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BEFORE THE U.S. COMMISSION ON CIVIL RIGHTS

REGARDING THE PROPOSED EMPLOYMENT NON-DISCRIMINATION ACT

MARCH 16, 2015

Introduction

Thank you very much, Mr. Chairman, for the opportunity to testify today. My name is Roger Clegg, and I am president and general counsel of the Center for Equal Opportunity, a nonprofit research and educational organization that is based in Falls Church, Virginia. Our chairman is Linda Chavez, and our principal focus is on public policy issues that involve race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation. I should add that Ms. Chavez was once the staff director of the U.S. Commission on Civil Rights, and that I was once the Deputy Assistant Attorney General in the U.S. Justice Department's Civil Rights Division.

For what it's worth, I will mention that CEO has had at least one gay employee and, as I recall, he opposed this legislation.

The Employment Non-Discrimination Act (ENDA) would make it illegal for public and private employers, among others, to discriminate on the basis of "actual or perceived sexual orientation or gender identity." The bill defines sexual orientation as "homosexuality, bisexuality, or heterosexuality," and gender identity as the "gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to an individual's designated sex at birth."

Before I get started, let me point out two important issues that are raised by ENDA that I do *not* plan to discuss in my testimony. First, it presents important First Amendment issues, of speech, religion, and association; I have included two appendices to my testimony that include some discussion of that. Second, my own view is that the kinds of discrimination that ENDA would prohibit are not prohibited by Title VII of the 1964 Civil Rights Act (for essentially the same reasons that I have told the commission that Title IX of the 1972 Education Amendments does not cover discrimination on the basis of sexual orientation), but I will simply reference that testimony today and leave it at that:
http://www.eusccr.com/6.%20Roger%20Clegg,%20Center%20for%20Equal%20Opportunity.pdf

Now, the bill's proponents make a simple argument: Discrimination against homosexuals, etc. is wrong, and therefore there should be a federal law against it. But this simplistic argument is wrongheaded for several reasons.

The points I will make in my testimony are: (1) Congress lacks the constitutional authority to pass this bill. (2) There is no call for a federal role in this area anyway. (3) The bill is inconsistent with free-market, federalism, and personal freedom principles. (4) It is not necessarily immoral or irrational to discriminate on the basis of sexual orientation or gender identity. (5) The legislation would create many practical problems for employers. (6) The main purpose of this bill is to try to marginalize the views of Americans who believe that gay sex is a sin, and this is a bad aim. There is some overlap among these points, by the way, but they are distinct.

One last preliminary point: I'm going to be focusing mostly on homosexuality here, rather than bisexuality and gender identity. But suffice it to say that the problems I identify for the former are at least as great for the latter two.

Lack of Congressional Authority

Congress does not have the power to pass this bill. Our Constitution grants Congress only certain enumerated powers — as the Supreme Court has affirmed — and none of these powers is adequate for ENDA.

The bill itself asserts two fonts of authority: the Fourteenth Amendment and the Commerce Clause. When it passed the Civil Rights Act of 1964, banning discrimination on the basis of race, ethnicity, religion, and sex in private employment, Congress likewise pointed to the Commerce Clause and Section 5 of the Fourteenth Amendment. The Commerce Clause grants to Congress the "Power ... To regulate Commerce ... among the several States ...." Section 5 of the Fourteenth Amendment gives Congress the "power to enforce, by appropriate legislation, the provisions of this [amendment]" which, in Section 1, provides that "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

If Congress had authority to pass the Civil Rights Act of 1964, does it follow that it has authority to pass ENDA? Not at all.

Consider first the Commerce Clause. In *United States* v. *Lopez*, 514 U.S. 549 (1995), the Supreme Court reminded Congress that it had to do more than simply assert that an activity it sought to regulate had some "effect" on interstate commerce. Rather, that effect had to be "substantial." Now, it was certainly arguable in 1964 that the widespread and systemic discrimination against blacks in large parts of the country had a substantial effect on interstate commerce. But can it be credibly argued that, in 2015, discrimination against homosexuals has a "substantial" effect on interstate commerce? I don't think so. If Commerce Clause support is lacking, then the bill fails with respect to private actors, because the Congress's Fourteenth Amendment authority is inapplicable here. See *United States v. Morrison*, 529 U.S. 598 (2000).

Moreover, it should be borne in mind that Congress was stretching its authority to its utmost when it prohibited private employment discrimination on the basis of race, ethnicity, religion,

and sex in 1964. And as high-minded as it may have been, a ban on discrimination is not obviously a way to "regulate Commerce ... among the several States"; a regulation of a business in a state, surely, but not of "commerce" and not "among the several States."

I don't doubt that employment discrimination against homosexuals still occurs, but it is becoming less and less common. Companies have voluntarily foresworn such discrimination, it is already a violation of more and more state and local laws, and of course the federal government itself now bans it in its own employment practices and in those of any company with which it contracts. In an editorial written five years ago, the *Washington Post* asserted that "17 states, 276 cities and towns (including the District of Columbia) and 433 companies of the Fortune 500" prohibit employment discrimination based on sexual orientation, and that popular "support for equal employment opportunities for gay men and lesbians jumped from 56 percent in 1977 to 89 percent in 2006, according to the Gallup Organization." All that was five years ago — and since then both sides of the aisle would acknowledge astonishing advances for the gay rights agenda. Last week, the *Wall Street Journal* reported: "Support for gay marriage has risen to an all-time high in the latest Wall Street Journal/NBC News poll, reinforcing it as one of the fastest-moving changes in social attitudes of this generation. The new survey found that 59% of Americans support allowing same-sex marriage, nearly double the 30% support reported in 2004." How widespread can antigay discrimination be under these circumstances? S. Rept. 113-105 confirms the increasing government, corporate, and popular support for nondiscrimination in this area. And of course, in sheer numbers, there are many fewer homosexuals than African Americans.

As to Section 5 of the Fourteenth Amendment, again, it gives Congress authority to act only against state governments, not private businesses. And as to state actors, precisely because the Supreme Court is making it harder and harder to discriminate on these bases as a constitutional matter, and because the law is very much in flux, it seems like an odd time for Congress to be asserting its Section 5 authority, when no one really knows how far that authority goes; conversely, when the constitutional law is spelled out, then it will be hard to see why ENDA is needed, since actions can always be brought under the Constitution itself. In this regard, ENDA's attempt to trump the states' sovereign immunity under the 11th Amendment raises overlapping problems. The increasing scarcity of antigay discrimination is relevant here, too, since to the extent that Congress bans discrimination that is not unconstitutional (that is, as a general matter, not rational), ENDA potentially lacks "congruence and proportionality" with Section 5's authority, and that standard will be harder to meet to the extent that the banned discrimination is either attenuated or is already illegal. See *Kimel v. Florida Board of Regents*, 528 U.S. 62 (2000) (ADEA is unconstitutional as to state actors, since there was no showing it was congruent and proportional to remedying widespread unconstitutional age discrimination); *Schroeder v. Hamilton School District*, 282 F.3d 946 (7th Cir. 2002) (public school district had rational basis for not remedying sexual-orientation "harassment" of employee by students and others, since sexual orientation is only a rational-basis review classification, and the school district had a rational, cost-or-resource-based reason not to create a formal policy policing against sexual orientation harassment).

Remember that the question for Senators and Representatives is not just whether a deferential and/or liberal reviewing court might give them the benefit of the doubt; they have taken an oath

to follow the Constitution, so they are obliged independently to be satisfied that they are acting within their constitutional authority. I do not believe that they can meet this burden.

Federalism, Free Markets — and Freedom, Period

The second flaw in the pro-ENDA argument is its assumption that Congress is obliged to act whenever there is a wrong to be righted. Assuming that it is wrong to discriminate against homosexuals in private employment, and assuming that Congress has authority to ban such discrimination, is this the sort of problem that cries out for a national solution? Is there a wholesale refusal in the American marketplace to hire, promote, and not fire homosexuals? Are state and local governments powerless to take action? Are homosexuals themselves without recourse, either individually or collectively?

The answer to all these questions is no. As noted above, Corporate America has been quite accommodating to gays already, without any intervention by the federal government; states and municipalities, and now the Executive Branch of the federal government, have shown themselves willing to intervene, too; and for better or worse gay activists have succeeded in making antigay discrimination decidedly uncool.

But it's not just that intervention by the national legislature is unnecessary. We are forgetting what ought to be a fundamental principle: Absent extraordinary circumstances, Congress should not tell people how to use their property and how to run their businesses. I discuss this point at greater length here: Roger Clegg, "*Bragdon v. Abbott*, Asymptomatic Genetic Conditions, and Antidiscrimination Law: A Conservative Perspective," 3 *J. Health Care L. & Pol'y* 409, 417-429 (2000).

As I discuss later, there will be circumstances where discrimination here is not irrational. To give just one example now: Particularly in an era when employees are asked to work as teams, the fact that some members of a team may view the behavior of other members of the team as immoral is not an irrelevant consideration for an employer. And employees will relate to one another as human beings as well as simply co-workers. There should be a strong presumption that employers, not the government, are in the best position to decide who will be the best employee for the company, and are unlikely to act irrationally by hiring someone who is not the best qualified.

Here again, ENDA's proponents are likely to argue that, if this principle did not stop Congress from passing the Civil Rights Act of 1964, then why should it prevent it from passing ENDA? But everyone should admit that, at some point, the federal government must stop micromanaging a private employer's personnel practices and let him hire whom he wants. Where we draw the line will determine whether our principles of freedom of association and private property are to be the exception or the rule.

Racial discrimination presented an extraordinary situation justifying departure from the usual free-market presumptions. It was widespread, blatant, and often governmentally codified and mandated; it was irrational and dictated — at least in the 20th century — by no non-fringe religious or moral convictions; it was a historic problem, national in scope, which was clearly not

susceptible to state, local, or private resolution. Discrimination against homosexuals is simply not in this league.

Something should be said now about the distinction between homosexuality and homosexual behavior. While this is of course be an important distinction morally, it is very doubtful that the drafters of ENDA intended it (see, e.g., S. Rept. 113-105), that its supporters want it, that the bureaucracy that will write the statute's regulations and enforce the statute will allow it, or that federal courts will recognize it. What reaction — from her lawyer, let alone an EEOC bureaucrat or federal judge — would an employer expect were she to justify her firing of a homosexual on the grounds that it was not the homosexuality per se that prompted the firing, but rather the fact that the employee was engaging in gay sex?

Let us continue with the point — with the fact — that millions of Americans believe that homosexual behavior violates sincerely and deeply held religious beliefs rooted in explicit Scripture. It is, in other words, a sin. What is the relevance of this fact for law and government?

Well, sometimes sins are made illegal — murder and theft, for instance. Sometimes they are not; no one is jailed for failing to honor his father and mother. And sometimes they are made illegal but seldom prosecuted. Much fornication, including homosexual behavior, falls or once fell into this category. The idea is to stigmatize certain behavior, even if it is unrealistic to prosecute it.

It might be objected that this is not an appropriate role for law and government. Instead, if some people want to stigmatize certain behavior then they should find ways to do so without dragging legislators and lawyers, let alone prosecutors, into the act.

Which, of course, is exactly what the Employment Non-Discrimination Act makes it impossible to do.

Quick: Who wants to make private behavior by an adult illegal — those supporting the bill or those opposing it? And who wants to use the government to stigmatize people and force them to act against deeply held personal beliefs? It is, of course, the *proponents* of the bill who want to make private behavior illegal and stigmatize it, not its opponents. The private behavior is the exercise of one's freedom of association and control of one's own property to refuse, on occasion, if one wishes, to hire homosexuals.

Such private actions, voluntarily undertaken, are an appropriate way in our society to make the point that, legal or not, certain behavior is unwelcome and objectionable.

Immoral or Irrational?

As I discussed in the law review article cited above, generally antidiscrimination laws are justified because the banned discrimination is thought to be immoral or irrational or both. But neither justification works for ENDA.

As for immorality, the supporters of ENDA really cannot answer the point that gay sex is considered a sin by many Americans, employers among them. ENDA's proponents may think

that discriminating against those who engage in gay sex is immoral, but many others think that what is immoral is acting as if gay sex is no big deal. And so ENDA's supporters must also argue that discrimination against homosexuals is unfair because it is irrational. The late Senator Edward Kennedy declared that what the bill requires is "basic fairness" and that "[j]ob discrimination is not only un-American — it is counterproductive. It excludes qualified individuals, lowers workforce productivity, and hurts us all."

It was good for Senator Kennedy to help stupid employers make the best business decisions, based on his own vast personal experience in the private sector. But unfair how? Adultery bears as little relationship to work performance as homosexuality does; are we then to conclude that it is unfair — and so ought to be illegal — to fire someone for adultery, or incest for that matter? People are entitled to think that certain activities are wrong even if they have nothing to do with workplace performance, and even if overlooking such behavior might be the appropriate response of a rational economic actor.

Let's put the shoe on the other foot: Should a private employer be forced to hire someone who is an outspoken racist, so long as the racist can do the job well?

And, anyhow, *is* it irrational to think that, everything else being equal, a heterosexual might sometimes be a better employee for a particular job in a particular workforce than a homosexual, or vice versa?

As suggested, all this means that an employer should also be free to *prefer* hiring homosexuals if he wants. ENDA would make that illegal, too. So a gay bookstore or a gay bar that wanted to give a preference to hiring gays would be violating ENDA, as would a bookstore specializing in Hasidic literature if it wanted to give a preference to hiring people who were not likely to be "perceived" — ENDA's word — as homosexual. Neither preference is "irrational," nor is it irrational for a youth organization like the Boy Scouts to prefer hiring straight men, nor for an organization fighting for the right of gays to be hired by the Scouts to prefer hiring a gay spokesperson, and so on.

Under ENDA, it is too bad if the employer believes that many of his other employees, or clients or customers, might prefer to work with someone who is not a homosexual, or not a heterosexual. But it is not irrational for an employer to want to keep as many of his employees, customers, and clients as happy as possible. These third-party preferences may or may not themselves be explicitly job-related, but surely it is not irrational for an employer to indulge them. To be sure, we have made it illegal to indulge such preferences in the case of race, for instance, but it does not follow that this third-party indulgence was ever irrational for the employer, let alone that it should be made illegal as regards homosexuals just as it was for race.

Perhaps most employers, most people, would conclude that for most jobs they see no moral or rational reason to discriminate against heterosexuals or homosexuals most of the time. But that, of course, is not the issue. The issue is whether the federal government should prohibit each and every employer from making that decision at any time for any job.

Practical Problems

Stopping discrimination against homosexuals is simply not the same as stopping discrimination against African Americans. The historical background is different, the economics are different, the constitutional law is different, the morality is different, everything is different. The costs of racism were different and higher and the benefits of getting rid of it are different and greater.

And we should not be afraid to admit that, even in the case of race, the results of federal legislation were not an unalloyed good. To the contrary, there have been real social and economic costs: spurious litigation, overbearing federal bureaucracies, dubious personnel practices, and unintended consequences like "disparate impact" litigation and institutionalized reverse discrimination.

There will be a lot slippage between the ideal of the law passed and its actual consequences. The law will become reality through litigation and regulation, two costly and highly distortive media. One way or another, a new federal bureaucracy will be created, which will inevitably develop its own agenda. And that agenda will, equally inevitably, come from the gay-rights lobby and will distort and expand the scope of the original statute.

It will result in lawsuits — some legitimate and many not, but all of them expensive (ENDA of course provides that prevailing plaintiffs get attorney fees). Every homosexual with a straight supervisor, and vice versa, who isn't promoted will have a ready-made lawsuit. And the case law, like the bureaucracy's regulations, will lead in unexpected directions.

For instance, will it have to be proved that the employer knew that the plaintiff was a homosexual (this is usually not an issue in a case where the plaintiff is black, or female, or older, or in a wheelchair)? Probably so, and this of course will create an incentive for homosexual employees to make their status widely known.

To give another example, there will have to be regulations regarding what constitutes "harassment" of employees because of sexual orientation, just as we now have regulations regarding other forms of harassment. Jokes about homosexuals or in any way featuring homosexuals will now have to be policed, of course, but that’s just the beginning.

Posters that homosexuals might find offensive would be prohibited and at least limited and, conversely, posters with a homosexual orientation would have to be allowed to the same extent that those with heterosexual orientation were allowed. But what if — as is likely — heterosexuals are made more uncomfortable by gay erotica than homosexuals are by straight erotica? Does it matter that, just in raw numbers, there are many more people made uncomfortable by “gay art” than “straight art”?

Similarly, do the rules for homosexual overtures have to be identical to those governing heterosexual overtures? Overtures are now illegal if "unwelcome," but if a coworker responds angrily to a sexual overture from a homosexual employee and not from a heterosexual employee, have both been harassed, or neither, or just one and which one? If the rejection of a gay overture

is more likely to be angry or even violent than the reaction to a straight overture, do we have a "hostile environment" for gays that means the employer has violated ENDA?

And, of course, there will be inevitable tension between accommodating many religious employees and accommodating many gay employees. What if an employee Bible study group notes that gay sex is an abomination? What if a gay-rights employee discussion group comes to unflattering conclusions about Southern Baptists? What if a Christian employee feels a special calling to witness to a gay employee, or vice versa?

These questions will all have to be answered, not on a case-by-case basis by a variety of employers in different settings and with sensitivity to particular individuals and workplaces and locales, but on a one-size-fits-all basis by federal bureaucrats — under direct and indirect pressure from various interest groups — in Washington, D.C.

ENDA keeps being drafted and redrafted, which evidences how difficult the line-drawing is here. "Gender identity," of course, was not in the original bill; now imagine the fun that lawyers and bureaucrats will have figuring out the meaning of "gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to an individual's designated sex at birth." As the Bush administration said in its "Statement of Administration Policy" on ENDA (Oct. 23, 2007), "The bill turns on imprecise and subjective terms that would make interpretation, compliance, and enforcement extremely difficult. … If passed, [it] is virtually certain to encourage burdensome litigation beyond the cases that the bill is intended to reach." I am not going to quote every provision of the bill that might be ambiguous or give one pause, but I can't resist urging you to read Section 8(a) ("Dress or Grooming Standards") and ask whether this is really the sort of thing that belongs in the United States Code.

Finally, as someone who has been very critical of "affirmative action" and "disparate impact," I was glad to see that even the Left agrees that these concepts exceed and even contradict true antidiscrimination and that, therefore, ENDA ostensibly eschews them. Except it really doesn't. The prohibition in the section titled "No Preferential Treatment or Quotas" can — and no doubt will — be read very, very narrowly by any employer who wants to engage in politically correct discrimination and by any bureaucrat who wants to coerce it. And while the section titled "No Disparate Impact Claims" bars disparate-impact *lawsuits*, it will not stop bureaucracies from promulgating disparate-impact *regulations*. (This is no chimera: There are, for example, many disparate-impact regulations that have been promulgated under Title VI of the 1964 Civil Rights Act, 42 U.S.C. 2000d, even though the Supreme Court has said repeatedly that the statute prohibits only disparate treatment and allows only disparate-treatment private rights of action. See, e.g., *Alexander v. Sandoval*, 532 U.S. 275 (2001).)

In sum, doubtless there are some instances of antigay discrimination that many or even most Americans would lament and that might be prosecuted if but only if ENDA becomes law. But there will be relatively few such cases, and weighed against them must be the inevitable specious suits, the enforcement expenses, the dubious regulations — and the important costs of enacting yet another federal law of dubious constitutionality that violates free-market, freedom of association, and federalism principles. It's not worth it.

What's Really at Stake

Let me begin the last section of my testimony by quoting from S. Rept. 113-205. The report acknowledges that "[a]part from the legal remedies that ENDA will provide," there is another agenda here, namely: "[J]ust as passage of legislation such as title VII and the ADA helped to change attitudes and diminish the social acceptability of bias, prejudice and bigotry, the committee believes passage of ENDA will make clear that lesbian, gay, bisexual and transgender Americans are equal, first-class citizens. They are fully recognized and welcomed as members of our American family."

In 2015, the ENDA's proponents see this not just as a happy byproduct of the bill: It is one of the main things — perhaps *the* main thing — driving ENDA. Its purpose is not only to bring about lawsuits but, more broadly, to legislate morality. ENDA's proponents assert not just that being gay has nothing to do with how well one can do a job, but that it is wrong — as *The Washington Post* put it — for people to be penalized "simply because of who they are."

Let us assume for the sake of argument that being gay is always irrelevant to how someone performs a job, narrowly defined, and that gay people can't help being gay. We very frequently allow discrimination on the basis of immutable characteristics irrelevant to job performance. Consider good looks. Not getting a promotion because I'm ugly is just as unfair as not getting a promotion because I'm a lesbian, and there are more below-average-looking people in this country that gay people, but there is no demand for a federal law here.

What's different is the moral — or, to be more precise, the religious — angle. As noted above, it has to be recognized that ENDA will make it illegal not only to discriminate against people because they are gay, but also because they engage in gay sex. The gay rights folks hate it that discrimination against gays is often motivated by moral objections to gay sex. And those on the other side in the culture wars hate it that gays are trying to tell them that objecting to gay sex is nothing but irrational bigotry.

Like it or not, millions of Americans view gay sex as immoral. Now, suppose an employer refused to hire a man who was a notorious philanderer (or choose any other activity an employer might view as immoral: torturing kittens, for instance). The man said this was a private matter of personal preference, and that he could do the job well, but the employer decided he did not want to associate with the man and believed that many of his employees, clients, and customers felt the same way. Should the federal government step in and force the man to be hired?

Certainly adultery can be distinguished from gay sex, let alone torturing kittens, but the point is, why should federal legislation be used by some to force their moral views on everyone else — which is, rather ironically, just what ENDA does? With few exceptions, Americans should not be forbidden by a politically correct Big Brother from disapproving, shunning, and, yes, stigmatizing behavior that they find wrong. To the extent that the proponents of ENDA want it passed in order to make a national statement, like the one in the Senate Report, that gay sex is not immoral, it is perfectly legitimate for a Senator or Representative to say, "Well, if that's what you're after, then count me out. My constituents and I think it *is* immoral and, besides, we don't need and shouldn't make a national statement about it, one way or the other."

One last time: Yes, we have made such a national statement about racial discrimination, but this is different. I suppose if we are serious about making a national statement about gay sex, we will have to have a debate in Congress about whether gay sex is more like adultery or being black. Mr. Chairman, I'm not spoiling for such a discussion about the immorality of gay sex. But it is the proponents of ENDA who are forcing the issue. It is they who want a national policy pronouncement on gay sex, not their opponents. Let's leave the federal government out of this, and let's not pass national legislation aimed at marginalizing the religious beliefs of some people.

Conclusion

Thank you very much, Mr. Chairman. I'm happy to try to answer any questions that the Commission might have.

APPENDIX I

Mr. Bader published similar criticisms of ENDA at https://cei.org/blog/senate-committee-passes-enda-which-would-lead-meritless-litigation-and-erode-free-speech and http://www.examiner.com/article/senate-committee-passes-enda-which-could-harm-free-speech-and-small-business.

http://www.examiner.com/article/enda-would-harm-free-speech-vote-against-the-employment-non-discrimination-act

ENDA would harm free speech; Vote against the Employment Non-Discrimination Act

by Hans Bader, June 14, 2012 8:55 AM MST

American business is perfectly willing to hire gay and lesbian employees, and needs no federal mandate to do so. Virtually all Fortune 500 companies already ban sexual orientation discrimination in their own hiring and firing, and have done so for years. But on June 12, a Senate Committee held a hearing to promote a bill, the Employment Non-Discrimination Act (ENDA), that would hold private employers liable for potentially hundreds of thousands of dollars in punitive damages and attorneys fees if a judge or jury later decides they committed discrimination based on sexual orientation. Never mind the fact that free-market competition already provides private employers with a powerful incentive not to discriminate, as even the bill's supporters, like the Center for American Progress (CAP), have admitted in the past. As CAP conceded on March 22, "Businesses that discriminate based on a host of job-irrelevant characteristics, including sexual orientation . . . put themselves at a competitive disadvantage compared to businesses that evaluate individuals based solely on their qualifications and capacity to contribute."

Since businesses seldom discriminate based on sexual orientation, the potential benefits of ENDA are limited, at best. But ENDA would impose real and substantial costs on business, and it could trigger conflicts with free speech and religious freedom. Even if chemotherapy cured a cold, you wouldn't use it, because the "cure" would be worse than the disease. ENDA should be

rejected for the same reasons: its costly "cure" is not warranted given the increasing rarity of private-sector discrimination against gays.

ENDA would harm even businesses that hire and fire based on merit, not sexual orientation. It would also erode free speech in the workplace about sexual-orientation-related political and religious issues. Since ENDA is modeled on other employment laws that have produced many meritless discrimination lawsuits (through one-way fee shifting), ENDA, too, is likely to result in wasteful litigation and settlements paid out by employers that are actually innocent of discrimination (most employment discrimination claims turn out to be meritless).

ENDA's attorneys' fee provision, Section 12, uses the same language as other federal employment laws that incorporate the *Christiansburg Garment* standard for awarding attorneys fees — a sort of "heads I win, tails you lose" scheme under which the plaintiff gets his attorneys fees paid for by the other side if he wins, but the employer has to pay its own attorneys fees even if it wins (a win at trial typically costs an employer at least $250,000). While the language of ENDA's attorney-fee provision is seemingly neutral on its face, similar provisions in other federal employment laws have consistently been interpreted by the courts as favoring plaintiffs under the Supreme Court's 1978 *Christiansburg Garment* decision. Moreover, even if the plaintiff's case is so insubstantial that the plaintiff only wins $1 at trial, the employer can still be ordered to pay tens of thousands of dollars in attorneys fees. For example, an appeals court ruling awarded $42,000 in attorneys fees to a plaintiff who suffered only $1 in damages. (See *Brandau v. Kansas*, 168 F.3d 1179 (10th Cir.1999).) These attorney fee provisions will lead to some employers paying thousands of dollars to plaintiffs just to settle weak or meritless discrimination claims.

While private employers generally have no reason to hire or fire based on sexual orientation (and few do), ENDA's Section 4(a)(1) reaches beyond hiring and firing to vaguely defined "terms, conditions, or privileges of employment," which courts interpret as requiring certain restrictions on speech. In *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), the Supreme Court interpreted the same vague "terms or conditions" language in another statute, Title VII of the Civil Rights Act, as requiring employers to prohibit employee speech or conduct that creates a "hostile or offensive work environment" for women or blacks. The employer is liable for damages and attorneys fees if a court decides that it was negligent in failing to detect, prevent, or punish such speech or conduct. Such "hostile work environment" liability applies to each and every protected class covered by federal law, such as race, religion, national origin, and disability, not just gender. See, e.g., *Amirmokri v. Baltimore Gas and Electric Co.*, 60 F.3d 1126 (4th Cir. 1995) (employer was liable for national-origin based taunts and harassment by plaintiff's co-workers).

If ENDA were enacted, such liability would also cover "sexual orientation"-based hostile work environments, meaning that a company would potentially be liable for a "hostile work environment" resulting from anti-gay things its employees say (even if those employees' sentiments are at odds with the company's own views or policies). Thus, to avoid liability, an employer might have to silence employees with political opinions that are perceived as anti-gay, and prevent such employees from expressing political views such as opposition to gay marriage or gays in the military that could contribute to a "hostile work environment." As Professor

Eugene Volokh, one of America's leading First Amendment scholars, has noted, political speech can create a "hostile work environment," despite the serious First Amendment problems that creates. While I have supported gay marriage and the inclusion of gays in the military, I do not think employers should be sued because their employees express contrary views.

Although Section 4(g) of ENDA only bans "disparate treatment" based on sexual orientation, some judges have interpreted "disparate treatment" to include speech or conduct by the complainant's co-workers that affects the complainant's work environment, even when the speech is not aimed at the complainant, and is not motivated by the complainant's sex or minority status. For example, in *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798 (11th Cir. 2010), a unanimous court of appeals held that a female employee could sue over recurring offensive speech, such as co-workers listening to vulgar radio programs and a co-worker who looked at a picture of a nude woman on his computer screen, even though most of this speech was not aimed at her, and not motivated by her (or anyone's) sex. The appeals court expressly labeled this "disparate treatment," even though in reality, there was no differential treatment, since her male co-workers would have been just as vulgar even if there were no women around.

It is likely that ENDA will be used to silence some speech about gay issues. Some supporters of ENDA openly hope to use it to squelch viewpoints that offend them. For example, a detractor of the *New York Post*, who dislikes its coverage of gay celebrities and public figures, hopes that the *Post*'s gay employees will sue the newspaper if ENDA passes, under the theory that its content creates a hostile work environment for gay employees. In Seattle, a city human rights commission official suggested that complainant John Dill might have had a valid sexual-orientation harassment claim based on allegations that a co-worker listened to conservative talk radio shows and posted a letter from a congresswoman skeptical of repealing the military's ban on gays.

"Hostile environment" liability poses a real threat to religious businesses like Christian bookstores that are not run by a church or religious institution (and thus are not exempt under Section 6 of ENDA). Working in a fire-and-brimstone conservative Christian bookstore might be said to be a "hostile or offensive environment" for a gay or lesbian employee, but the contents of the bookstore ought nonetheless to be protected by the First Amendment. The primary purpose of the First Amendment is to protect religious and political speech that is so offensive to some people that it risks being suppressed. But there is no guarantee that the courts would respect the First Amendment in the event of a clash between ENDA and the First Amendment. Some courts are eager to stretch anti-discrimination laws to punish conservative Christians who object to gay marriage, as is illustrated by a recent New Mexico Court of Appeals ruling that expanded the reach of the state's law banning discrimination in public accommodations, and gutted the New Mexico Religious Freedom Restoration Act, in order to uphold a penalty imposed on an Evangelical Christian wedding photographer who did not want to photograph a lesbian couple's commitment ceremony. I earlier discussed that court ruling in *Elane Photography v. Willock*, and how it violates First Amendment free-speech rights, at this link. (There are only a few court rulings that have limited the reach of "hostile environment" liability for religiously or politically-offensive speech at all. See *Meltebeke v. B.O.L.I.*, 903 P.2d 351 (Or. 1995) (overturning fine for religious harassment of private employee, and citing state religious-freedom guarantees); *Rodriguez v. Maricopa Community College*, 605 F.3d 703 (9th Cir. 2010) (dismissing racial

harassment lawsuit over racially-charged anti-immigration emails, because of First Amendment free speech rights.).

But those rulings seem to be the exception rather than the rule, and the federal anti-discrimination agency, the EEOC, has completely disregarded them, as I explained at this link.) It is conceivable that if ENDA is passed, a civil-rights agency could use it to pressure some employers to adopt sexual-orientation-based hiring goals or veiled quotas, notwithstanding the language of Section 4(f) of ENDA. Activists have already pressured President Obama to mandate sexual-orientation-based hiring goals for government contractors. The Supreme Court's decision in *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977), permits employers to be held liable for "disparate treatment" (not just "disparate impact") if circumstantial evidence in the form of workplace racial imbalances suggests that the employer is guilty of discrimination. Statistical disparities are treated as creating a "prima facie" case of "disparate treatment" if the racial or sexual composition of the employer's workforce is at least two standard deviations away from the purported norm. But no one knows exactly what that norm is for sexual orientation, although the gay percentage of the workforce is probably less than five percent for most occupations.

As Gallup, America's leading pollster, notes, Americans tend to vastly overestimate the percentage of the population that is gay. "Surveys show a shockingly high fraction think a quarter of the country is gay or lesbian, when the reality is that it's probably less than 2 percent." Most people erroneously believe that a tenth or more of the population is gay — a gross overestimate based on obsolete research — and a "high" percentage of Americans even believe that a quarter or more of the population is gay. Such overestimates may make employers that have perfectly normal percentages of gay employees look to some civil-rights officials (or jurors) as if they are anti-gay under the logic of the *Teamsters* decision.

As Garance Franke-Ruta of *The Atlantic* pointed out,

> Americans systematically overestimate the percentage of the population that is gay or lesbian: In surveys conducted in 2002 and 2011, pollsters at Gallup found that members of the American public massively overestimated how many people are gay or lesbian. In 2002, a quarter of those surveyed guessed upwards of a quarter of Americans were gay or lesbian (or "homosexual," the third option given). By 2011, that misperception had only grown, with more than a third of those surveyed now guessing that more than 25 percent of Americans are gay or lesbian. Women and young adults were most likely to provide high estimates, approximating that 30 percent of the population is gay. Overall, "U.S. adults, on average, estimate that 25 percent of Americans are gay or lesbian," Gallup found. Only 4 percent of all those surveyed in 2011 and about 8 percent of those surveyed in 2002 correctly guessed that fewer than 5 percent of Americans identify as gay or lesbian.

Although Section 4(f) of ENDA purports to prohibit quotas and preferences to remedy workforce "imbalances," the courts may well interpret that provision so narrowly as to make it meaningless, as they have done with similar language in other civil-rights statutes, such as 20 U.S.C. 1681(b) and 42 U.S.C. 2000e-2 (j), whose limits on racial and gender balancing and preferences were

largely nullified by the courts in cases like *Steelworkers v. Weber*, 443 U.S. 193 (1979) and *Cohen v. Brown University*, 101 F.3d 155 (1st Cir. 1996).

In addition to banning sexual-orientation discrimination, ENDA also contains "transgender rights" provisions that ban discrimination based on "gender identity." Similar prohibitions in state laws created legal headaches for some businesses. One case pitted pitted a transgender employee with male DNA who sued after being denied permission to use the ladies' restroom, a denial that resulted from complaints filed by female employees. The employer lost in the Minnesota Court of Appeals, but then prevailed in the Minnesota Supreme Court. Another case involved a male-looking person who sued and obtained a substantial settlement after being ejected from the ladies room in response to complaints by a female customer who thought that a man had just invaded the ladies' room.

[See also http://www.mlive.com/news/saginaw/index.ssf/2015/03/transgender_members_welcome_in.html .]

APPENDIX II

Professor Volokh is a leading First Amendment expert and has testified in the past before the Commission.

http://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/12/17/marquette-university-tells-employees-opposition-to-same-sex-marriage-could-be-unlawful-harassment/

Marquette University tells employees: "Opposition to same-sex marriage" could be "unlawful harassment"

by Eugene Volokh December 17, 2014

Marquette's suspension of a professor — apparently for criticizing an instructor who seemingly refused to allow discussion of anti-gay views in her philosophy of ethics class — reminds me about the Marquette "unlawful harassment" training, which I'd been meaning to blog about.

Some months ago, Marquette conducted training on "Unlawful Harassment Prevention for Higher Ed Faculty and Graduate Assistants." As usual, the training involved some specific vignettes, with questions and answers. I have copies of the screenshots from one of the vignettes, and here are some excerpts (this John McAdams (Marquette Warrior) post also has more):

All week, Becky and Maria have been talking about their opposition to same-sex marriage….

Their coworker Hans is offended ….

Even though Becky and Maria were only expressing their opinions and didn't mean to offend, they could still be engaging in harassment. The complainant does not need to be involved in the conversation to be offended….

Liability Avoidance Tip[:] Although employees have free speech rights under the United States Constitution, in academic and other workplaces those rights are limited when they infringe upon another person's right to work in an environment free of unlawful harassment….

Practical Points[:] Having good intentions does not necessarily prevent liability for unlawful harassment.

Unfortunately, given that Wisconsin law bans sexual orientation discrimination, and that discrimination laws have been read as banning "hostile environment harassment" — including political and social commentary that offends people based on race, religion, sex and (in those states that cover this) sexual orientation discrimination — there is indeed a risk that such speech by co-workers would be found to be unlawful. But this risk is far from a certainty, and there are indeed cases (e.g., this one) stating that the First Amendment forbids legal liability for this sort of political or social commentary overheard by offended co-workers. (The First Amendment, of course, doesn't itself bar private employers from restricting employee speech, but it would indeed bar legal liability that pressures employers to restrict such speech.)

Universities, it seems to me, shouldn't just take the most liability-avoiding, speech-restrictive position in such situations — if they want to continue being taken seriously as places where people are free to investigate, debate and challenge orthodox views. A professor at Marquette (not Prof. McAdams) tells me: "[T]he new harassment training, which McAdams mentions on his blog and which we as faculty all had to go through this fall, has a chilling quality to it, … then basically urging people, when in doubt, to refrain from expression." A sad thing to see at a university.