gay graffiti and comments directed at a gay employee by his co-workers, the Sixth Circuit Court of Appeals in 1992 ruled that “these actions, although cruel, are not made illegal by Title VII.” *Dillon v. Frank*, 1992 U.S. App. LEXIS 766 (6th Circuit 1992). The Fourth Circuit Court of Appeals came to the same conclusion in a 1996 case, in which it denied a sexual orientation discrimination claim under Title VII, clearly stating, “Title VII does not prohibit conduct based on the employee’s sexual orientation, whether homosexual, bisexual, or heterosexual.” *Hopkins v. Baltimore Gas and Electric Co.*, 77 F.3d 745, 751–2 (4th Circuit 1996).

The First Circuit Court of Appeals regrettably denied a sexual orientation discrimination claim brought under Title VII in 1999, nonetheless finding such discrimination to be highly troubling and deserving of a legislative response. *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Circuit 1999).

In 2001, the Third Circuit ruled, “Harassment on the basis of sexual orientation has no place in our society. Congress has not yet seen fit, however, to provide protection against such harassment. Because the evidence produced by Bibby—and, indeed, his very claim—indicates only that he was being harassed on the basis of his sexual orientation, rather than because of his sex, the District Court properly determined that there was no cause of action under Title VII [of the Civil Rights Act of 1964].” *Bibby v. Philadelphia Coca-Cola Bottling Co.*, 2001 U.S. App. LEXIS 17075 (3rd Cir. 2001).

The Second Circuit Court of Appeals in 2000 similarly found that “Title VII does not prohibit harassment or discrimination because of sexual orientation,” in another case in which a sexual orientation claim was denied under Title VII. In this case, the court found the vulgar and degrading behavior of the plaintiff’s co-workers “morally reprehensible,” but was constrained by what it perceived to be the clear legislative intent of Title VII to address sex discrimination, versus sexual orientation discrimination. *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Circuit 2000). The same year, the Seventh Circuit Court of Appeals denied a sexual orientation discrimination claim under Title VII, finding that “sexual orientation is not a classification that is protected under Title VII.” *Hamner v. St. Vincent Hospital and Health Care Center, Inc.*, 224 F.3d 701, 707 (7th Circuit 2000).

An excerpt from the Ninth Circuit Court of Appeals’ most recent opinion on whether sexual orientation discrimination is actionable

under Title VII indicates the lack of movement on this issue in the last twenty years.

. . . Title VII protects against discrimination only on the basis of race, color, religion, sex, or national origin . . . Discrimination based on a victim's other characteristics, no matter how unfortunate and distasteful that discrimination may be, simply does not fall within the purview of Title VII. This court recognized that fact more than twenty years ago in *DeSantis v. Pacific Telephone and Telegraph Company*, when we held that discrimination on the basis of sexual orientation does not subject an employer to liability under Title VII. While societal attitudes towards homosexuality have undergone some changes since *DeSantis* was decided, Title VII has not been amended to prohibit discrimination on the basis of sexual orientation; *DeSantis* remains good law and has been followed in other circuits. . . .

The degrading and humiliating treatment [the plaintiff] contends that he received from his fellow workers is appalling, and is conduct that is most disturbing to this court. However, this type of discrimination, based on sexual orientation, does not fall within the prohibitions of Title VII.

Rene v. MGM Grand Hotel, 2001 U.S. App. LEXIS 5201 (9th Cir. 2001).

Given the courts' clear indication that Title VII as currently construed does not provide a cause of action for employment discrimination based on sexual orientation, the Employment Non-Discrimination Act is absolutely necessary to provide a clear statement on Congressional intent to prohibit workplace discrimination based on sexual orientation.

D. CONGRESS MUST PASS ENDA

Congress must pass the Employment Non-Discrimination Act to fill a gaping hole in the fabric of Federal civil rights legislation. Title VII prohibits discrimination based on race, color, religion, sex and national origin—but not sexual orientation. This leaves gay, lesbian, and bisexual Americans—as well as heterosexual Americans—reliant on a patchwork of legal protections inadequate to address the problem of sexual orientation discrimination in employment in a uniform, predictable, fair and reliable manner.

Twelve States and the District of Columbia have laws prohibiting sexual orientation discrimination, and an estimated 225 municipalities have ordinances or policies barring sexual orientation discrimination in private employment. At least 68 Senators and 268 Representatives have non-discrimination policies encompassing sexual orientation for their staffs. Federal civilian employees are governed by an executive order prohibiting discrimination based on sexual orientation, and over 2000 companies, colleges, universities, State and local governments and Federal agencies have non-discrimination policies encompassing sexual orientation for their employees. Twenty-three States, the District of Columbia, and roughly 225 municipalities prohibit sexual orientation discrimination for their public employees. The private and public sectors clearly rec-

ognize the importance of guaranteeing fair treatment to employees without regard to sexual orientation. Yet Congress has still not acted to provide a Federal solution to this pressing national problem.

For Americans working outside any of these jurisdictions—that is—for the vast majority of Americans, there is no explicit legal recourse for discrimination based on sexual orientation in employment. Notwithstanding the significant progress outlined above, in most of America, it is perfectly legal to fire or refuse to hire someone purely because he or she is—or is perceived to be—gay or lesbian. The fact that in the year 2002 our Federal law still tolerates this kind of unfair treatment in the workplaces of America is unacceptable.

Prohibiting sexual orientation discrimination in American workplaces does not create special rights for gay and lesbian Americans. ENDA would not give any greater rights to gay and lesbian Americans than Irish-Americans, Baptists, senior citizens, Americans with disabilities or women enjoy under existing federal law. ENDA merely prohibits the consideration of sexual orientation in employment decisions such as hiring and firing to the same extent consideration of race, gender, religion, and national origin is prohibited under current Federal law. ENDA is a rational response to the inequities created by sexual orientation discrimination in American workplaces and guarantees nothing more than equality.

There exists broad support for including sexual orientation among the classifications upon which employers may not discriminate. According to a 2001 Harris Interactive/Witeck Combs Communications survey, 42 percent of Americans believe that a Federal law already exists to prohibit sexual orientation discrimination. The fact that these Americans are mistaken makes clear that Congress is well behind the times by the gauge of the American people with respect to the issue of employment discrimination based on sexual orientation.

Americans have always believed that people who do their jobs, pay their taxes, and contribute to their communities should not be singled out for unfair discrimination. Federal law should ensure that this basic fairness applies to all Americans without regard to sexual orientation, and the Employment Non-Discrimination Act would accomplish that goal in the workplace.

E. ENDA HAS BROAD PUBLIC SUPPORT

Overwhelming majorities have indicated that they believe gays and lesbians should have equal rights in terms of job opportunities. In fact, to ensure equal opportunities exist in the workplace regardless of sexual orientation, a majority of Americans support ENDA. In June of 2001, a Gallup Poll asked respondents, “In general, do you think homosexuals should or should not have equal rights in terms of opportunities?” Up from 56 percent in 1977, 85 percent of respondents favored equal opportunity in employment for gays and lesbians. Only 11 percent thought gays and lesbians should be discriminated against based on sexual orientation in the workplace.

In June 2001, a Harris Poll found that 61 percent of Americans favored a Federal law prohibiting job discrimination based on sexual orientation. Additionally, the survey found that 42 percent of adults surveyed incorrectly believe that such a law currently exists.

In addition to the broad support this legislation enjoys in Congress and among the American public, corporate America supports ENDA and the legislation's principles. In fact, the closer a corporation is to the top of the Fortune 500 list, the more likely the company is to have a non-discrimination policy that includes sexual orientation. Many of our nation's most successful corporations have specifically endorsed ENDA, including:

AT&T, New York, NY; Bausch & Lomb, Rochester, NY; Ben & Jerry's Homemade Ice Cream, South Burlington, VT; Borland International, Scotts Valley, CA; BP, Chicago, IL; Capital One Financial Corp., Falls Church, VA; Charles Schwab, San Francisco, CA; Coors Brewing Co., Golden, CO; Digi-Net Syndication, Tampa, FL; Eastman Kodak, Rochester, NY; FleetBoston Financial Corp., Boston, MA; Franklin Research, Boston, MA; General Mills, Minneapolis, MN; Hewlett-Packard Co., Palo Alto, CA; Hill and Knowlton, New York, NY; Honeywell, Morristown, NJ; Imation, Oakdale, MN; Louis Dreyfus Corp., Wilton, CT; MFS Investment Management, Boston, MA; Microsoft, Redmond, WA; Millipore Corp., Bedford, MA; Nike, Beaverton, OR; Pacific Telesis, San Francisco, CA; Prudential Insurance Co., Newark, NJ; Quark, Denver, CO; SGI, Mountain View, CA; Shell Oil Co., Houston, TX; Software Spectrum Inc., Garland, TX; State Street Corp., Boston, MA; The Quaker Oats Company, Chicago, IL; Triarc Beverage Group, White Plains, NY; Wainwright Bank, Boston, MA; Xerox, Stamford, CT.

While small businesses with less than 15 employees are exempt from ENDA, many small businesses support this legislation. Among the small businesses which have supported ENDA are:

America's Second Harvest, Chicago, IL; AnsaFone.com/Ephonamation.com, Santa Ana, CA; Aquila Dallas Marketing, Dallas, TX; Atlanta Computer Group, Alpharetta, GA; Billingsley Co., Dallas, TX; Bridge Capital, Irvine, CA; Ceres Capital Partners, Dallas, TX; Corey & Co., Watertown, MA; Crow Design Centers, Dallas, TX; Donato's Pizza, Boston, MA; EduMedia, Round Lake Beach, IL; Emerson Partners Inc., Dallas, TX; Employon, Cleveland, OH; Far West Management, Santa Ana, CA; Greater Boston Food Bank, Boston, MA; Hall Financial Group, Frisco, TX; Homewood Suite Hotels, Lewisville, TX; I Love Flowers, Dallas, TX; James Daniels & Associates, Fort Worth, TX; Linkage Inc., Lexington, MA; LOPEZGARCIA Group, Dallas, TX; MassEnvelopePlus, Sommerville, MA; Memorial Family Medicine Medical Group Inc., Long Beach, CA; Microtek Inc., Chicopee, MA; Morrisey Associates Inc., Chicago, IL; Mozzarella Co., Dallas, TX; Nims Associates Inc., Dallas, TX; Odell & Associates, Dallas, TX; Parma Pediatrics Inc., Parma, OH; Phil's CookShop LLC, Lexington, KY; Rafanelli Events Management Inc., Boston, MA; Replacements Ltd., Greensboro, NC; Resource One, Columbus, OH; Riverview Center for Orthopedic Rehabilitation, Columbus, OH; Saddleback Interiors, Corona Del Mar, CA; Southern Enterprises Inc., Dallas, TX; The Feed Bag Restaurants, Dallas, TX; The Staubach Co., Addison, TX; Triton Funding Group, San Francisco, CA; Voice Publishing Co. Inc., Dallas, TX; Waters Ford Co. Inc., Blackshear, GA; WheelHouse Corp.,

Burlington, MA; Winninghabits.com, Dallas, TX; Witeck-Combs Communications, Washington, DC; Wyndham Jade, Dallas, TX.

Business leaders support the act for numerous reasons. Many believe it fosters a diverse workplace that encourages all workers to fulfill their potential. Many believe its provisions are not burdensome. Business leaders also note that the act is unlikely to lead to excessive litigation. In fact, in a July 9, 2002, report to Senators Kennedy, Jeffords, Lieberman, and Specter, the General Accounting Office wrote, “For those States where the law has taken effect, relatively few formal complaints of employment discrimination on the basis of sexual orientation have been filed, either in absolute numbers or as a percentage of all employment discrimination complaints in the State. Moreover, the state statistics generally do not show any trend in the volume of employment discrimination cases based on sexual orientation over the periods we examined.”

While religious organizations are not currently covered by ENDA, many religious organizations support enactment of this legislation. On April 24, 2002, religious groups in support of the Act wrote the following:

ENDA is a modest measure that would extend employment protections currently provided on the basis of race, gender, and disability to sexual orientation, thereby repairing the injustice that allows gay and lesbian Americans to suffer discrimination in the workplace.

Under current Federal law, it is entirely legal to fire, hire, demote, promote, and make all other employment decisions based solely on sexual orientation, regardless of workplace performance. As people of faith who stand for the equality and dignity for all people, we find this reprehensible.

Biblical tradition teaches us that all human beings are created *b'tselem elohim*—in the Divine image. As it says in Genesis 1:27, “And God created humans in God’s own image, and in the image of God, God created them; male and female God created them.” Regardless of context, discrimination against any person arising from apathy, insensitivity, ignorance, fear, or hatred is inconsistent with this fundamental belief. We oppose discrimination against all individuals, including gays and lesbians, for the stamp of the Divine is present in each and very one of us.²

F. CONSTITUTIONAL AUTHORITY FOR ENDA

Congressional authority to enact ENDA is found in the Commerce Clause and the 14th Amendment. ENDA’s provision authorizing individual suits against State governmental employers is based on Congress’ Article I Spending Power and Congress’ enforcement power under Section Five of the Fourteenth Amendment.

²Letter from Union of American Hebrew Congregations; Central Conference of American Rabbis; Women of Reform Judaism; Unitarian Universalist Association; Presbyterian Church (USA), Washington Office; Evangelical Lutheran Church in America; United Church of Christ, Justice and Witness Ministries; Friends Committee on National Legislation (Quaker); United Methodist Church, General Board of Church and Society, Episcopal Church, USA to United States Senate (Apr. 24, 2002) (discussing passage of ENDA).

1. Commerce Clause Authority for ENDA

The Commerce Clause provides Congress' strongest source of legislative authority to prohibit intentional employment discrimination based on sexual orientation. Congress has a well-established history of enacting civil rights laws based on this authority, including Title VII, the ADEA, and the ADA. The Supreme Court's recent decisions invalidating Federal statutes as an inappropriate use of the Commerce Clause power do not apply to ENDA because the discrimination prohibited—employment discrimination—is very directly related to commerce.

Terms and conditions of employment in industries affecting commerce fall squarely within the purview of Congress' Commerce Clause authority. Discrimination based on sexual orientation is an expensive detriment to American commerce, costing employers lowered productivity and costing employees lost wages. The economic impacts of sexual orientation discrimination in the workplace are serious and broad, and ENDA is an appropriate response to what is as much an economic problem as a civil rights problem.

2. Fourteenth Amendment Authority for ENDA

The Federal Government has long recognized that ensuring civil rights is essential to national citizenship and has sought to enforce and protect those rights under the authority granted to Congress by the Fourteenth Amendment. Section Five of the Fourteenth Amendment gives Congress the power to enforce the substantive provisions of the Fourteenth Amendment, stating, "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Section Five of the Fourteenth Amendment is an affirmative grant of legislative power to Congress. *Katzenbach v. Morgan* 384 U.S. 641 (1966). The Supreme Court has recognized that Congress may legislate, using its authority under Section Five of the Fourteenth Amendment, to deter or remedy Federal constitutional violations even if, in the process, the legislation prohibits conduct which is not itself unconstitutional. *City of Boerne v. Flores*, 521 U.S. 507 (1997). The Supreme Court has also ruled that the scope of Congressional legislative authority under Section Five of the Fourteenth Amendment is broader than the language of the Amendment itself, providing Congress the ability to deter and remedy conduct which is not forbidden by the Fourteenth Amendment itself. *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000).

Sexual orientation discrimination in employment, like discrimination based on race, sex, national origin, religion, age, or disability, is an evil properly addressed by Congress under its Fourteenth Amendment legislative powers. When perpetrated through State action, such discrimination is in many instances unconstitutional, and in the absence of State action, employment discrimination based on sexual orientation still deprives hard-working Americans of the basic fairness to which all American workers aspire: the right to be judged on one's merits, and not upon irrelevant factors such as sexual orientation.

3. Enforceability against States through a private cause of action for damages

ENDA is enforceable against State governments. Congress invokes its authority under the Spending Clause and the Fourteenth Amendment to provide a private cause of action for damages against States to State employees who suffer discrimination based on sexual orientation in the workplace.

a. Spending Clause.—In several recent cases, the Supreme Court has indicated that Congress may use its Spending Clause powers to condition the receipt of Federal funds upon a State’s agreement to forego its Eleventh Amendment immunity to suit under certain Federal regulatory and statutory schemes. See *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *South Dakota v. Dole*, 483 U.S. 203 (1987). As Justice Scalia framed the issue, “Congress has no obligation to use its Spending Clause power to disburse funds to the States; such funds are gifts.” *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627, 686–687 (1999). As such, “Congress may, in the exercise of its spending power, condition its grant of funds to the States upon their taking certain actions that Congress could not require them to take, and that acceptance of the funds entails an agreement to the actions.” *Id.* at 686.

Nonetheless, the Court has recognized five limitations on Congressional power to condition funding upon a State’s agreement to subject itself to private suits for damages. First, conditions placed upon receipt of Federal funds may not be “so coercive as to pass the point at which ‘pressure turns into compulsion.’” *South Dakota v. Dole*, 483 U.S. 203, 211 (1987). Second, the plain language of the Spending Clause indicates that the use of the spending power must be aimed at “the general welfare” of the country, that is, it must have a “general public purpose.” *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *Helvering v. Davis*, 301 U.S. 619, 640–41 (1937). Third, congressional intent to condition States’ receipt of funding on compliance with certain regulations must be “unambiguous” in the language of the statute, such that the State may make an informed choice as to whether to adhere to the conditions upon which the receipt of funds are contingent. See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Fourth, conditions upon the grant of Federal funds must be related to the Federal interest asserted by the “particular national projects or programs,” in other words, the “condition imposed must be reasonably related to the purpose for which the funds are expended.” *South Dakota v. Dole*, 483 U.S. 203, 207, 213 (1987). Finally, the conditional grant of Federal funding must not be barred by any provision of the Constitution. *South Dakota v. Dole*, 483 U.S. 203, 208 (1987); *Lawrence County v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 269–270 (1985).

Consistent with these guidelines for the use of Congress’ spending power, Congress intends to condition the receipt of Federal funding in state programs and activities upon the availability of a private cause of action for damages against the State under ENDA to State employees.

i. The Condition Placed Upon Receipt of Funds is Not Coercive

First, the conditioning of receipt of Federal funds under ENDA upon a State's agreement to be open to private suits for damages by employees under ENDA is not a condition so coercive as to compel States to accept the condition in exchange for Federal funding of programs or activities as defined by 42 U.S.C. 2000d-4a. A State which chooses not to forego immunity to private suits for damages under ENDA becomes ineligible only for Federal funding of those "programs or activities," as that term is defined by 42 U.S.C. §2000d-4a, for which it wishes to retain its Eleventh Amendment immunity. The funds at stake, therefore, are not so substantial as to compel the exchange of Eleventh Amendment immunity for Federal funding. This arrangement represents a non-coercive, reasonable use of Congress' Spending Clause powers.

Further, States will not be unduly burdened by the choice to remain open to such suits, as States' experience with Title VII has shown that the defense of private employment discrimination suits is not overly burdensome, and because sexual orientation-based claims make up a relatively small proportion of employment discrimination claims generally.

States have been subject to private suits under Title VII since shortly after the statute's enactment. The resources required to defend a private suit under ENDA should generally be no different from those required to defend a private cause of action under Title VII.

The number of cases a State may expect to defend would be, in fact, a relatively small proportion of employment discrimination cases generally. According to a 2002 GAO report submitted to Senators Jeffords, Kennedy, Lieberman, and Specter in response to their request for information regarding how much litigation has been created by the advent of sexual orientation-inclusive employment non-discrimination laws in the States, of all the employment discrimination claims made under those State laws "relatively few" pertained to sexual orientation discrimination.³ The GAO examined the experiences of the twelve States with statutory prohibitions on sexual orientation discrimination, and the District of Columbia. Seven of the thirteen jurisdictions have over ten years worth of experience with their statutory prohibitions on sexual orientation law, and sexual orientations claims ranged from .5 percent to 9 percent of yearly employment discrimination claims in those jurisdictions.⁴ Only six of the States reported a proportion of sexual orientation-based cases of 3 percent or higher.⁵ Assuming a similar proportion of Federal employment discrimination cases against States would be sexual orientated-related were ENDA to become law, these figures indicate that the proportion of additional employment discrimination complaints and associated costs States are likely to face upon ENDA's passage is relatively small.

³U.S. General Accounting Office, Sexual Orientation-Based Employment Discrimination: States' Experience with Statutory Prohibitions, GAO-02-878R (Washington, D.C.: July 9, 2002).

⁴U.S. General Accounting Office, Sexual Orientation-Based Employment Discrimination: States' Experience with Statutory Prohibitions, GAO-02-878R (Washington, D.C.: July 9, 2002).

⁵U.S. General Accounting Office, Sexual Orientation-Based Employment Discrimination: States' Experience with Statutory Prohibitions, GAO-02-878R (Washington, D.C.: July 9, 2002).

ii. Prevention of Sexual Orientation Discrimination Advances the General Welfare of the Country

The prevention of discrimination based on sexual orientation by State employers is a legitimate national interest, meaning that the spending at issue in the case of ENDA falls well within the rubric of “the general welfare.” Extensive data support the contention that discrimination based on sexual orientation is a pressing problem in both public and private workplaces. ENDA would provide a reasonable, well-tailored remedial scheme which, like Title VII is made most effective through the inclusion of a private right of action against State employers for violations of Title VII.

iii. The Conditions Imposed on the Receipt of Funding Are Unambiguous

The conditions imposed upon receipt of Federal funds through this statute are unambiguous. Specifically, States accepting Federal funds for qualifying programs or activities shall, as a condition upon the receipt of those funds, forego their immunity to private suit by employees of those qualifying programs or activities for the enforcement of the provision of ENDA.

iv. The Nexus Between the Funding and Condition is Clear

The nexus between the conditions placed upon the receipt of these Federal funds and the purpose of the expenditure of such funds is clear; where the Federal Government contributes funding to State programs or activities, those funds necessarily contribute to the employment conditions of State workers. Because Congress is concerned with the eradication of discrimination based on sexual orientation in the State workplace, and because Congress may therefore refuse to provide funding to State programs or activities which do not comply fully with the provisions of ENDA and agree to subject themselves to the potential for private suit in order to enforce ENDA, the required nexus between conditions and purposes of the expenditure is established. Stated differently, Congress is under no obligation to fund the operations of State programs and activities which are unwilling to comply with, and remain open to the potential for private enforcement of, the Employment Non-Discrimination Act.

v. The Condition Placed on the Receipt of Funding Is Not Unconstitutional

Finally, this conditioning of the receipt of Federal funds upon a State’s agreement to remain open to private suits for damages does not violate any provision of the Constitution.

b. Fourteenth Amendment.—In enacting ENDA, Congress is invoking Section Five of the Fourteenth Amendment as a separate source of constitutional authority for remedying and preventing sexual orientation discrimination in State workplaces. Section 13 of ENDA clearly abrogates States’ Eleventh Amendment immunity to private causes of action for damages. The invocation of the Fourteenth Amendment follows a long-standing practice by Congress of relying on the Fourteenth Amendment when enacting civil rights statutes.

The Supreme Court has held that Congress has the power to abrogate States’ sovereign immunity to private suits when it properly

exercises its enforcement powers under Section Five of the Fourteenth Amendment or under other amendments added to the Constitution after ratification of the Eleventh Amendment. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 121 S. Ct. 955 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1996). For example, it is well-established that Title VII allows for private suits for damages against State governments and the officials of State governments in their official capacities. *Fitzpatrick v. Bitzer*, 427 U.S. 455 (1976). Congress finds that it has similar authority under Section Five of the Fourteenth Amendment to abrogate State immunity for sexual orientation discrimination claims for damages brought by private persons against States.

Congress always has the authority to abrogate State immunity to private suits for damages when the Federal statute remedies and prevents little or no more discriminatory conduct by States than the Constitution itself prohibits. Recent Supreme Court decisions applying the Eleventh Amendment do not contradict this principle. *E.g.*, *Garrett*, 121 S. Ct. at 963 (stating that “Section Five legislation reaching beyond the scope of Section One’s [of the Fourteenth Amendment] actual guarantees must exhibit ‘congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.’”) (emphasis added); *Kimel*, 528 U.S. at 91 (holding that lack of legislative findings “is not determinative of the Section Five inquiry”). The Justice Department has successfully defended numerous Federal statutes against Eleventh Amendment defenses, including the Religious Land Use and Institutionalized Persons Act, the religious accommodation provision of Title VII, and the Equal Pay Act, as prohibiting little or no more discriminatory conduct by States than the Constitution itself prohibits. In the reported decisions, every Federal appellate court that has decided the constitutionality of the Equal Pay Act, and every Federal court that has decided the constitutionality of the Religious Land Use and Institutionalized Persons Act and the religious accommodation provision of Title VII, has found that Congress properly exercised its Fourteenth Amendment authority, regardless of whether Congress had received evidence of a pattern of unconstitutional conduct by States. *E.g.*, *Cherry v. Univ. of Wis. Sys. Bd. of Regents*, 265 F. 3d 541, 549–53 (7th Cir. 2001) (Equal Pay Act); *Siler-Khodr v. Univ. of Texas Health Science Center San Antonio*, 261 F. 3d 542, 550–51 (5th Cir. 2001) (Equal Pay Act); *Kovacevich v. Kent State Univ.*, 224 F. 3d 806, 820 n.6 (6th Cir. 2000) (Equal Pay Act); *Freedom Baptist Church of Delaware County v. Tp. of Middletown*, 204 F. Supp. 2d 857, 874 (E.D. Pa. 2002) (Religious Land Use and Institutionalized Persons Act); *Holmes v. Marion County Office of Family and Children*, 184 F. Supp. 2d 828, 835–36 (S.D. Ind. 2002) (religious accommodation provision of Title VII of the Civil Rights Act of 1964).

Congress finds that ENDA remedies and prevents little or no more discriminatory conduct by States than the Constitution itself prohibits. Although the Supreme Court has not definitively held whether government classifications based on sexual orientation should be subject to rational basis or to some level of heightened scrutiny, *see* Chai R. Feldblum, *The Pursuit of Social and Political*

Equality: Sexual Orientation, Morality and the Law: Devlin Revisited, 57 U. PITT. L. REV. 237 (1996), the Court recently indicated that classifications based on sexual orientation may be unconstitutional even when afforded the most generous standard of review, the rational basis standard of review, when those classifications fail to serve a legitimate governmental purpose. *Romer v. Evans*, 116 S. Ct. 1620 (1996).

The intentional sexual orientation discrimination in the State workplace prohibited by ENDA is never justified by a legitimate State interest. As a Federal court recently held, “harassment in the public workplace against homosexuals based on their sexual orientation constitute[s] an Equal Protection violation.” *Quinn v. Nassau Co. Police Dep’t*, 53 F. Supp. 2d 237, 256–57 (E.D.N.Y. 1999). As a statute that prohibits only intentional sexual orientation discrimination in the State workplace, ENDA tracks constitutional prohibitions against State-sponsored sexual orientation discrimination. Thus, Congress has the Fourteenth Amendment authority to apply ENDA to the States.

The Supreme Court has decided several recent cases in which it found that a Federal statute created a private right of action against a State for a broad swath of what the Court considered constitutional conduct. *E.g.*, *Garrett*, 121 S. Ct. 955; *Kimel*, 528 U.S. 62. In those cases, the Court found that Congress did not properly rely on its Fourteenth Amendment authority in applying those statutes to the States in abrogation of their Eleventh Amendment immunity, because the remedy of allowing a private cause of action for damages against States was a disproportional and incongruent remedy to the problem addressed by the statute. *Id.* In *Garrett*, the Court held that when a Federal statute prohibits a broad swath of constitutional conduct by States, a substantial record of unconstitutional conduct by States may be required to show that the statute’s prophylactic prohibitions against constitutional discriminatory conduct by States are proportional and congruent to the need to prevent unconstitutional conduct. *Garrett*, 121 S. Ct. 955.

Although Congress finds that ENDA prohibits little or no constitutional conduct by States, it also finds that States have engaged in a long-standing pattern of unconstitutional conduct based on sexual orientation in the workplace. *See generally* Section IV–A and IV–B, describing the history of sexual orientation discrimination in both public and private employment contexts. Congressional abrogation of States’ immunity to private suit under Title VII has been considered a valid exercise of congressional power under Section Five of the Fourteenth Amendment for over three decades. *See Fitzpatrick v. Bitzer*, 427 U.S. 455 (1976). Sexual orientation discrimination, unlike discrimination based on race, sex, national origin and religion, has gone without a remedy under Federal law, creating a situation in which all Americans are vulnerable. The lack of a Federal cause of action for sexual orientation discrimination in the workplace creates a situation in which State employees who are victims of sexual orientation discrimination have in general had few opportunities to bring claims against their employers for unconstitutional discrimination.

Congress finds that sexual orientation discrimination in State employment continues to occur throughout the country, at almost

all levels of State government service, and in varying levels of severity. Examples of States discriminating on the basis of sexual orientation in employment abound, and affect employees in law enforcement, academia, and many other fields of employment. The following are just two examples of the many cases in which State employees suffered discrimination based on sexual orientation in State workplaces.

- James Shermer worked as a building tradesman for the Illinois Department of Transportation. John Tress, a plant maintenance engineer, supervised Shermer between May and August 1993. In front of Shermer and his co-workers, Tress repeatedly made offensive remarks, suggesting Shermer enjoyed having sex with men. In 1995, Shermer filed suit against the department under Title VII of the Civil Rights Act of 1964, claiming that Tress' conduct created a hostile work environment. Both the U.S. District Court and U.S. Court of Appeals found against Shermer, arguing that the harassment was based on sexual orientation and not prohibited by State law or Title VII.

- Thomas Figenshu worked as an officer with the California Highway Patrol from 1983 to 1993. After he was promoted to sergeant and transferred to West Los Angeles in 1988, co-workers began to harass him. Anti-gay pornographic cartoons were taped to his mailbox. A ticket for "sex with dead animals" was left on his windshield. He found urine on his clothes in his locker. Figenshu was commonly the object of anti-gay slurs. After Figenshu complained, an officer was reprimanded and another suspended, but the harassment continued. To remove himself from the hostile work environment, Figenshu resigned in 1993, and brought a successful suit under California law.

G. STATE AND LOCAL GOVERNMENTS ACT ON EVIDENCE OF SEXUAL ORIENTATION DISCRIMINATION IN PUBLIC EMPLOYMENT

The fact that sexual orientation discrimination is widespread in State employment and municipal employment is also apparent from the numerous State governments and agencies who have recognized the problem of sexual orientation discrimination in the State workplace and taken affirmative steps to address it. Twenty-two States, the District of Columbia and 243 State and local governments and quasi-governmental agencies across the country prohibit workplace discrimination based on sexual orientation for their public employees. It is reasonable to believe that these policies were enacted not in a vacuum, but instead represent rational State responses to a pattern of sexual orientation discrimination—a discrimination the State clearly found to be irrational and therefore to be prohibited.

The American Federation of State, County and Municipal Employees (AFSCME) represents 1.3 million State, county and municipal employees around the country and has made clear to Congress its position that ENDA is necessary to address the widespread problem of sexual orientation discrimination in the State workplace, and to fill the gaps in Federal workplace discrimination law left by Title VII's inapplicability to sexual orientation discrimination. As a union organized solely for the representation of public employees, AFSCME is perhaps one of the best situated organizations in the country to attest to the presence of sexual orientation

discrimination in State employment. AFSCME has passed two Resolutions in support of the Employment Non-Discrimination Act and has written the Chairman of this Committee as recently as April 2002, to express its strong support for ENDA as a necessary response to “the millions of hard working Americans [who] are not hired or . . . find themselves subject to firing, lack of promotions and other unfair treatment, simply because of their sexual preference.”⁶

In short, Congress intends to invoke two sources of constitutional authority in making ENDA enforceable against States: the Spending Power and Section Five of the Fourteenth Amendment. The Spending Power provides the clearest authority for Congress to condition the receipt of Federal funding in programs and activities as defined by 42 U.S.C. 2000d–4a (2002). States that wish to obtain Federal funds for their programs or activities must comply with the reasonable, constitutional conditions placed on receipt of such funds. Further, Section Five of the Fourteenth Amendment clearly gives Congress the power to remedy sexual orientation discrimination in employment through the abrogation of States’ immunity to private suits for damages under ENDA. Abrogation of States’ immunity to private suits for damages is a congruent and proportional response to the pattern of unconstitutional conduct by States that discriminate in employment based on sexual orientation.

X. EXPLANATION OF THE LEGISLATION

A. THE ACT IS BASED ON TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

The purpose of the Employment Non-Discrimination Act is straight-forward and simple: to prohibit intentional discrimination based on sexual orientation in employment. ENDA will add sexual orientation to the Federal list of prohibited bases for employment discrimination, which currently consists of race, sex, national origin, religion, age and disability. In doing so, ENDA extends fair employment guarantees to thousands of Americans who face employment discrimination based on sexual orientation, in the same way that Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act prohibit other common forms of employment discrimination. In sum, ENDA is a guarantor of equal rights; it in no way creates special rights.

ENDA is narrowly crafted to address sexual orientation discrimination in employment, and to ensure that sexual orientation becomes exactly what it should be in the American workplace—a non-issue. Employment decisions should be made on individual merit and performance, not extraneous, irrelevant factors such as sexual orientation. Like other personal qualities such as race and sex, sexual orientation is irrelevant to an individual’s ability to do his or her job. Sexual orientation only becomes a factor in employment when people’s biases and prejudices determine employment actions such as hiring and firing. Just as it is unacceptable to fire or refuse to hire a person based on his or her race or sex, for example, it is unacceptable to base employment decisions on an employee’s or applicant’s sexual orientation. Federal law should reflect this.

⁶AFSCME letter to The Honorable Edward Kennedy, Chairman, Health, Education, Labor & Pensions Committee, April 23, 2002.

Title VII serves as the model for the Employment Non-Discrimination Act, and it is the intent of this committee that, except as indicated in the act, ENDA be read as consistent with Title VII to the greatest extent possible. Just as Title VII does with respect to race, religion, national origin and religion, ENDA prohibits employers, employment agencies, and labor unions from making employment decisions such as hiring, firing, promotion and compensation on the basis of sexual orientation. Because the purposes of Title VII and ENDA are consistent, and because the Committee wishes to provide courts construing ENDA with the benefit of the well-established jurisprudence of Title VII, much of ENDA's language comes directly from Title VII.

Nonetheless, there are several ways in which ENDA differs from Title VII. Some of these differences stem from the Committee's intent to codify certain aspects of Title VII jurisprudence that should be imported into courts' interpretation of ENDA, and others stem from an intent to treat sexual orientation discrimination somewhat differently from other forms of employment discrimination under Federal law.

Title VII has been interpreted by courts to prohibit associative discrimination in employment, that is, discrimination against a person based on the race, sex, national origin or religion of the persons with whom the employee associates. ENDA makes the prohibition on associative discrimination explicit in Section 4(e). It is the intent of the committee that this provision be construed consistent with the associative discrimination jurisprudence developed under Title VII.

Title VII and other Federal laws, including the Americans with Disabilities Act, have been interpreted to prohibit discrimination based on the perceived characteristics of an employee or applicant for employment, without regard to whether that perception is correct. The discriminatory intent of an employer is the evil to be remedied by Federal civil rights legislation, therefore even absent explicit language regarding "perceive" characteristics or characteristics individuals may be "regarded as" having, courts have often interpreted civil rights statutes as encompassing discrimination based on perceived characteristics. The definition of sexual orientation in ENDA adopts this reasoning, by defining sexual orientation as "homosexuality, bisexuality, or heterosexuality, whether the orientation is real or perceived."

Section 11(a) addresses employer rules and policies, and no correlate for this provision exists in the language of Title VII. This provision is intended to reinforce existing law with respect to employers' prerogative to regulate employee conduct, and merely states that such regulation shall be done in a way that is sexual orientation-neutral.

The small number of limited differences between Title VII and ENDA are intended to treat sexual orientation discrimination in employment differently from the way employment discrimination based on race, sex, national origin and religion is treated under Title VII.

Unlike Title VII, which provides for disparate impact claims, ENDA only provides redress for intentional discrimination. That is, only disparate treatment claims may be brought under ENDA. While evidence of disparate impact may be introduced in a pro-

ceeding to support a claim of disparate treatment, as ENDA clearly states under Section 4(f), there is no cause of action under ENDA for disparate impact.

ENDA also differs from Title VII by not requiring employers to provide domestic partnership benefits to employees. While Federal law has made clear that the provision of employment benefits in a discriminatory manner based on sex is impermissible,⁷ ENDA's Section 6 clearly states that the act does not apply to the provision of employee benefits. Employers nonetheless remain free to provide such benefits.

Section 7 of ENDA differs from Title VII by prohibiting the collection of statistics on sexual orientation by the EEOC. The privacy concerns inherent in the collection of information about individuals' sexual orientation by a government agency make the collection of such statistics at best impracticable, and at worst, impermissibly invasive.

Finally, ENDA differs from Title VII with respect to the availability of affirmative action as a remedy. ENDA's Section 8 makes clear that employers may not adopt quotas or give preferential treatment to individuals on the basis of sexual orientation and it prohibits orders or consent decrees that include quotas or preferential treatment for those protected under the act. Section 12(d) explicitly precludes the institution of affirmative action as a remedy under the act. Finally, ENDA differs from Title VII in the breadth of its religious organization exemption. Section 9 of ENDA exempts religious organizations, including religious corporations, associations, or societies, or educational institutions substantially owned, managed, controlled or supported by religious organizations or whose curriculum is directed to the propagation of a religion. The range of organizations covered by ENDA's definition of "religious organization" comes directly from Title VII. However, under Title VII, the scope of the religious organization exemption only permits religious organizations to discriminate on the basis of religion.⁸ It does not permit religious organizations to discriminate in non-clergy positions on the basis of race, sex or national origin. By contrast, ENDA provides entities that qualify as religious organizations a complete exemption from the statute.

The differences between Title VII and ENDA outlined in this committee report are the only differences intended to be found between ENDA and Title VII as it is currently interpreted by the courts. The fact that ENDA in some respects provides less protection from employment discrimination based on sexual orientation than Federal law provides for other forms of employment discrimination is by no means a statement that anti-gay discrimination or other forms of sexual orientation discrimination are any less abominable than other forms of federally prohibited discrimination. Instead, ENDA's deviations from Title VII are meant to acknowledge particular challenges inherent in addressing discrimination against American workers based on their sexual orientation, and to narrowly tailor legislation to address this problem. Privacy and reli-

⁷See *Califano v. Westcott* 443 U.S. 76, 99 S. Ct. 2655 (1979); *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Weinberger v. Wiesenfeld*, U.S. 636 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973).

⁸Note that the Free Exercise Clause also allows religious organizations to discriminate on any basis in the selection of clergy. *McClure v. Salvation Army*, 460 F. 2d 553 (5th Cir. 1972).

religious freedom concerns are carefully balanced against concerns regarding equal protection and fairness. While the committee expects courts to acknowledge the technical differences in the way ENDA addresses sexual orientation versus the way other Federal laws treat discrimination based on race, sex, national origin, religion, age and disability as outlined above, the committee expects that in all other ways ENDA should be interpreted consistent with Title VII and its companion legislation in the larger body of Federal civil rights legislation, the Age Discrimination in Employment Act, and the Americans with Disabilities Act.

B. EXPLANATION OF DEFINITIONS

1. Most definitions are taken from Title VII

The definitions provided under Section 3 of ENDA come almost exclusively from Title VII, thereby providing courts with the benefit of over three decades of experience. Courts understand these definitions, as do employers, giving ENDA a level of predictability and clarity uncommon in new Federal legislation.

The definitions of “employee,” “employer,” “employment agency,” “labor organization,” “person” and “State” are all cross-referenced to the relevant Title VII definitions. These terms in ENDA should be interpreted consistent with Title VII.

The “Commission” is clearly defined in Section 3(1) to mean the Equal Employment Opportunity Commission.

The term “covered entity” does not appear in Title VII, and instead comes from the Americans with Disabilities Act. “Covered entity” is a term used to encompass all employing entities covered by the act, including employers, employment agencies, labor organizations and joint labor-management committees. ENDA’s definition of “covered entity” mirrors precisely the definition of “covered entity” found at Section 12111(2) of the Americans with Disabilities Act.

The definition of the term “religious organization” in ENDA is a combination of two provisions of Title VII and is meant to be read consistent with Title VII. The language of ENDA’s Section 8 represents a combination of the language of Title VII Section 702(a), which provides an exemption for religious corporations, associations, educational institutions, or societies, and Section 703(e)(2), which exempts schools, colleges, universities or educational institutions which are “in whole or in substantial part, owned, supported, controlled, or managed by a particular religion . . . or directed toward the propagation of a particular religion.”

The definition of sexual orientation is written to include “homosexuality, bisexuality, or heterosexuality, whether the orientation is real or perceived.”

2. The definition of “Sexual Orientation” is clear and well understood.

The definition of sexual orientation under federal law is clear, and the terms homosexuality, bisexuality, and heterosexuality are well understood in the courts and by the American people.⁹ Furthermore, laws like ENDA exist in 12 States, the District of Columbia and over 200 municipalities in this country, and the definition

⁹See *Hyman v. City of Louisville*, 132 F. Supp. 2d 528, 545–47 (W.D.KY 2001) (The definition of “sexual orientation” is consistent with the meaning attributed to the term by common usage).

of sexual orientation has never presented a court with any difficulty.

The use of the term “perceived” in ENDA’s definition of “sexual orientation” represents an effort to address employment discrimination directed at individuals because of their presumed sexual orientation, whether or not that presumption is correct. It ensures that ENDA’s prohibitions reach all discriminatory actions of an employer, regardless of whether the assumptions upon which the employer bases his discrimination are accurate. The use of the term “perceived” or a similar modifier is seen in the civil rights laws of many States, emphasizing the importance of the subjective intent of an employer in determining whether inappropriate discrimination has occurred.¹⁰

This Federal interest in addressing subjective intent in employment discrimination is also reflected in other Federal laws. For example, the Americans with Disabilities Act prohibits discrimination against the disabled and those who are “regarded as” having a disability. Courts have also read prohibitions on discrimination based on perceived characteristics into statutes where this language does not exist, because such a reading supports the spirit in which Congress promulgates civil rights laws. Even without such explicit language, courts regularly interpret civil rights statutes as encompassing discrimination based on perceived characteristics. Title VII has been interpreted to encompass discrimination based on perceived race and national origin, without regard to whether the perception upon which the employer based his discrimination was correct.¹¹

In summary, the definition of sexual orientation is intended to be narrowly construed to include heterosexuality, bisexuality, and homosexuality, whether real or perceived. The use of the term “real or perceived” in ENDA is consistent with the statutory definitions of sexual orientation found in many State laws, and represents an effort to discourage inappropriate discrimination, regardless of the accuracy of the assumptions upon which the discrimination is based.

C. THE “DISCRIMINATION PROHIBITED” SECTION

Section 4 is at the core of the act and describes the discrimination prohibited by ENDA. Subsections 4(a)–(d) are taken directly from Title VII subsections 703(a)–(d), and have the benefit of over

¹⁰ Minn Stat. §363.01 (2001), defining sexual orientation as “having or being perceived to have an emotional, physical, or sexual attachment to another person without regard to the sex of that person . . . or having or being perceived as having an orientation for such attachment;” R.S.A. 354-A:2 (2001), defining sexual orientation for the purposes of New Hampshire law as “having or being perceived as having an orientation for heterosexuality, bisexuality or homosexuality;” N.J. Stat § 10:5-3 (2001), defining “affectional or sexual orientation” as “male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation;” Nev. Rev. Stat. Ann §281.370 (2001), defining sexual orientation as “having or being perceived as having an orientation for heterosexuality, homosexuality or bisexuality;” R.I. Gen. Laws § 28-5-6 (2001), defining sexual orientation as “having or being perceived as having an orientation for heterosexuality, bisexuality, or homosexuality;” Wis. Stat. § 111.32 (2001), defining sexual orientation as “having a preference for heterosexuality, homosexuality, or bisexuality, having a history of such a preference, or being identified with such a preference;” Md. Ann. Code art. 49B § 5 (2001), defining sexual orientation as “the identification of an individual as to male or female homosexuality, heterosexuality, or bisexuality;” Conn. Gen. Stat. § 46a-81a (2001), defining sexual orientation as “having a preference or being identified with such preference;” Mass. Ann. Laws ch. 151B, § 3 (2002), defining sexual orientation as “having an orientation for or being identified as having an orientation for heterosexuality, bisexuality, or homosexuality.”

¹¹ *EEOC v. Shoney’s*, 1994 U.S. App. LEXIS 16876.

30 years of judicial interpretation. Employers and courts alike understand this language and its requirements.

ENDA prohibits employers (including government employers), employment agencies, labor organizations, and joint labor-management committees from engaging in intentional discrimination in employment on the basis of sexual orientation. This discrimination includes but is not limited to discrimination in hiring, firing, compensation and other terms, conditions, or privileges of employment or union membership. Employers also may not limit, segregate or classify their employees or applicants for employment so as to disadvantage certain employees based on their sexual orientation.

Subsection 4(e)'s prohibition on associative discrimination is meant to prohibit such discrimination to the same extent as Title VII does. Courts have read a prohibition on associative discrimination into Title VII, and in the Americans with Disabilities Act, this prohibition is explicit in Section 102(b)(4). ENDA makes the prohibition on associative discrimination explicit just as the ADA does, and associative discrimination is meant to be actionable to the same extent as it is under Title VII. Discrimination against an employee because he or she has a lesbian daughter, or because he or she has a gay friend, for example, should be prohibited in the same manner that it would be unlawful under Title VII to discriminate against an employee because of the race of her spouse.

Finally, subsection 4(f) clarifies that ENDA does not provide a cause of action for disparate impact discrimination as Title VII does. ENDA only provides a remedy for disparate treatment. While evidence of disparate impact may be used to support a claim of disparate treatment, there is no cause of action under ENDA for disparate impact discrimination.

D. RETALIATION AGAINST THOSE WHO EXERCISE THEIR RIGHTS UNDER THE ACT IS PROHIBITED

Section 5 makes it an unlawful employment practice for a covered entity to discriminate against those who exercise their rights under ENDA, or participate in any manner in an investigation, proceeding, or hearing under ENDA. Section 5 was amended at the April 24, 2002 committee business meeting to mirror Section 704 of Title VII as precisely as possible, creating greater uniformity throughout federal civil rights law.

Prior to April 2002, a subsection (b) was also included in this section of the bill. That subsection was modeled on Section 503(b) of the Americans with Disabilities Act, and prohibited a person from coercing, intimidating, threatening, or interfering with any individual in the exercise of his or her rights under the Act. However, given the relative paucity of case law interpreting that provision of the ADA, the committee approved an amendment, offered by Senator Collins, to remove subsection (b) and change the language of this Section to mirror Section 704 of Title VII, which has the benefit of over thirty years of judicial interpretation.

The elimination of subsection (b) was not intended to narrow the scope of ENDA's prohibition on retaliation in any way. The amendment was instead designed to create uniformity with Title VII, the primary Federal law upon which ENDA is modeled, and to allow courts to draw from the well-established jurisprudence of Title VII when adjudicating retaliation claims under ENDA.

E. THE ACT DOES NOT REQUIRE EMPLOYERS TO PROVIDE DOMESTIC
PARTNERSHIP BENEFITS

Section 6 of ENDA explicitly states that ENDA “does not apply to the provision of employee benefits to an individual for the benefit of the domestic partner of such individual.” The language of ENDA could not be more clear on this point: ENDA does not require employers to provide domestic partner benefits. Employers remain free to provide these benefits, however ENDA does not require the provision of domestic partner benefits.

Employers across the country are discovering that the provision of domestic partnership benefits make good business sense. Over 4,300 employers, including corporations, universities, and State and local governments across the country offer such benefits to their employees. Fully, 59 percent of Fortune 500 companies offer domestic partner benefits to their employees.

Given these statistics, it seems likely that domestic partnership benefits will become the rule, rather than the exception, for American employers. However, ENDA leaves employers free to make decisions about whether and to what extent to provide domestic partnership benefits to their employees without pressure from Congress.

During the April 2002 committee meeting, a member of the committee expressed concern that ENDA could conflict with Federal regimes governing employment benefits. Section 6 makes clear, however, that no such conflict is presented by ENDA.

Eligibility for many Federal employment benefits is based upon spousal status, and the Defense of Marriage Act¹² currently precludes the recognition of same-sex spouses for the purposes of Federal law. ENDA has no effect on the administration of pre-existing workers’ compensation benefit programs, the FMLA, or other Federal benefits programs, and would not create a cause of action allowing employees to sue for alleged violations of these benefit systems.

6. The Act Specifically Prohibits the Collection of Statistics and Does Not Require Employers or Unions to Collect Statistics

ENDA expressly prohibits the EEOC from collecting statistics on sexual orientation and from requiring covered entities to collect such statistics. Collection of such information would violate the privacy rights of workers and is not necessary to support an intentional discrimination action brought under the act.

This provision reflects current EEOC practice and decisions with regard to employers’ collecting statistics on the religious affiliations of their employees. The only statistics that the EEOC requires employers with over 100 employees to maintain are statistics regarding the gender and race breakdown in the workplace. The EEOC has never required the collection of statistics regarding an employee’s religion—a characteristic which, like sexual orientation, is not apparent on its face and can be determined mainly through making inquiries of applicants and employees. Nor has the EEOC found that presenting such statistics after a charge of discrimination is particularly useful in defending against a claim of intentional discrimination. To the contrary, the EEOC has looked with some sig-

¹² 1 USCS § 7 (2002).

nificant suspicion on employers who have attempted to maintain records of employees' religious affiliations.¹³ While it is unlikely that the EEOC would have ever added sexual orientation to the reporting form used by employers or otherwise required the collection of statistics on sexual orientation, this section addresses this concern by explicitly prohibiting such an action.

Some query was whether the act would prevent employers from asking about the sexual orientation of their employees as part of a defense strategy to counter a sexual orientation discrimination lawsuit—particularly, to gather evidence of other employees of the same sexual orientation who did not experience discrimination. For example, if a lesbian employee brought a suit against her employer alleging she suffered discrimination based on sexual orientation, her employer might wish, as part of its defense strategy, to highlight the positive treatment of other lesbian employees in the company. In doing so, the employer may ask employees believed to be lesbian to testify on the employer's behalf.

Section 7 does not prohibit an employer from asking such employees to testify, make statements, or otherwise support the employer's defense. Under current law, an employer may ask employees to voluntarily attest to their experiences regarding a lack of sexual orientation discrimination in the workplace, and ENDA would not change this. The only way such a question or request would violate ENDA would be if information regarding employees' sexual orientation elicited through such a request or survey resulted in sexual orientation discrimination.

Situations analogous to this one occur in the litigation of disability discrimination cases and other sensitive cases where medical information is pertinent to a defense. In particular, cases of discrimination brought against healthcare providers accused of denying care to HIV positive persons create situations in which the defense strategy would include the disclosure of third parties' private medical information. In such cases, courts can be expected to issue protective orders allowing for affidavits to be submitted under pseudonyms, or for relevant documentation to be submitted with names or other identifying information redacted. Courts would be at liberty to employ similar measures to protect employee privacy where the sexual orientation of employees not parties to the suit may be relevant to the defense.

G. QUOTAS AND PREFERENTIAL TREATMENT ARE PROHIBITED

ENDA's section 8 is included to clearly delineate the limits of the act's remedial powers. Subsection 8(a) and 8(b) prohibit employers from adopting quotas or giving preferential treatment to an individual on the basis of sexual orientation, primarily because such policies are not practical remedies for sexual orientation employment discrimination. As with the prohibition on affirmative action in section 12(d), ENDA recognizes that some policies and practices traditionally used to provide redress in cases of employment discrimination on the basis of race or gender are impractical and ultimately unworkable remedies for employment discrimination on the basis of sexual orientation. Subsection 8(c) further clarifies the lim-

¹³See EEOC Dec. No. 76-95, 1976 EEOC Lexis 23; EEOC Dec. No. 71-1469, 1971 EEOC Lexis 49.

its of such remedial actions by prohibiting the inclusion of a quota or preferential treatment as part of any order or consent decree entered for a violation of the act.

H. THE ACT'S RELIGIOUS EXEMPTION IS VERY BROAD

Section 9 of ENDA provides that “this act shall not apply to a religious organization.” The scope of this exemption is very broad, providing that any entity that constitutes a “religious organization” under ENDA is completely exempted from coverage under the act.

The definition of “religious organization” in Section 3 of the act mirrors the definition of “religious organization” used by courts interpreting Title VII. During the debate over the Civil Rights Act of 1964, some members of Congress expressed concerns that the legislation would trample the personal religious beliefs of employers. Therefore, the final statute, as enacted, contained two provisions exempting religious employers from coverage—§ 702(a) (a general exemption) and § 703(e) (an exemption for religiously-affiliated educational institutions). Prior to 1972, § 702 only exempted the religious activities of employees of religious employers. The statute was then amended to exempt all activities of employees of religious organizations. However, religious organizations are not permitted to discriminate on the basis of race, color, sex, or national origin in secular employment positions.

Although Title VII does not define the term “religious organization,” Federal courts have addressed the issue of defining a “religious organization” many times. According to the courts, religious organizations are religious corporations, associations, or societies, and educational institutions substantially owned, managed, controlled or supported by religious organizations or whose curriculum is directed to the propagation of a religion. Organizations as diverse as a retirement home operated by Presbyterian Ministries;¹⁴ a newspaper published by the First Church of Christ, Scientist;¹⁵ Christian elementary schools and universities;¹⁶ and a non-profit medical center operated and controlled by the Seventh Day Adventist faith¹⁷ have been found to be religious organizations under Title VII.

The range of organizations exempted from ENDA under this provision is the same as those religious organizations already exempted from Title VII of the Civil Rights Act of 1964. In an effort to simplify the legislative language of the act, the religious organizations protected by the exemptions in Title VII's § 702 and § 703 are combined in the act's definition of “religious organization.” The scope of ENDA's exemption is significantly broader than the scope of the Title VII exemption. While religious organizations are exempt from religious discrimination prohibitions in non-clergy positions under Title VII, they remain subject to prohibitions on race, sex, and national origin discrimination. By contrast, ENDA exempts religious organizations completely, thus exempting them entirely from the prohibition on discrimination based on sexual orientation.

¹⁴ See *EEOC v. Presbyterian Ministries*, 788 F. Supp. 1154 (W.D. Wash. 1992).

¹⁵ See *Feldstein v. Christian Science Monitor*, 555 F. Supp. 974 (D. Mass. 1983).

¹⁶ See *Ganzy v. Allen Christian School*, 1997 U.S. Dist. LEXIS 20938 (E.D.N.Y.), *Killinger v. Samford University*, 113 F. 3d 196 (11th Cir. 1997), *Little Wuerl*, 929 F. 2d 944(3rd Cir. 1991).

¹⁷ See *Young v. Shawnee Mission Med. Ctr.*, 1988 U.S. Dist. LEXIS 12248 (D. Ks. 1988).

Despite the act's broad religious exemption, some have expressed concern that the religious beliefs of employers and employees are not sufficiently protected. They argue that those whose religion dictates that homosexuality is wrong will be forced to hire or work with gay men and lesbians. Similar arguments are not new to the civil rights debate, but our nation's civil rights laws require those who participate in commercial activity to adhere to our broad principles of fairness and equality.

For example, during debate on the Civil Rights Act of 1964, one Senator said,

And yet, here we have a law proposed which would attempt to deny to millions of employers and employees any freedom to speak or to act on the basis of their religious convictions or their deep-rooted preferences for associating or not associating with certain classifications of people

It may be immoral for a man to have a prejudice against persons of a particular race, color, or religion just because he has found it particularly difficult to associate without discordant mutual misunderstandings with many persons of that particular race, color, or religion. But what is left of individual liberty if a man or woman cannot choose associates in work or in play on that basis of either reason or prejudice, which are often indistinguishable? Where was Congress ever given the power to establish a state or morality to be enforced in the private selection of private associates for work or play?¹⁸

Although several members of Congress made similar arguments, they were rejected by Congress. The Civil Rights Act of 1964—with the exception of the narrow religious exemption described above—prohibits discrimination based on race, ethnicity, gender, or religion irregardless of personal beliefs. Similarly, excepting religious organizations, ENDA prohibits discrimination based on sexual orientation. The principle set forth in 1964 remains true in 2002.

I. THE ACT DOES NOT AFFECT THE RELATIONSHIP BETWEEN THE FEDERAL GOVERNMENT AND THE ARMED FORCES OR VETERANS PREFERENCES

ENDA does not apply to the relationship between the U.S. government and uniformed members of the Armed Forces. Therefore, ENDA will not affect current law on gay men, lesbians, and bisexuals in the military or the associated "Don't Ask, Don't Tell" policy. In a provision taken from Title VII, Section 10 further provides the bill does not repeal or modify any other law that gives special preferences to veterans.

J. THE ACT DOES NOT AFFECT AN EMPLOYER'S RIGHT TO ESTABLISH AND IMPLEMENT UNIFORM RULES AND POLICIES OR A VOLUNTARY, NON-PROFIT MEMBERSHIP GROUP'S RIGHT TO FREEDOM OF ASSOCIATION

Section 11 was not in the original version of ENDA as introduced in the Senate in 104th Congress but was added immediately prior

¹⁸Congressional Record, Volume 110, p. 7778.

to the Senate consideration of the bill in September 1996, to address concerns raised by some that the legislation would prohibit employers from implementing and enforcing their own rules and policies, including those which govern the conduct of employees.

In July of 1996, the media reported that a high school teacher in Loudoun County, Virginia, was engaged in the production of sexually-explicit adult movies. The teacher resigned before Loudoun County school officials could take any disciplinary action against him. Prior to the Senate debate in 1996, concerns were raised that ENDA would prohibit any disciplinary action in similar situations. Those concerns were based on the erroneous assertion that disciplinary action would be considered discrimination on the basis of sexual orientation.

To clarify the intent of the bill, the sponsors of the act added a section before the Senate vote to ensure that employers retained the same right to enforce employer rules and policies under ENDA that they currently have under Title VII. However, the provision's emphasis on "nonprivate" employee conduct raised further concerns by a number of business groups that this language might prevent employers from enforcing policies such as anti-harassment policies. Questions were also raised about the meaning of the term, "non-private".

During the February 27, 2002, hearing on the act, Robert Berman, Director, Human Resources and Vice President, Eastman Kodak Company—a strong supporter of ENDA—raised the concern that the use of "nonprivate" in the original language of section 11(a) might "significantly impair" a company's ability to take prompt remedial action to end harassment that takes place in a private setting, away from a company office or plant, but which happened while the employee was engaged in company-related business or at a company-sponsored event.

In mark-up, Senator Collins offered an amendment to clarify the intention of section 11(a), to ensure that, like Title VII, ENDA allows employers to implement and enforce rules and policies governing employee conduct, as long as such rules and policies are enforced uniformly, without regard to an employee's sexual orientation.

Section 11(b) was added to the bill to acknowledge that the act has no effect on the right of freedom of association for nonprofit, voluntary membership groups, such as the Boy Scouts of America.

K. WITH ONE EXECPTION, THE REMEDIES ARE COMPARABLE TO THOSE
AVAILABLE UNDER TITLE VII

ENDA adopts the enforcement mechanisms of Title VII, as amended by the Civil Rights Act of 1991, with the exception of prohibiting the use of affirmative action (prohibited by section 12(d)).

The requirement of filing claims with the EEOC, the ability of an individual to bring a private right of action in court, and the ability of an individual to receive injunctive relief and damages, up to the limits authorized by Title VII (as amended), are all incorporated by reference in ENDA.

The remedy of affirmative action available under Title VII is explicitly made unavailable under ENDA through section 12(d). This subsection was added to emphasize that this legislation is not about affirmative action or special rights for rights gay and lesbian

people. This bill is about fairness in the workplace and allowing all Americans the freedom to work without fear of discrimination based on sexual orientation.

L. THE ACT ENSURES THAT AN INDIVIDUAL HAS REMEDIES AGAINST STATES AND THE UNITED STATES

Section 13 ensures that an individual can sue a State or an official of a State in his or her official capacity. In several recent cases, the Supreme Court has indicated that Congress may use its Spending Clause powers to condition the receipt of Federal funds upon waiver of Eleventh Amendment immunity to suit under certain Federal regulatory and statutory schemes. See *Fla. Prepaid Post-secondary Educ. Expense Bd. v. Coll. Sav. Bank*, 527 U.S. 627 (1999); *South Dakota v. Dole*, 483 U.S. 203 (1987). The Court has also held, however, that there are limitations to Congress' authority.

Five restrictions are generally associated with the use of Congress' spending power, and the act falls within the parameters of those restrictions. First, the act does not place conditions upon the receipt of Federal funds that are "so coercive as to pass the point at which 'pressure turns into compulsion,'" *South Dakota v. Dole*, 483 U.S. 203, 211 (1987). States have been subject to private suits under Title VII since shortly after the statute's enactment, and the resources required to defend a suit under ENDA should generally be no different from those required to defend a Title VII suit brought by the EEOC on behalf of an injured employee.

Second, the plain language of the Spending Clause indicates that the use of the spending power must be aimed at "the general welfare" of the country, that is, it must have a "general public purpose." *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *Helvering v. Davis*, 301 U.S. 619, 640-41 (1937). Extensive evidence supports the contention that discrimination based on sexual orientation is a pressing problem in both public and private workplaces. Without question, the prevention of discrimination based on sexual orientation by State employers is a legitimate national interest, meaning that the spending at issue in the case of the act falls well within the rubric of "the general welfare."

Third, the act clearly reflects congressional intent to condition States' receipt of funding on compliance with certain regulations. Congress' intent is "unambiguous" in the language of the statute, and a State may make an informed choice as to whether to adhere to the conditions upon which the receipt of funds are contingent. See *South Dakota v. Dole*, 483 U.S. 203, 207 (1987); *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Specifically, States accepting Federal funds for qualifying programs or activities shall, as a condition upon the receipt of those funds, waive their immunity to private suit by employees of those qualifying programs or activities to enforce the act.

Fourth, as required, the "condition imposed [on Federal funds is] reasonably related to the purpose for which the funds are expended." *South Dakota v. Dole*, 483 U.S. 203, 207, 213 (1987). In this instance, the act could not be more clear. Congress is concerned with the eradication of discrimination based on sexual orientation in the State workplace and may therefore refuse to provide funding to State programs or activities which do not comply

fully with the provisions of the act and agree to subject themselves to the potential for private suit in order to enforce it.

Fifth, the condition upon the receipt of Federal funds in the act is not barred by any provision of the Constitution. Because the basis for the waiver of 11th Amendment immunity in this case is the Spending Clause, compliance with the limitations upon the spending power indicated above is sufficient basis for the constitutionality of the act.

Finally, section 13 also sets forth that in an action against a State, State official, or the United States, remedies similar to those available under Title VII—with the exception of punitive damages and limited compensatory damages—are available.

XI. MINORITY VIEWS OF SENATORS GREGG, FRIST, ENZI, HUTCHINSON, BOND, AND SESSIONS ON S. 1284

The Employment Non-Discrimination Act (ENDA) attempts to pattern itself after other Federal nondiscrimination statutes, and has been revised to address some longstanding questions raised about the legislation. However, even with these revisions, including the adoption of two amendments introduced by Senator Collins during the committee mark-up, this legislation remains overly-broad and unclear in many respects, specifically, with regard to its effect on individual, constitutional and States' rights. As a result, we cannot support the legislation in its present form.

First, as currently drafted, ENDA may endanger the First amendment rights of many employers to make hiring decisions based upon religious criteria—a right that has been reiterated in federal civil rights law and upheld by the United States Supreme Court.

Second, ENDA may chill the rights of individuals to engage in constitutionally protected speech in the workplace when that speech involves beliefs and opinions contrary to certain lifestyle decisions and practices protected in the Act.

Third, because ENDA includes an overly-broad definition of sexual orientation which includes “perception” that the plaintiff is homosexual or bisexual or “association” with others who are or who are “perceived” to be homosexual or bisexual, employers will be subject to a virtual litigation bonanza. Forced to defend themselves in countless lawsuits by proving a negative, many employers will have no practical choice but to settle cases out of court to avoid potentially costly and lengthy court battles.

Fourth, an examination of the 13 laws passed by the States on this issue reveals a diverse collection of policies and remedies that are tailored to the needs and sensitivities of the various States, some of which have been reflected to ENDA, many others of which have not. Yet ENDA would very likely conflict with and preempt certain State laws, which is troublesome.

For example, many have questioned whether the phrase “sexual orientation” could be interpreted to include behavior or conduct that constitutes a criminal act. Of the 13 state nondiscrimination laws related to sexual orientation, eight contain provisions ensuring that criminal conduct is not protected.

Connecticut law, for example, excludes behavior with constitutes a criminal offense, Hawaii law ensures that “sexual orientation” shall not be construed to protect conduct otherwise proscribed by law. Massachusetts law says that “sexual orientation” “shall not include persons whose sexual orientation involves minor children as the sex object,” and also specifically excludes pedophilia from coverage. Minnesota law says that “sexual orientation” does not include a physical or sexual attachment to children by an adult.”

New Hampshire law's definition of "sexual orientation" does not render lawful any conduct prohibited by the criminal laws of this State. New Jersey law says that it shall not be construed to prevent or preclude daycare centers from refusing to employ known or suspected child molesters. Rhode Island law says its definition of sexual orientation does not render lawful any conduct prohibited by its State criminal laws. And finally, Vermont law states that "sexual orientation" shall not be construed to protect conduct otherwise proscribed by law.

Given that States facing this issue have made clear that "sexual orientation" shall not include criminal behavior, it is puzzling that the Federal ENDA legislation would not contain a similar clarification, making its preemption of State law particularly troubling.

In sum, the Employment Non-Discrimination Act as passed by this Committee leaves us with too many questions and concerns to be able to support the legislation.

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BILL FRIST.
MICHAEL B. ENZI.
TIM HUTCHINSON.
CHRISTOPHER S. BOND.
JEFF SESSIONS.

