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The Employment Non-Discrimination Act: An Argument for H.R. 3685

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Abstract:

This article examines the language of H.R. 3685 and compares it to an earlier version of the Employment Non-Discrimination Act that was introduced in April of 2007 as H.R. 2015. Drawing upon arguments from both conservative and liberal perspectives challenging the Act, this article argues that the latest version of the Employment Non-Discrimination Act, proposed in September of 2007 as H.R. 3685, offers greater promise for protecting gay, lesbian and bisexual Americans from discrimination in the workplace. The revised Employment Non-Discrimination Act will act to ensure that individuals will be protected regardless of their sexual orientation by the same fundamental principles of fairness and equality at work exemplified in this country's civil rights protections based on race, religion, sex, national origin, age or disability. These basic protections are long overdue, as gay, lesbian and bisexual, as well as heterosexual, employees have been susceptible to unfair treatment for many years and millions of hard working tax-payers have been left without Federal protection. The Employment Non-Discrimination Act merely furthers the spirit of existing civil rights law and extends similar protections to gay, lesbian and bisexual employees.

THE EMPLOYMENT NON-DISCRIMINATION ACT: AN ARGUMENT FOR H.R. 3685

Deborah L. Cook*

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I. INTRODUCTION

What was to be the career of an exceptional music teacher began in the year of 1993 in a small town outside of Grand Rapids, Michigan.[1] Mr. Gerry Crane was hired on at the public high school to revive a floundering music program and, in the following two years, Mr. Crane did just that.[2] Not only did Mr. Crane receive exceptional reviews, he was also described as "the teacher who built the music program," "one of the best teachers on the staff," and "a good role

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[1] Christine Yared, *Where Are the Civil Rights for Gay and Lesbian Teachers?*, HUM. RTS., Summer 1997, at 1, 1

[2] *Id.*

model for our students."[3] It was not until the summer of 1995 that an unknown individual within this small town got wind of Mr. Crane's planned commitment ceremony to his male life partner that everything began to change.[4]

It began at a school board meeting where parents demanded that Mr. Crane resign or be fired.[5] While parents removed their children from his classes, Mr. Crane continued to teach even as his lifestyle was debated in the local, state and national media.[6] Mr. Crane experienced pain and stress on a daily basis.[7] The school board issued a public statement in front of 700 people that "individuals who espouse homosexuality do not constitute proper role models as teachers" and warned Mr. Crane that he would be investigated and monitored.[8] Nevertheless, Mr. Crane went to work. Neither the State of Michigan nor Federal law provided him any protection against the hostile working environment to which he was subjected daily.[9] On December 27, 1996, Mr. Crane collapsed, went into a coma, and two days later, died at the age of 32.[10] The doctor who performed his autopsy revealed that Mr. Crane suffered from a congenital heart defect, which, while normally not fatal, was aggravated by the stress from his struggle to maintain his job.[11]

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[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* at 2.

[11] *Id.*

It is currently legal in thirty states[12] to fire persons based on their sexual orientation. Discrimination in the workplace that affects gay, lesbian and bisexual, as well as heterosexual, Americans occurs on a widespread basis and has been well documented over time.[13] The proposed federal Employment Non-Discrimination Act of 2007 (ENDA)[14] addresses this issue. When passed, ENDA will protect all Americans who either are or may be perceived to be gay, lesbian or bisexual by making it illegal for employers to fire, refuse to hire, and refuse to promote employees based on their perceived sexual orientation.[15] In addition, ENDA will prohibit employers from subjecting gay, lesbian and bisexual employees to a discriminatorily hostile or abusive working environment.[16] ENDA also creates a cause of action for an individual who is discriminated against because he or she is "perceived" to be homosexual for failing to conform to sex or gender stereotypes associated with the individual's sex, whether or not he or she is heterosexual or homosexual.[17]

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[12] CAL. GOV'T CODE § 12921(a) (West 2001); COLO. REV. STAT. §24-34-401-02 (2007); CONN. GEN. STAT. §46a - 81c-m (1991); D.C. CODE §2-1402.11 (2006); HAW. REV. STAT. §378-1 – 3 (1985); 775 ILL COMP. STAT. 5/1 – 102 (2007); IOWA CODE §216.6 (2008); ME. REV. STAT. ANN. tit. 5, §4571 (2008); COMAR 01.01.1995.19 (2002); MASS. GEN. LAWS ANN. Ch. 151B, § 3-4 (West 2001); MINN. STAT. §363A.01 to §363A.41 (2002); NEV. REV. STAT. 613.330 (2005)*;* N.H. REV. STAT. ANN. §§ 21-I:42 (2002), 354-A:2 (2002), 354-A:6 (2002), REV. STAT. ANN. §§ 21:49 (2002); N.J. STAT. ANN. § 10:5-12 (West 2007); N.M. STAT. ANN. §§ 28-1-2, 7, 9 (West 2003), N.M. STAT. ANN. § 28-1-7 (West 2001); NY EXEC. LAW § 296, 296-a. (2002); *Oregon Equality Act* (2007)*;* R.I. GEN. LAWS § 28-5-3 (2001), R.I. GEN. LAWS § 28-5-7 (2001), R.I. GEN. LAWS § 34-37-4 (2001), R.I. GEN. LAWS § 34-37-4.3 (2001), VT. STAT. ANN. tit. 21, § 495 (1991), VT. STAT. ANN. tit. 3, § 963 (1991); WASH. REV. CODE § 49.60.180 (2006); WIS. STAT. §111.31 (1999) have laws that prohibit discrimination in employment based on sexual orientation.

[13] George Miller, Employment Non-Discrimination Act of 2007, H.R. Doc. No. 110-406, at 1 (2007) [hereinafter Labor Report].

[14] Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007). H.R. 3685 was introduced on September 27, 2007 in the Senate of the United States on November 8, 2007 by Senator Edward Kennedy (D-MA)].

[15] *Id*. at § 4.

[16] *Id.*

[17] *Id.*

Various versions of the Employment Non-Discrimination Act have been introduced in both the House and the Senate since its inception in 1994. None passed until September 2007, when the House of Representatives voted to adopt H.R. 3685.[18] The Senate, however, failed to act on its equivalent to H.R. 3685.[19]

This article examines the language of H.R. 3685 and compares it to an earlier version of ENDA that was introduced in April of 2007 as H.R. 2015. The article argues that the latest version of the Employment Non-Discrimination Act, proposed in September of 2007 as H.R. 3685, offers greater promise for protecting gay, lesbian and bisexual Americans from discrimination in the workplace.

The article first addresses the history of the Employment Non-Discrimination Act and provides detailed explanations and comparisons of H.R. 2015 and H.R. 3685. The article then analyzes and rebuts objections that have been made against H.R. 3685 by critics on both the right and the left. It concludes that the Employment Non-Discrimination Act is a crucial step the federal government must take in order to ensure protection for those gay, lesbian and bisexual employees who are discriminated against because of their sexual orientation, as Title VII's Civil Rights Act and many state and local governments fail to protect them.

II. THE EMPLOYMENT NON-DISCRIMINATION ACT (ENDA)

The Employment Non-Discrimination Act of 2007 (H.R. 3685) passed the House of Representatives by a vote of 235-184 on November 7, 2007.[20] H.R. 3685 would make it an

[18] *Library of Congress*, Thomas, http://thomas.loc.gov/cgi-bin/bdquery/z?d110:HR03685:@@@R.

[19] *Id.*

[20] *Id.*

unlawful employment practice for an employer a) "to fail or refuse to hire or to discharge any individual, otherwise to discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual's actual or perceived sexual orientation;" or b) "to limit, segregate, or classify the employees or applicants for employment of the employer in any way that would deprive or tend to deprive any individual of employment or otherwise adversely affect the status of the individual as an employee, because of such individual's actual or perceived sexual orientation."[21] Enactment of ENDA is intended to fill a gap in the coverage offered by Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, which prohibits employment discrimination based on race, sex, religion, national origin, or color, by including protection for gay, lesbian, and bisexual employees, as well as for heterosexual employees who are mistakenly perceived to be gay, lesbian or bisexual.[22]

A. HISTORY OF THE EMPLOYMENT NON-DISCRIMINATION ACT

On January 14, 1975, Congresswoman Bella Abzug (D-NY) introduced the first bill that addressed sexual orientation discrimination in the workplace.[23] H.R. 166 would have amended the Civil Rights Act of 1964 to prohibit discrimination on the basis of "affectional or sexual orientation, sex, or marital status" in equal employment opportunities and in other areas.[24] The

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[21] H.R. 3685, 110th Cong. § 4 (2007).

[22] Erika Birch et al, *Is Legislation Necessary to Protect the Rights of Transgendered Employees?*, ADVOC., Oct. 2008, at 24, 24.

[23] Labor Report, *supra* note 13, at 2; *see also* H.R. 166, 94th Cong. (1975). Congresswoman Abzug introduced a bill of the same nature two additional times during the 94th Congress. S*ee* H.R. 5452, 94th Cong. (1975); H.R. 13928, 94th Cong. (1975).

[24] Labor Report, *supra* note 13, at 2.

bill was not considered by the Judiciary Committee.[25] From 1975 until 2005, similar bills were introduced to amend the Civil Rights Acts to prohibit discrimination on the basis of sexual orientation.[26] Although referred to various committees, such as the House Judiciary Committee, the House Education and Labor Committee and the Senate Labor and Human Resources Committee, no further action was ever taken on these bills.[27]

The Employment Non-Discrimination Act (ENDA) was first introduced by Senator Edward Kennedy (D-MA) on June 23, 1994.[28] S. 2338 was referred to the Senate and Human Resources Committee, which held the first hearing on the issue on July 29, 1994.[29] Senator Kennedy introduced "ENDA of 1995" on September, 5, 1995.[30] The bill was brought before the Senate by unanimous consent and the Senate rejected the bill by a narrow margin with a vote of 50-49.[31] The vote marked the first time Congress entertained the idea of a Federal non-discrimination clause protecting gays and lesbians.[32]

In 1998, President Clinton sought to enforce a prohibition against discrimination based on sexual orientation in the federal civilian workforce by issuing Executive Order 13087.[33]

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[25] *Id.*

[26] *Id*. at 2–8.

[27] *Id.*

[28] *Id*. at 5. Senator Kennedy introduced a bill of the same nature three additional times; S. 2056, 104th Cong. (1995); S. 1274, 107th Cong. (2001); S. 1705, 108th Cong. (2003).

[29] Labor Report, *supra* note 13, at 5; *see also Employment Non-Discrimination Act of 1994; Hearing on* S. 2238 *Before the Senate Labor and Human Resources Committee*, 103rd Cong. 103–703 (1994).

[30] Labor Report, *supra* note 13, at 6.

[31] *Id. See also Employment Non-Discrimination Act of 2005; Hearing on S. 2056 Before the Senate,* 104th Cong. 105–279 (1995).

[32] Labor Report, *supra* note 13, at 6.

[33] Human Rights Campaign, Timeline: The Employment Non-Discrimination Act, http://www.hrc.org/issues/5636.html (last visited 10/29/2008).

President Clinton also urged Congress to pass ENDA to extend these basic employment protections to all gay, lesbian and bisexual employees.[34] He argued that ''individuals should not be denied a job on the basis that has no relationship to their ability to perform work.''[35]

B. EMPLOYMENT NON-DISCRIMINATION ACT OF 2007 AS PROPOSED BY H.R. 2015

A gender-identity inclusive ENDA was introduced by Congressman Barney Frank on April 24, 2007 as H.R. 2015.[36] H.R. 2015 was modeled after a New Jersey Amendment.[37] As proposed, H.R. 2015 prohibited employment discrimination on the basis of actual or perceived sexual orientation or gender identity by covered entities, including actions based on the actual or perceived sexual orientation or gender identity of a person with whom the individual associates or has associated.[38] The Act defined "covered entity" as an employer, employment agency, labor organization, or joint labor-management committees.[39] It defined gender identity as "the gender-related identity, appearance, or mannerisms, or other gender-related characteristics of an individual, with or without regard to the individual's designated sex at birth."[40] Thus, for the first time, the protections of ENDA were extended to transgendered individuals.

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[34] Peter Freiberg, *President's Order Protects Workers: Anti-Gay discrimination banned in civilian jobs*, THE FED. GLOBE, June 5, 1998, http://www.fedglobe.org/actions/a.htm.

[35] *Id.*

[36] Lou Chibbaro, *Lawmakers to introduce trans-inclusive ENDA in '07*, WASH. BLADE, October 27, 2006, http://www.washblade.com/2006/10-27/news/national/enda.cfm [hereinafter Trans-inclusive ENDA].

[37] N.J. STAT. ANN. § 10:5-12 (West 2007).

[38] Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. § 4 (2007).

[39] H.R. 2015, 110th Cong. § 3 (2007).

[40] *Id.*

H.R. 2015 addressed transgendered employees more specifically in regards to shared showers or dressing facilities and grooming standards. Employers were permitted to deny requests for shared showers or dressing facilities where being fully unclothed was unavoidable as long as adequate facilities were provided consistent with the employee's gender identity.[41] It would also not be unlawful for an employer to require employees to adhere to reasonable dress and grooming standards so long as the employer allowed an employee who had undergone gender transition prior to employment, or had notified the employer they would be undergoing gender transition after the time of employment, to adhere to the same grooming standards for the gender to which the employee was transitioning or had transitioned.[42]

Provisions of H.R. 2015 did not apply to (1) the relationship between the United States and members of the armed forces; and (2) religious organizations.[43] H.R. 2015 specifically stated that the Act did not repeal or modify any federal, state, territorial, or local law creating a special right or preference concerning employment for a veteran.[44]

The exemption for religious organizations under H.R. 2015 was narrowed from prior versions of the bill.[45] Prior versions included a broadly stated religious exemption patterned after that in Title VII of the Civil Rights Act of 1964. However, H.R. 2015 provided an exemption only in very specific, clearly defined circumstances. Thus, Section 6(a) stated that the Act "shall not apply to any of the employment practices of a religious corporation, association, educational institution, or society which has [as] its primary purpose religious ritual or worship

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[41] H.R. 2015, 110th Cong. § 8 (2007).

[42] *Id.*

[43] *Id*. §§ 6–7.

[44] *Id*. § 7.

[45] Trans-inclusive ENDA, *supra* note 36.

or the teaching or spreading of religious doctrine or belief."[46] If an organization found itself a covered entity under section 6(a), it might still be excluded under section 6(b) of the Act, which stated that an employer would be exempt with respect to an employee "whose primary duties consist of teaching or spreading religious doctrine or belief, or supervision or participation in religious ritual or worship."[47] Section 6(c) of H.R. 2015 also allowed for a religious organization to require applicants and employees to conform to religious tenets the organization declared to be significant. These tenets were specifically excluded from judicial or administrative review.[48]

H.R. 2015 prohibited preferential treatment or quotas and allowed only disparate treatment claims as opposed to disparate impact claims.[49] Accordingly, a claim could only be brought for intentional discrimination against an individual based on his or her sexual orientation; a challenge against discrimination that derived from application of a facially neutral rule, which results in an adverse impact against an individual of a certain sexual orientation, was not authorized.[50] H.R. 2015 also outlawed retaliation by a covered entity.[51] This whistle blowing provision made it unlawful for an employer to retaliate against an employee who reported discriminatory conduct. H.R. 2015 also provided for the construction of the Act regarding employer rules and policies.[52] In general the Act was not to be construed to prohibit an employer

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[46] H.R. 2015, 110th Cong. § 6 (2007).

[47] *Id.*

[48] *Id.*

[49] *Id*. § 4.

[50] Joanna Grossman, *The House Passes the Employment Non-Discrimination Act of 2007: A Limited Symbolic Victory for Gay and Lesbian Employees, and One that Will Likely Result in a Presidential Veto*, FIND LAW, November 13, 2007, http://writ.news.findlaw.com/grossman/20071113.html.

[51] H.R. 2015, 110th Cong. § 5 (2007).

[52] *Id*. § 8.

from enforcing its own policies so long as it did not circumvent the purpose of the Act.[53] Thus, employers were permitted to enforce their own policies on sexual harassment, as long as the policies were uniformly applied to all individuals regardless of actual or perceived sexual orientation or gender identity.[54] A covered entity was not required to treat a same sex couple the same as a married couple for purposes of employee benefits, but the bill gave States the option to establish rights, remedies, or procedures for the provision of employee benefits to gay, lesbian, bisexual and transgender employees and their domestic partners.[55]

H.R. 2015 proved particularly controversial. Representative Frank received letters of opposition from politically influential organizations objecting to the narrower version of the religious exemption.[56] When he and other House leaders determined on a vote count that a more inclusive bill covering transgendered individuals could not be passed, Representative Frank introduced H.R. 3685 on September 28, 2007.[57] H.R. 3685 was referred to the House Committee on Education and Labor, Administration, Judiciary, and Oversight and Government Reform.[58] On October 18, 2007, the Committee on Education and Labor met to mark up H.R. 3685 and subsequently reported the bill favorably by a vote of 27-21 to the House of Representatives.[59]

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[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] Representative Barney Frank (D-MA), Statement of Congressman Barney Frank in Response to a Recent Press Release by Lambda Legal Raising Questions About ENDA, http://www.house.gov/frank/enda100307.html. (last viewed 09/05/2008).

[57] *Id.*

[58] Labor Report, *supra* note 13, at 9.

[59] *Id.*

C. EMPLOYMENT NON-DISCRIMINATION ACT OF 2007 AS PROPOSED BY H.R. 3685

After careful consideration by Congressman Frank and other House leaders regarding certain provisions of H.R. 2015, a revised version of the Employment Non-Discrimination Act was introduced on September 27, 2007 as H.R. 3685.[60] Like H.R. 2015, H.R. 3685 makes it an unlawful employment practice for covered entities, including employers, employment agencies, labor organizations, and joint labor-management committees, to discriminate against an individual on the basis of actual or perceived sexual orientation, including actions based on the actual or perceived sexual orientation of a person with whom the individual associates or has associated.[61] However, the revised bill no longer forbade discrimination on the basis of gender identity.

Section 3 of H.R. 3685 defines certain key terms, most of which are used in Title VII's Civil Rights Act of 1964.[62] The term "sexual orientation" is defined as "homosexuality, heterosexuality and bisexuality."[63] An "employer" is a person engaged in business activity that affects commerce who employs 15 or more employees; therefore, employers with less than 15

[60] Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007).

[61] *Id*. § 4.

[62] Labor Report, *supra* note 13, at 31.

[63] H.R. 3685, 110th Cong. § 3 (2007).

employees are exempt from the Act.[64] Volunteers and private membership clubs are also excluded.[65]

Like H.R. 2015, H.R. 3685 prohibits preferential treatment or quotas and does not require an employer to justify neutral practices that result in a disparate impact against employees of a particular sexual orientation.[66] H.R. 3685 also retains a non-retaliation provision, which makes it unlawful to discriminate against an individual who opposed any practice outlawed by the Act or who made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under the Act.[67]

As noted above, one of the primary reasons for revising the bill was to broaden the religious organizations exemption provided for by H.R. 2015 after House members received criticisms from politically influential organizations. H.R. 3685 makes the Act inapplicable to a corporation, association, educational institution, or society that is exempt from religious discrimination provisions under the Civil Rights Act of 1964.[68] This is the same broad religious organizations exemption included in all prior versions of ENDA, and if an organization qualifies for Title VII's religious exemption from religious discrimination claims, it qualifies for ENDA's exemption as well.[69]

In harmony with H.R. 2015, the revised version of ENDA makes the Act inapplicable to the relationship between the United States and members of the Armed Forces, including the

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[64] *Id.*

[65] *Id.*

[66] *Id*. § 4.

[67] *Id*. § 5.

[68] *Id*. §§ 3, 6.

[69] Labor Report, *supra* note 13, at 31.

Coast Guard.[70] The Act further declares it does not repeal or modify any federal, state, territorial, or local law creating a special right or preference concerning employment for a veteran.[71]

H.R. 3685 also prohibits construing the Act to prohibit a covered entity from enforcing rules and policies that do not intentionally circumvent the Act's purposes if the rules or policies are designed for, and uniformly applied to, all individuals regardless of actual or perceived sexual orientation.[72] The bill further prohibits construing the Act to limit a covered entity from taking adverse action against an individual because of a charge of sexual harassment against that individual, provided that sexual harassment rules and policies are designed for, and uniformly applied to, all individuals regardless of actual or perceived sexual orientation.[73]

Also in congruence with H.R. 2015, the revised version of ENDA prohibits construing the Act to require a covered entity to treat couples who are not married in the same manner as the covered entity treats married couples for purposes of employee benefits.[74] However, unlike H.R. 2015, H.R. 3685 no longer allows for a State or political subdivision of a State to establish rights, remedies, or procedures for the provision of employee benefits to non-married employees for the benefit of their domestic partners.[75] H.R. 3685, as introduced to the Senate on November 8, 2007, is careful to reference the Defense of Marriage Act and declares that under ENDA, the

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[70] H.R. 3685, 110th Cong. § 7 (2007).

[71] *Id.*

[72] *Id*. § 8.

[73] *Id.*

[74] *Id.*

[75] H.R. 2015, 110th Cong. § 8 (2007).

terms "married" and "marry" refer to a legal union between one man and one woman as husband and wife so as to deter future litigation over the issue.[76]

Section 11 of H.R. 3685 waives states' Eleventh Amendment immunity from suit for discrimination based on sexual orientation. A state's receipt or use of Federal financial assistance for a program or activity constitutes a waiver of sovereign immunity.[77] Section 15 of the bill preserves provisions of other Federal, state, or local laws providing protection from discrimination.[78] Section 16 ensures that if one or more provisions of the Act are invalidated by a court, the remainder of the Act remains in effect.[79]

III. OBJECTIONS TO THE EMPLOYMENT NON-DISCRIMINATION ACT AS PROPOSED BY H.R. 3685

A. EXECUTIVE OFFICE OF MANAGEMENT AND BUDGET VETO RECOMMENDATION

The Office of Management and Budget (OMB) released a statement opposing the bill and recommending its veto by President Bush.[80] The OMB objected to the bill on both constitutional and policy grounds.[81] As to their constitutional objections, the OMB alleged that H.R. 3685 is inconsistent with the right to the free exercise of religion and that damage actions against State entities may violate the State's immunity under the Eleventh Amendment. The OMB's policy

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[76] H.R. 3685, 110th Cong. § 8 (2007).

[77] H.R. 3685, 110th Cong. § 11 (2007).

[78] *Id*. § 15.

[79] *Id*. § 16.

[80] EXECUTIVE OFFICE OF THE PRESIDENT, OFFICE OF MANAGEMENT AND BUDGET, STATEMENT OF ADMINISTRATIVE POLICY, H.R. 3685 – THE EMPLOYMENT NON-DISCRIMINATION ACT. (2007), http://www.whitehouse.gov/OMB/legislative/sap/110-1/hr3685sap-r.pdf [hereinafter OMB Statement].

[81] *Id.*

objections contended that H.R. 3685 turns on imprecise and subjective terms, making interpretation, compliance and enforcement arduous.

The OMB's first constitutional argument alleged that "H.R. 3685 was inconsistent with the right to the free exercise of religion."[82] As an example, the OMB asserted that while schools owned or directed toward a particular religion would be exempt, a school that emphasized religious principles broadly would have its religious liberties burdened.[83] While the OMB never addressed exactly how schools that broadly emphasize religious principles would be burdened, the argument is addressed consistently throughout the right.[84]

The Republican[85] view expressed within House Report 110-406 proclaims that, as written, H.R. 3685 fails to protect the hiring prerogatives of religious schools.[86] The argument rejects the notion that H.R. 3685's religious exemption is the same exemption found in Title VII.[87] Specifically, while Title VII broadly exempts religious corporations, associations, societies, and educational institutions in section 702(a), H.R. 3685 contains a two-part test to

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[82] *Id.*

[83] *Id.*

[84] H.R. Rep. No. 110-406, pt. 1, at 53 (2007).

[85] Republican members of the Committee on Education and Labor constituted the minority view in the report concerning H.R. 3685. These members asserted 1) the bill fails to protect the hiring prerogatives of religious schools; 2) the bill provides vague prohibitions based on ''perceived'' sexual orientation; 3) policies conditioning employment on marriage undermines the ability of states to define, preserve and protect the institution of marriage; 4) the protection from retaliation provision fails to protect those who may not agree with employer policies relating to this Act, because of sincerely held beliefs regarding sexual orientation; and 5) protection against discrimination based on gender identity, although absent from the bill, is up for future consideration and is premature given privacy issues that ensure litigation will be abound. Members backing this view were Howard P. McKeon, Pete Hoekstra, Mark Souder, Joe Wilson, John Kline, Cathy McMorris Rodgers, Tom Price, C.W. Boustany, Jr., David Davis and Tim Walberg. H.R. Rep. No. 110-406, at 52 (2007).

[86] *Id.*

[87] *Id.*

determine if an educational institution qualifies for an exemption.[88] The test to which the Republicans refer can be found in Section 3(a)(8) of H.R. 3685 which requires: 1) that the school be "controlled, managed, owned, or supported by a particular religion" or 2) have its curriculum "directed toward the propagation of a particular religion."[89] Under this test, the argument sets forth that "a non-denominational, independent faith-based school that is not controlled or supported by a particular religion, or whose curriculum is not directed toward propagation of a particular religion, may not be exempt from [H.R. 3685] even though religion forms the foundation of its mission."[90]

In support of their argument, the Republicans refer to a letter written to Congressman Tim Walberg (R-MI) by Duane Litfin as President of Wheaton College.[91] In the letter, while Litfin concedes that H.R. 3685's religious exemption is consistent with the Civil Rights Act, he expresses concern that Title VII's categorical exemption is undermined by Section 3(a)(8) of H.R. 3685's definition of a religious organization that may cast doubt on whether Wheaton College, as a college not controlled by a religious organization but a clearly defined religious identity, would be exempt.[92] In writing this letter to Congressman Walberg, Litfin's intentions are expressly stated as he urges Congress to remove the "problematic religious definition language currently in ENDA and [to] ensure that the Act categorically exempts religious organizations as in Section 702(a) of Title VII of the Civil Rights Act."[93] In closing their

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[88] *Id.*

[89] H.R. 3685, 110th Cong. §3 (2007).

[90] H.R. Rep. No. 110-406, pt. 1, at 53–54 (2007).

[91] *Id.* at 54.

[92] *Id*.

[93] *Id*.

argument, the Republicans stated they would support an amendment that would appropriately expand the exemption to include religious and faith-based schools.[94]

In response to the Wheaton argument, Representative George Miller (D-CA) and Representative Bart Stupak (D-MI) recognized the religious exemption within H.R. 3685 has caused a lot of confusion and, in an effort to clarify the exemption, proposed an amendment to H.R. 3685 during a floor proceeding while voting on the Employment Non-Discrimination Act of 2007.[95] The amendment would elucidate that the religious liberties of religious schools, including religious schools which are not affiliated with any particular church or denomination, will be protected.[96] Under the amendment, a religious corporation, association, or school would be categorically exempt from ENDA.[97]

As requested by the president of Wheaton College and other organizations, such as the Council for Christian Colleges and Universities, under the amendment, the religious exemption will ensure the same protection as provided by section 702(a) and 703(e)(2) of Title VII as it states "[t]his act shall not apply to a corporation, association, educational institution, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Act of 1964 pursuant to 702(a) or 703(e)(2) of such Act (42 U.S.C. 2000e-1(a); 2000e-2(e)(2))."[98] Section 702(a) of the Civil Rights Act states that Title VII "[s]hall not apply to . . . a[n] educational institution…with respect to the employment of individuals of a particular religion to

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[94] *Id.* at 55.

[95] 110 CONG. REC. H13229 (daily ed. Nov. 7, 2007) (statement of Rep. Miller).

[96] *Id*.

[97] *Id*.

[98] Labor Report, *supra* note 13, at 54.

perform work connected with the carrying on by such…educational institution…[and] its activities."[99] Section 703(e)(2) states "[i]t shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion."[100]

The Miller-Stupak Amendment was voted on by the House and passed by a 402-25 vote; 10 representatives did not vote.[101] The revised version of H.R. 3685 was submitted to the Senate on November 8, 2007 and included the new exemption for religious organizations within section 6 of the bill.[102] This amendment imports the many decades of case law on Title VII's religious exemption into ENDA.[103] Therefore, assuming that the OMB's objection in regards to schools that emphasize religious principals broadly will not be protected is valid, the OMB objection has been taken to heart and an attempt has been made to alleviate its concern by making the exemption broader.

However, the OMB's objection is not valid at all. To create an exemption that would encompass any school that advances a religious outlook would certainly produce a slippery slope

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[99] 42 USC § 2000e-1(a) (1964).

[100] 42 USCS § 2000e-2(e)(2) (1964).

[101] 110 CONG. REC. H13229 (daily ed. Nov. 7, 2007) (statement of Rep. Miller).

[102] H.R. 3685, 110th Cong. §6 (2007).

[103] 110 CONG. REC. H13229 (daily ed. Nov. 7, 2007) (statement of Rep. Miller).

by creating an opening for secular institutions to claim they are essentially religious in nature. By further broadening the exemption, institutions secular by nature would set forth a religious outlook in order to evade liability.

Title VII case law demonstrates that in order to be entitled to the 702(a) or 703(e)(2) religious exemptions, an institution must be demonstrably religious.[104] For example, *EEOC v. Kamehameha Sch./Bishop Estate* exemplifies this theory.[105] In *Kamehameha*, Carole Edgerton, a non-Protestant, contacted the school district to apply for a position as a substitute teacher but was denied the position because the district was required to hire Protestant applicants only.[106] Edgerton filed a charge of religious discrimination with the EEOC and the EEOC subsequently filed suit alleging religious discrimination in employment in violation of the Civil Rights Act of 1964.[107] In deciding this case, the 9th Circuit recognized Congresses' conception of the 702(a) religious exemption was not a broad one, as its legislative history showed all involved assumed only those institutions with extremely close ties to organized religion would be covered.[108] The court further noted its decision in *EEOC v. Townley Engineering & Mfg. Co.* which clarified that 702(a) "does not exempt an institution that is 'merely affiliated' with a religious organization."[109]

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[104] *See* EEOC v. Kamehameha Sch./Bishop Estate, 990 F.2d 458 (9th Cir. 1993) (affirming the district court's approach in weighing all significant religious and secular characteristics to determine whether the corporation's purpose and character are primarily religious); Samford v. Killinger, 113 F.3d 196 (11th Cir. 1997); EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 618 (9th Cir. 1988) (holding "all significant religious and secular characteristics must be weighed to determine whether the corporation's purpose and character are primarily religious"); EEOC v. Mississippi College, 626 F.2d 477 (5th Cir. 1980); LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217 (3d Cir. Pa. 2007).

[105] *Kamehameha*, 990 F.2d at 458.

[106] *Id.* at 459.

[107] *Id*.

[108] *Id.* at 460.

[109] EEOC v. Townley Engineering & Mfg. Co., 859 F.2d 610, 617 (9th Cir. 1988).

The 9th Circuit has set forth a test to determine whether an institution falls within the limited exemption for religious institutions and states that each case must turn on its own facts.[110] To avail itself of the exemption when a school is not owned by a church, a court must determine whether the educational institution is a religious organization by looking to such factors as "[o]wnership and affiliation, purpose, faculty, student body, student activities, and curriculum of the Schools [as] either essentially secular, or neutral as far as religion is concerned."[111]

Upon analyzing these factors to the facts in the *Kamehameha* case, the court concluded that the schools reflected a primarily secular, rather than primarily religious, orientation.[112] Under the ownership and affiliation prong, the court found that the schools had never been controlled or supported by a religious organization, nor had they ever been affiliated with any denomination of Protestants or any other religious organization.[113] While the schools were a part of the Bishop Trust, the Bishop Trust was primary secular, The Bishop Estate annual reports did not mention religion and the schools' annual reports mentioned religion only as a form of ancillary support.[114]

As to the purpose prong, the court found the purpose and emphasis of the schools shifted over time from providing religious instruction to furnishing students with ethical principles that would allow them to make their own moral judgments.[115] As to the faculty, the school adhered to the Protestant only requirement; however, teachers were never required to maintain active

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[110] *Kamehameha*, 990 F.2d at 460.

[111] *Id.* at 460–61.

[112] *Id.* at 461.

[113] *Id*.

[114] *Id*.

[115] *Id.* at 462.

membership in a church, nor were they required to integrate their beliefs into their work.[116] In regards to the student body, the school did not consider the religious affiliation of prospective students and less than one-third of the on-campus students were Protestants.[117] Some school activities were found to have religious overtones.[118] In classes up to the eighth grade, students were led by a daily prayer, athletic teams prayed before games, mandatory school functions included prayer and hymns, the schools daily bulletin printed a bible verse, and all boarding students were required to say grace before meals and to attend mandatory church services every Sunday.[119] Student curriculum consisted of an array of secular courses and no effort was made to instruct students in Protestant doctrine.[120] However, students up to the sixth grade were taught with religious songs, bible stories and prayer and upper level students were exposed to comparative studies of religion.[121]

In conclusion the court held that "[r]eferences to Bible verses, comparative religious education, and even prayers and services are common at private schools and cannot suffice to exempt such schools from [702(a)]."[122]

As a result, the OMB's contention that H.R. 3685 is inconsistent with the right to the free exercise of religion is either: 1) no longer relevant given the Miller-Stupak amendment which broadens the exemption to provide the same protection as provided under Title VII; or 2) the

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[116] *Id*.

[117] *Id*.

[118] *Id*.

[119] *Id.* at 462–63.

[120] *Id*. at 463.

[121] *Id*.

[122] *Id*.

contention is completely invalid because it would open the exemption to institutions that are primarily secular in nature. These institutions should be held to the same laws as all other secular organizations and should not be provided with special treatment.

The OMB's second constitutional objection alleged that "damage actions against State entities…may violate the State's immunity under the Eleventh Amendment."[123] Again, the OMB does not expand on its argument. This argument is flawed on two different grounds: 1) it is by no means certain that individuals could even sue state employers; and 2) if they can, mechanisms employed in ENDA for allowing actions against state employers pass constitutional muster. However, the Eleventh Amendment of the U.S. Constitution expressly states that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."[124] Reading the Amendment literally, one might conclude that an individual may bring an action against his or her own state; however, the Supreme Court held in *Hans v Louisiana* that the Eleventh Amendment in fact barred federal suits against a state by that state's own citizens.[125] Apparently the OMB's argument is that a private citizen is barred from bringing a federal suit against a state. Therefore, a gay, lesbian or

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[123] OMB Statement, *supra* note 80.

[124] U.S. CONST. amend. XI

[125] Hans v. Louisiana, 134 U.S. 1, 17–18 (1890). (As a citizen of Louisiana, Hans brought an action against the State of Louisiana alleging the State, by changing its state constitution, impaired a contractual obligation in violation of Article I , Section 10 of the United States Constitution. The State of Louisiana defended the action under the doctrine of sovereign immunity. The issue before the court was whether a state can be sued in a Circuit Court of the United States by one of its own citizens. The court held that "a citizen [cannot] sue a state unless the state consent[s] to jurisdiction.) *See* Kimel v. Florida Bd. of Regents, 528 U.S. 62, 72-73, 145 L. Ed. 2d 522, 120 S. Ct. 631 (2000); College Savings Bank v. Florida Prepaid Postsecondary Educ.. Expense Bd., 527 U.S. 627, 669-670, 144 L. Ed. 2d 575, 119 S. Ct. 2199 (1999); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54, 134 L. Ed. 2d 252, 116 S. Ct. 1114 (1996); Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 363 (2001).

bisexual employee would not be able to bring a claim under the Employment Non-Discrimination Act without violating the State's immunity under the 11th Amendment.

It can be further argued that while Congress has been provided with the power under Section 5 of the 14th Amendment to enforce provisions under the Article against the States, the courts have placed close limits on Congress' remedial and substantive powers.[126] In *City of Boerne v. Flores*, the court introduced a test for deciding whether Congress had exceeded its section five powers, which is called the "congruence and proportionality" test.[127] The test requires Congress to show "congruence and proportionality" between the end it aims to reach and the means it chooses to reach those ends.[128] This test has had great importance in the context of the Eleventh Amendment. Damage actions against state entities provided for by the Employment Non-Discrimination Act are alleged to be problematic because discrimination based on sexual orientation is likely to fail this test.[129] Failure of the test would occur as a result of sexual orientation's lack of protected class status within the courts.[130]

Court analysis of the Age Discrimination Employment Act proves the "congruence and proportionality" test is indeed a tough test to pass. The Supreme Court held in *Kimel v. Florida Board of Regents* that the doctrine of sovereign immunity barred federal jurisdiction over Age

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[126] Dale Carpenter, *Bush to veto ENDA?*, http://volokh.com/archives/archive_2007_10_21-2007_10_27.shtml#1193191212. (last viewed 09/16/2008).

[127] *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). (Flores, the Catholic Archbishop of San Antonio, brought a lawsuit against the City of Boerne, Texas for denying his construction permit request alleging the denial was a violation of the Religious Freedom Restoration Act of 1993. The Act was enacted to protect the rights of citizens to the free exercise of religion beyond that which a court would recognize. The court held the Act to be an unconstitutional use of Congress' enforcement powers as the judicial branch is the only branch with the power to define the substantive rights of an individual as guaranteed by the Fourteenth Amendment).

[128] *Id*. at 530.

[129] Carpenter, *supra* note 126.

[130] *Id.*

Discrimination Employment Act suits brought by private individuals against the states.[131] The Court held Congress lacked power under the Fourteenth Amendment to abrogate the state's sovereign immunity.[132] The Court stated that the Age Discrimination Employment Act was not an appropriate proportional law under Section 5 of the Fourteenth Amendment because age is not a suspect class.[133] The holding in *Kimel* suggests that so long as sexual orientation is not a protected class, a discrimination claim brought against a state based on sexual orientation will raise sovereign immunity issues and will be barred.[134] Thus, under this reasoning, the OMB's fears appear unjustified.

There is a substantial argument that Congress may in fact have the power to enforce this provision against the states. The Employment Non-Discrimination Act's authorization for individual suits against State government employers derives from Congress' Enforcement Power under Section 5 of the Fourteenth Amendment and Congress' Spending Power under Article 1 of the United States Constitution.[135] Section 5 of the Fourteenth Amendment provides Congress with power to carry out ENDA's provisions against a state or local government, stating "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."[136] Furthermore, the Supreme Court stated in *Board of Trustees of the University of*

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[131] *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 92 (2000). *See also Massachusetts Bd. of Retirement* v. *Murgia*, 427 U.S> 307, 313-314, 49 L. Ed. 2d 520, 96 S. Ct. 2562 (1976) (upholding ALM GL ch. 32, § 26, Massachusetts Civil Service, Retirement and Pension Plan mandating a police officer's retirement at the age of 50 years as valid under rational basis review); *Cleburne* v. *Cleburne Living Center, Inc.*, 473 U.S. 432, 441, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985). (upholding a city zoning ordinance as constitutional and not in violation of the Equal Protection Clause because the mentally retarded were not a quasi-suspect class warranting anything other than rational basis review).

[132] *Id*. at 91.

[133] *Id*. at 83.

[134] *Id*. at 91.

[135] Labor Report, *supra* note 13, at 42.

[136] U.S. Const. amend. XIV, § 5.

Alabama v. Garret that Congress has both the power to "remedy and to deter violations of rights guaranteed" by the Fourteenth Amendment.[137] The Court further noted that "legislation reaching beyond the scope of Section 1's actual guarantees must exhibit congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[138]

ENDA is both a congruent and proportional response to the injury caused by discrimination in employment based on sexual orientation and the means that have been adopted to that end. Discrimination against gay, lesbian, and bisexual employees is irrational. Ample evidence has been introduced before Congress establishing that state conduct in the area of sexual orientation discrimination evidences pervasive and unequal treatment of gay, lesbian and bisexual employees who have been left legally unprotected.[139] Thirty states make state sponsored discrimination legal by allowing state employers to hire, fire, or harass an employee based on their sexual orientation.[140]

While the Supreme Court has consistently deferred to Congress' determinations concerning what is necessary to guarantee Fourteenth Amendment rights, the Court has also placed the burden on Congress to limit legislative provisions so that they coincide with the addressed constitutional violation.[141] Provisions of ENDA have been narrowly tailored to

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[137] *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 365 (2001). *See* Kimel v. Fla. Bd. of Regents, 528 U.S. 62, 81 (U.S. 2000) (Congress' power to enforce the Fourteenth Amendment includes "the authority both to remedy and to deter violation of rights guaranteed there under by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text"); City of Boerne v. Flores, 521 U.S. 507, 518 (U.S. 1997) ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'").

[138] *Id.*.

[139] Labor Report, *supra* note 13, at 29.

[140] *See supra* note 12.

[141] Labor Report, *supra* note 13, at 29.

manifest the Act's interest in targeting conduct which is in need of redress and which serves no possible rational purpose.[142] To ensure that ENDA does not reach beyond Congress' authority, the Act exempts certain categories of employers from liability. For example, ENDA excludes application to the military; it exempts businesses with fewer than 15 employees; and it broadly exempts religious organizations, making it legal for a church to refuse to hire someone because the job applicant does not subscribe to that particular religion or even because of animus.[143] Furthermore, the Act also prohibits the adoption of quotas or granting preferential treatment to employees based on sexual orientation.[144] Additionally, ENDA further limits itself by prohibiting gay, lesbian or bisexual employees to file a disparate impact claim.[145]

Even if a court were to hold the doctrine of sovereign immunity bars federal jurisdiction over Employment Non-Discrimination suits brought by private individuals against the states, Congress would still be able to utilize its Spending Power authority to administer ENDA to state and local governments.[146] The Supreme Court has recognized that a state which desires to obtain Federal funds to subsidize its programs must abide by reasonable constitutional conditions placed on the receipt of those funds.[147] With this power, Congress may provide for a private

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[142] *Id.*

[143] H.R. 3685, 110th Cong. §§ 6–7 (2007).

[144] *Id*. § 4.

[145] *Id.*

[146] Labor Report, *supra* note 13, at 30.

[147] *South Dakota v. Dole*, 483 U.S. 203, 206 (U.S. 1987) (Petitioners brought an action again the United States alleging that 23 USCS § 158 that allows the reduction of federal funding of state highways for those states with a minimum drinking age less than 21 years of age is in violation of Congress' spending power. The Court held that Congress may attach conditions on the receipt of federal funds as long as long as the restriction is in pursuit of the general welfare. The court held § 158 to be valid as the "means chosen by Congress to address a dangerous situation… were reasonably calculated to advance the general welfare." *Id.*.

cause of action for damages against states for an employee who has been exposed to discrimination based on sexual orientation.[148]

Through Section 11's State and Federal Immunity provision of H.R. 3685, Congress intends to use its Spending Power 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 to state employees.[149] Section 11(b)(1)(A) provides that "[a] State's receipt or use of Federal financial assistance for any program or activity of a State shall constitute a waiver of sovereign immunity, under the Eleventh Amendment to the Constitution or otherwise, to a suit brought by an employee or applicant for employment of that program or activity under this Act for a remedy authorized under subsection (c)."[150] Subsection (c) entitled "Remedies Against the United States and the States" further declares that in an action against the United States or a State for a violation of the Act, "remedies (Including remedies at law and in equity, and interest) are available for the violation to the same extent as the remedies are available for the violation of Title VII of the Civil Rights Act of 1964…by a private entity, except that (1) punitive damages are not available; and (2) compensatory damages are available.." up to $300,000.[151]

The OMB's first policy objection asserted that ENDA "turns on imprecise and subjective terms that would make interpretation, compliance, and enforcement extremely difficult."[152] Specifically the OMB argues that if ENDA were to pass, terms such as "perceived" sexual

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[148] Labor Report, *supra* note 13, at 30.

[149] H.R. 3685, 110th Cong. § 11 (2007).

[150] *Id.*

[151] *Id.*

[152] *Id.*

orientation and "association" with individuals are certain to encourage "burdensome litigation."[153]

There is no reason for the OMB to fear the courts will be burdened by implementation of these terms. The term "perceived" sexual orientation has long been included in state legislation anti-discrimination statutes. Currently, there are twenty states, plus the District of Columbia, that provide protection against employment discrimination based on sexual orientation.[154] The majority of states provide in some form that "sexual orientation" encompasses heterosexuality, homosexuality, or bisexuality.[155] All state definitions, except for those in Illinois, New York, Maryland and Vermont, further include people who are perceived by others to be in one of those three categories, whether or not they actually are.[156]

In fact, including the term "perceived" within the Act serves a substantial purpose in the protection of gay, lesbian and bisexual employees. Including "perceived" sexual orientation prevents employers from requiring fired employees to prove they are, in fact, gay, lesbian or bisexual, or even straight in the case of a heterosexual filing a claim under the statute.[157] In reality, state courts that have litigated cases over perceived sexual orientation claims never

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[153] *Id.*

[154] *See supra* note 12.

[155] *See* New Jersey Civil Rights Act, N.J. STAT. ANN. § 10:2-1; 10:5-1 – 49; stating "Affectional or sexual orientation" means male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation."

[156] *Id.*

[157] Chris Crain, *Bush Semi-Threatens ENDA Veto*, http://citizenchris.typepad.com/citizenchris/2007/10/bush-semi-threa.html. (last viewed 09/21/2008).

addressed the term "perceived" and have proceeded to analyze the facts of the case as they would any other employment discrimination case.[158]

In addition, the term "association" has established meaning in statutory and constitutional law.[159] There are two states that have provisions expressly prohibiting associational discrimination. California's statute bars unlawful employment practices on the basis of sexual orientation, including instances where the employee is associated with a person who has, or is perceived to have, any of the characteristics on which basis it is illegal to discriminate.[160] Minnesota's statutory provision makes it an unfair discriminatory practice for an employer who allegedly engaged in discrimination to intentionally engage in a reprisal against any person because that person, among other things, associated with a person or group of persons who are of a different sexual orientation.[161] There are no cases on record where the courts in California and Minnesota have litigated the meaning of the term "association."

ENDA was modeled after both the Americans with Disabilities Act (ADA), and Title VII's Civil Rights Act.[162] The terms to which the OMB objects have not produced voluminous litigation in either instance.[163] There is no reason to fear such provisions of the Employment Non-Discrimination Act will produce such litigation.[164] In fact, supporters and opponents of the

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[158] *See Lafleur v. Bird-Johnson Co.*, 3 Mass. L. Rep. 196 (Mass. Super. Ct. 1994).

[159] Chris Crain, *Bush Semi-Threatens ENDA Veto*, http://citizenchris.typepad.com/citizenchris/2007/10/bush-semi-threa.html. (last viewed 09/21/2008).

[160] Cal. Gov. Code § 12926(q) (2001).

[161] Minn. Stat. § 363.01 subd. 41a (2002).

[162] Nat'l Gay & Lesbian Task Force: Frequently Asked Questions About the Employment Non-Discrimination Act, http://www.thetaskforce.org/downloads/misc/ENDAFAQFinal2007v2.pdf (last visited 10/12/2008).

[163] *Id.*

[164] *Id.*

ADA never envisioned difficulties in interpreting these terms.[165] Rather, they focused on the ambiguity of terms like "reasonable accommodation," "undue hardship," and "fundamental alteration," none of which are included in the Employment Non-Discrimination Act.[166]

Thus, the OMB's argument which presupposes that if ENDA were to pass, terms such as "perceived" sexual orientation and "association" with individuals will encourage "burdensome litigation is without merit. Not only does the term "association" have established meaning within the law, but the term "perceived" has never created a litigation issue within the state courts in jurisdictions with similar legislation.

Finally, the OMB's last policy objection argued that provisions of ENDA give Federal authority to same sex marriages, thereby conflicting with the Defense of Marriage Act (DOMA)[167] passed under the Clinton Administration in 1996.[168] Through Section 8 of H.R. 3685, Congress' express intentions are to avoid any confusion a court or employer may have within the realm of marriage.[169] In fact, section 8(b) of H.R. 3685 asserts employers will not be required to treat an unmarried same sex couple the same as a married couple for purposes of employee benefits.[170] The term "married" for purposes of this provision will likely be interpreted by the Federal courts to be the definition under DOMA and not a state's definition of

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[165] *Id.*

[166] Robert D. Dinerstein, *The Americans with Disabilities Act of 1990: Progeny of the Civil Rights Act of 1964*, http://www.abanet.org/irr/hr/summer04/disable.html.

[167] The Defense of Marriage Act, or DOMA, is the short title of a federal law of the United States passed on September 21, 1996 as Public Law No. 104-199. Its provisions are codified at 1 U.S.C. § 7 and 28 U.S.C. § 1738C (2008).

[168] OMB Statement, *supra* note 80.

[169] H.R. 3685, 110th Cong. § 8 (2007).

[170] *Id.*

the term that would allow marriage between those of the same sex.[171] The government has had no problem treating gay couples that States "deem" to be married as single for purposes of taxation and social security under Federal law. Moreover, Section 8(a)(3) simply prevents employers in states where gay and lesbian employees cannot marry from using "eligibility to marry" as a pretext for anti-gay discrimination.[172] Indeed, in response to the Miller-Stupak amendment, the Senate version of H.R. 3685 even cites to the Defense of Marriage Act and declares that under the Act, the terms "married" and "marry" refer to a legal union between one man and one woman as husband and wife so as to deter future litigation over the issue.[173] Therefore, there are no provisions within H.R. 3685 that will conflict with the Defense of Marriage Act as suggested by the OMB.

B. THE RIGHT'S CONSTITUTIONAL AND POLICY OBJECTIONS TO ENDA AS PROPOSED IN H.R. 3685

Right wing independent organizations have also taken a stand against H.R. 3685. Roger Clegg[174] of the Center for Equal Opportunity objected to ENDA in the National Review stating the bill is illegal for three reasons: 1) Congress lacks authority to propose or approve the law because none of Congress' enumerated powers permit it to authorize ENDA; 2) although Congress bases its authority to enact ENDA on the Fourteenth Amendment and its power to

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[171] Carpenter, *supra* note 126.

[172] H.R. 3685, 110th Cong. § 8 (2007).

[173] H.R. 3685, 110th Cong. § 8 (2007).

[174] Roger Clegg is President and General Counsel of the Center for Equal Opportunity. Mr. Clegg centers his attention on civil rights legal issues—including, but not limited to, regulatory impact on business and problems in higher education arising from affirmative action. Mr. Clegg is a former Deputy Assistant Attorney General from the Reagan and Bush administrations and has held the second highest positions in both the Civil Rights Division (1987-91) and the Environment and Natural Resources Division (1991-93). Other positions held include positions at the U.S. Justice Department, including Assistant to the Solicitor General (1985-87), Associate Deputy Attorney General (1984-85), and Acting Assistant Attorney General in the Office of Legal Policy (1984). Mr. Clegg graduated from Yale University Law School in 1981. Roger Clegg – Biography, http://www.ceousa.org/content/view/507/123/.

regulate commerce and provide for the general welfare under Section 8 of Article 1 of the United States Constitution, neither apply to ENDA, and 3) ENDA violates First Amendment rights and property rights of individual business owners by providing the Federal government with the authority to prescribe to business owners how to use their property, how to run their business, and who they can or cannot hire, promote, or fire.[175] Each of these proposed arguments will be addressed in turn.

Clegg asserts that Congress lacks authority under its enumerated powers to enact H.R. 3685.[176] Clegg argues that Congressional authority under Section 8 of the Commerce Clause only deals with raising "Taxes, Duties, Imposts, and Excises."[177] He further states that the Commerce Clause only permits Congress to "regulate Commerce…among the several States" and not individual businesses within states.[178] In addition, he states Congress is required to show a "substantial" effect on interstate commerce and not merely an effect.[179]

Clegg's arguments are rebuttable by working through Commerce Clause analysis. Congress may enforce the Commerce Clause against the States through the Fourteenth Amendment. As to the Fourteenth Amendment, Section 5 of the Amendment provides Congress with the "power to enforce, by appropriate legislation, the provisions of this [amendment]" which, in Section 1, provides that "[n]o 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

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[175] Roger Clegg, Bad ENDA, http://www.nationalreview.com/clegg/clegg050902.asp. (last viewed 09/16/2008) [hereinafter Bad ENDA}.

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.*

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."[180]

Supreme Court precedence rebuts Clegg's contentions that Congress may only regulate commerce among the several states and not against individual businesses within the states, and that Congress is required to show a substantial effect on interstate commerce issues and not merely an effect. [181] Indeed, the Supreme Court has recognized that Congress has appreciable discretion in deciding which activities effect interstate commerce.[182] In *U.S. v. Darby*, the Supreme Court went so far as to hold that events of purely local commerce, such as local working conditions, might negatively effect interstate commerce due to market forces and therefore may be regulated.[183]

Admittedly, Congress's regulatory authority is not unlimited. In *United States v. Lopez*, the Court identified three broad categories of activity that Congress could regulate under the Commerce Clause: 1) the channels of commerce, 2) the instrumentalities of commerce, or persons or things in interstate commerce, even if the threat comes from intrastate activities, and 3) action that substantially affects interstate commerce, in relation to a broad regulatory scheme.[184] In *Lopez*, the Court focused on the third prong and held that Congress' lawmaking

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[180] U.S. Const. amend. XIV §5.

[181] Bad ENDA, *supra* note 175.

[182] *See United States. v. Darby*, 312 U.S. 100 (1941) (upholding the Fair Labor Standards Act as applied to a local employer); Wickard v. Filburn, 317 U.S. 111 (1942) (upholding federal limits on farm production as applied to a local farmer who grew wheat for family consumption).

[183] *U.S. v. Darby*, 312 U.S. 100, 120 (1941).

[184] *United States v. Lopez,* 514 U.S. 549, 558–59 (1995). *See United States v. Darby*, 312 U.S. 100, 113 (U.S. 1941) ("Pursuant to Congress' commerce power Congress may regulate the use of the channels of interstate commerce"); *Houston, E. & W. T. R. Co. v. United States*, 234 U.S. 342 (U.S. 1914) ("Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"); *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1, 36 (U.S. 1937)

authority under the Commerce Clause did not apply to something as far from commerce as carrying handguns, especially when there was no evidence that carrying them affected the economy on a massive scale.[185] There were a few relevant and significant considerations for analysis purposes that contributed to the Court's decision in *Lopez*. First, in cases where the Court sustained federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question had to be some sort of economic endeavor.[186] The federal law in question in *Lopez* was the Gun-Free School Zones Act that was a "criminal statute that by its terms had nothing to do with 'commerce' or any sort of economic enterprise."[187] Second, the Gun-Free School Zones Act's legislative history contained no express Congressional findings regarding the effects upon interstate commerce of gun possession in a school zone.[188]

Likewise, in *United States v. Morrison*, the Court held that parts of the Violence Against Women Act were unconstitutional because they exceeded congressional power under the Commerce Clause.[189] Once again, the Court based its decision on the premise that gender-motivated crimes of violence do not amount to economic activity.[190] However, the Court did

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("Congress' commerce authority includes the power to regulate activities having a substantial relation to interstate commerce").

[185] *Id.* at 561.

[186] *Id*. at 556.

[187] *Id.*

[188] *Id*. at 562.

[189] *United States v. Morrison*, 529 U.S. 598, 617 (2000). (In this case, the petitioner filed suit alleging she was raped by three students at Virginia Polytechnic Institute in violation of 42 USCS § 13981 Violence Against Women Act. The Supreme Court held the Act invalidated as Congress exceeded its constitutional bounds under the commerce clause and the Fourteenth Amendment because gender-motivated crimes of violence are not economic activity).

[190] *Id*. at 613.

establish that Congress had demonstrated the serious impact that gender-motivated violence had on victims and their families.[191] The court noted that "[C]ongress found that gender-motivated violence affected interstate commerce "by deterring potential victims from traveling interstate, from engaging in employment in interstate business, and from transacting with business, and in places involved in interstate commerce; by diminishing national productivity, increasing medical and other costs, and decreasing the supply of and the demand for interstate products."[192]

The Employment Non-Discrimination Act is distinguishable from both of these cases. Congress indeed has the power to enact the Employment Non-Discrimination Act under the Commerce Clause because discrimination against a gay, lesbian or bisexual employee by an employer creates a direct and substantial economic impact. It is the responsibility of the Federal government to remedy the significant costs of sexual orientation discrimination in the workplace.[193] Discrimination against gay, lesbian or bisexual employees is detrimental to American commerce because it hinders the productivity level of employers and causes a loss or decrease in employee wages resulting in substantial psychological and economic costs to workers.[194] For example, productivity is lost for employers and results in costs for retraining employees when gay employees either voluntarily leave because of unfair treatment or because they were fired merely for being gay.[195] In addition, employees that have no sense of job security often do not make a commitment to employers who make no commitment to them,

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[191] *Id*. at 635.

[192] *Id*. at 615.

[193] Labor Report, *supra* note 13, at 28.

[194] *Id.*

[195] George Henderson, Human Relations Issues in Management 163–64 (1996).

resulting in an inefficient productivity level.[196] Furthermore, studies by economists and sociologists who have studied the pattern of workplace discrimination against an individual's sexual orientation, have concluded that, due to discrimination based on sexual orientation, gay men earn less money than heterosexual men who have similar experience, education, and credentials.[197] Given the Supreme Court's analysis in *Darby,* it is highly likely the Court would hold the resulting negative working conditions adversely affect interstate commerce due to market forces, and consequently gives Congress the authority to enact the Employment Non-Discrimination Act through the Commerce Clause of the United States Constitution.

Clegg further alleges Congress lacks authority to enact the Employment Non-Discrimination Act through the Fourteenth Amendment.[198] The Fourteenth Amendment guarantees to all Americans equal protection under the law.[199] Section 5 of the Fourteenth Amendment, which states that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article," provides affirmative authority to Congress to enforce the substantive provisions of the amendment.[200] In *Kimel v. Florida Board of Regents*, the Supreme Court held that Congress's authority to legislate under the Fourteenth Amendment is broad and provides Congress with the ability to deter and remedy conduct which is not forbidden by the Fourteenth Amendment by itself.[201]

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[196] *Id.*

[197] LEE BADGETT ET AL, BIAS IN THE WORKPLACE: CONSISTENT EVIDENCE OF SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION (2007), http://www.law.ucla.edu/williamsinstitute/publications/Bias%20in%20the%20Workplace.pdf.

[198] Bad ENDA, *supra* note 175.

[199] U.S. Const. amend. XIV, § 1.

[200] *Id*. § 5.

[201] *Kimel,* 528 U.S. at 80–81.

Interestingly, a federal district court in Utah, which is presumably conservative, held in *Weaver v. Nebo School District* that States are prohibited under the Fourteenth Amendment's Equal Protection Clause from participating in intentional discrimination based on sexual orientation without some rational basis for doing so.[202] In *Weaver*, a tenured teacher and volleyball coach was approached by a student who asked if she were gay.[203] After Ms. Weaver responded in the affirmative to the student, she was subsequently let go as the volleyball coach and instructed by the school district never to speak of her sexual orientation to students, staff members, or parents.[204]

In a deprivation of rights action against the school district under 42 U.S.C. § 1983 (1979) of the Civil Rights Act, Ms. Weaver challenged restraints on her speech by the school district as well as her removal as volleyball coach.[205] The court focused on the question of whether bias concerning Ms. Weaver's sexual orientation furnished a rational basis for the school district's decision not to appoint her as volleyball coach and held it did not.[206] In reaching its decision, the court reasoned that the negative reactions from some members of the community in regards to homosexuals were not a proper basis for discrimination.[207] The court found the evidence brought

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[202] *Weaver v. Nebo Sch. Dist*., 29 F. Supp. 2d 1279, 1287 (D. Utah 1998). *See* Glover *v. Williamsburg Local Sch. Dist. Bd. of Educ*., 20 F. Supp. 2d 1160 (S.D. Ohio 1998) (holding the board of education violated a teacher's right to Equal protection when it fired the teacher on the basis of his sexual orientation); *compare* Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. Wis. 1996) (upheld student plaitntiff's Equal Protection claim based on sexual orientation where the plaintiff alleged, and also presented evidence, he had been harassed over a duration of time due to his sexual orientation by another student and even though he and his parents repeatedly complained to school officials, no action was taken by the school to protect the student.").

[203] *Id*. at 1281.

[204] *Id*. at 1281–82.

[205] *Id*. at 1282.

[206] *Id.*

[207] *Id.*

before the court contained no job-related justification for not assigning Ms. Weaver as volleyball coach. Nor had the school district demonstrated how "Ms. Weaver's sexual orientation [bore] any rational relationship to her competency as teacher or coach, or her job performance as coach, a position she…held for many years with distinction."[208] It was evident from the facts that Ms. Weaver was an excellent coach and up until the time her sexual orientation was revealed she was the likely candidate for the position.[209] The school district's decision not to place Ms. Weaver as the volleyball coach was based solely on her sexual orientation. The court held that "absent some rational relationship to job performance, a decision not to assign Ms. Weaver as coach because of her sexual orientation runs afoul of the Fourteenth Amendment's equal protection guarantee."[210] Thus, *Weaver* suggests that, even if courts were to hold Congress does not have the authority to enact the Employment Non-Discrimination Act under the Commerce Clause, the Fourteenth Amendment will provide Congress with that power.

Lastly, Clegg argues that ENDA violates the First Amendment and property rights of individual business owners by providing the Federal government with "the authority to dictate to individual business owners how to use their property, how to run their business, and who they can and cannot hire, promote or fire."[211] This argument presupposes that discrimination based on irrelevant characteristics such as sexual orientation is rational. This assumption, however, is completely unfounded.

There is pervasive evidence that, from the perspective of business efficiency, discrimination based on sexual orientation is entirely irrational. Anti-gay bias is predominantly

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[208] *Id.*

[209] *Id.*

[210] *Id.*

[211] Bad ENDA, *supra* note 175.

the result of prejudices and stereotypes and is not the result of actual differences.[212] Dr. Gregory Herek[213], a psychologist at the University of California has said, "Once a person has an anti-gay bias, it is difficult to change, even when reality contradicts it."[214] Herek theorizes that even though most gay men and lesbians do not conform to the stereotypes of a gay men as "feminine" and lesbians as "masculine", these images persist in people's minds.[215] The facts in *Weaver* demonstrate this theory. Ms. Weaver had been the volleyball coach for years and had an exceptional record, leading her team to the championship four times, and it was not until she affirmed to a student that she was gay that bias set in and she was terminated from her volleyball position.[216] Although Ms. Weaver apparently successfully conformed to society's gender role expectations up until her affirmation that she was a lesbian, beyond that point she failed to do so and was fired for it. As the court in *Weaver* noted, there was no rational basis for the school district's discriminatory actions.[217]

If employers facing the dilemma of hiring gay, lesbian or bisexual employees were to consider the question more rationally, they might well conclude that promotion of equality by

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[212] Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915, 937 (1989).

[213] Gregory Herek, Ph.D., Professor of Psychology at the University of California at Davis, teaches graduate and undergraduate courses on prejudice, sexual orientation, and survey research methodology. Dr. Herek has published 85 plus scholarly papers on prejudice against lesbians and gay men in addition to anti-gay violence and AIDS-related stigma. Dr. Herek is a Fellow of the American Psychological Association (APA) and the Association for Psychological Science. He has been awarded the APA Award for Distinguished Contributions to Psychology in Public Interest. Dr. Herek received the Kurt Lewin Memorial Award from the Society for the Psychological Study of Social Issues in 2006. His testimony before Congress includes issues on antigay violence and on military personnel policy. Additionally, he has assisted the APA in preparing amicus briefs for numerous court cases related to sexual orientation. Gregory Herek - Biography, http://www.beyondhomophobia.com/blog/about/.

[214] Daniel Goleman, *Studies Discover Clues to the Roots of Homophobia*, N.Y. TIMES, July 10, 1990.

[215] *Id.*

[216] *Weaver,* 29 F. Supp. 2d at 1280.

[217] *Id.* at 1282.

employers makes good business sense. Workplace anti-discrimination policies protecting the rights of gay, lesbian and bisexual employees have been adopted all across the United States. Such anti-discrimination policies that include sexual orientation have been adopted by over two-thousand companies, colleges, universities, state and local governments and Federal agencies.[218] Further, approximately ninety percent of all Fortune 500 companies include work place protections based on sexual orientation.[219]

In a report prepared by the Committee on Education and Labor approving the Employment Non-Discrimination Act, the Committee found that companies who provide for workplace protections based on sexual orientation support the theory that such internal public policies are necessary to preserve a stable and developing economy.[220] ENDA has the ability to promote creativity and an atmosphere where knowledge and life experiences can be exchanged freely within the workplace, providing an environment that benefits not only employees, but employers as well.[221] Business leader Lucy Billingsley, a partner in the Billingsley Company of Carrollton, Texas, testified before the 107th Congress that most businesses believe failing to enact ENDA will be more costly to them than it would be to comply with ENDA's nondiscrimination requirements.[222] Without the enactment of ENDA, workplace discrimination may burden companies with costly grievances and lawsuits.[223] If ENDA were enacted, a Federal

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[218] Labor Report, *supra* note 13, at 23.

[219] *Id.*

[220] *Id.*

[221] *Id*. at 24.

[222] *The Employment Non Discrimination Act of 2007*: Hearing before the Subcommittee on Health, Employment, Labor and Pensions, 110th Cong., 1st Sess. (2007) (written testimony of Nancy Kramer, Founder and CEO, Resource Interactive, at 1).

[223] *Id.*

law banning sexual orientation discrimination would give businesses a better focus.[224] Ms. Billingsley testified that ''by directing attention to only factors of performance and productivity…all of America's businesses will perform better.''[225] In light of the positive experiences of businesses which have adopted anti-discrimination policies, it is difficult to understand how employment discrimination against gay, lesbian, and bisexual employees advances business interests, as Clegg asserts.[226]

Most importantly, ENDA's provisions themselves rebut the argument that the bill authorizes the Federal government to dictate how employers shall run their businesses. Section 8(a)(1) of HR. 3685 expressly states that "nothing in this Act shall be construed to prohibit a covered entity from enforcing rules and policies that do not intentionally circumvent the purpose of this Act" as long as the rule and/or policy is applied equally to all employees.[227]

Thus, ENDA does not strip business owners of their rights to make their own business decisions as they desire. It merely requires that their decisions, whatever they may be, are applied uniformly to all employees.

Another policy argument against ENDA made generally by the right is that ENDA is a way for gays, lesbians, and bisexuals to obtain special rights. The assertion of Matt Barber, of

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[224] *Id.*

[225] *Id.*

[226] Businesses are not the only ones fighting against discrimination. Various denominations of faith based organizations such as the Episcopal Church, the Union for Reform Judaism, The United Church of Christ, The United Methodist Church, the American Friends Service Committee and Quaker institutions, the Unitarian Universalists; the Universal Fellowship of Metropolitan Community Churches; and the Interfaith Alliance have all taken part in the strong movement against discrimination. At the HELP Subcommittee hearing, Representative Manuel Cleaver, who is an ordained minister for the United Methodist Church, stated that as a minister "no one has yet explained to me how keeping someone from gaining equal consideration based on their individual skill set to obtain lawful employment pleases God." *The Employment Non-Discrimination Act*: Hearing Before the Senate Health, Education, Labor and Pensions Committee, 107th Cong., 2nd Sess. (2002) (written testimony of Rep. Emanuel Cleaver, II).

[227] H.R. 3685, 110th Cong. § 8 (2007).

the organization Concerned Women for America, is representative. Mr. Barber speculates that if ENDA were to pass, "the bill would grant special employment rights and protected minority status to individuals who define themselves based upon chosen sexual behaviors and others who, among other things, suffer from clinical self-delusion."[228]

Those who make the "special rights" argument have apparently not read the provisions of ENDA. Section 4(f) of ENDA specifically addresses this issue. It calls for no preferential treatment, stating that "[n]othing in this Act shall be construed or interpreted to *require or permit* any covered entity to grant preferential treatment to any individual or to any group because of the actual or perceived sexual orientation of such individual or group." (Emphasis added).[229] Sexual orientation is further defined in the Act as homosexuality, heterosexuality and bisexuality,[230] so, in actuality, ENDA would give no more rights to employees with a homosexual or bisexual orientation than it would to employees with a heterosexual orientation. Under this provision, a heterosexual male who has been refused a job as a bartender in a gay bar on the basis of his sexual orientation could sue for damages just as a homosexual male could sue if he were refused a management position in a law firm on the basis of his sexual orientation. It is hard to conceive how homosexuals and bisexuals will receive "special" rights when those same "special rights." are extended to heterosexuals.[231]

In conclusion, notwithstanding the criticisms from the right, the Employment Non-Discrimination Act is constitutional as Congress has the authority to enact the Act through both

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[228] Matt Barber, *Culture and Family Issues*, Concerned Women for America (2007) http://www.cwfa.org/articles/13852/CFI/freedom/index.htm. (last viewed 11/12/2008).

[229] H.R. 3685, 110th Cong. § 4 (2007).

[230] *Id*. § 3.

[231] B.A. Robinson, *Employment discrimination on the basis of sexual orientation* (2007) http://www.religioustolerance.org/hom_empl2.htm. (last viewed 11/12/2008).

the Commerce Clause and the Fourteenth Amendment. In addition, any concern that ENDA dictates how business owners can run their businesses is expressly refuted by the Act itself. And, given that ENDA applies equally to heterosexuals, it cannot be said to grant special rights to one group over another.

C. THE LIBERAL ARGUMENT AGAINST THE REVISED ENDA AS PROPOSED IN H.R. 3685

Surprisingly, there has been significant lamentation and criticism from liberal organizations concerning the revised version of ENDA of 2007 as proposed in November 2007. As noted above, the previous version of ENDA, H.R. 2015, introduced in April 2007 by Representative Barney Frank (D-MA), banned discrimination on the basis of "gender identity" to protect transgendered individuals as well as gays, lesbians and bisexuals.[232] As discussed, H.R. 3685 no longer includes this provision. The non-inclusive aspect of H.R. 3685 provides the catalyst for liberal criticism. This article will address arguments set forth by Lambda Legal,[233] regarding the non-inclusive version of ENDA, as they echo those of other organizations such as the American Civil Liberties Union, the National Center for Lesbian Rights, Gay & Lesbian Advocates & Defenders and the Transgender Law Center, which promote rights for gays, lesbians, bisexuals and transgendered individuals in general.[234]

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[232] Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007).

[233] Lambda Legal (Lambda Legal Defense and Education Fund) is a United States civil rights organization that focuses on gay men, lesbians, bisexuals, transgender people and those with HIV through impact litigation, education, and public policy work.

[234] *See* Lambda Legal's statement: *Narrow Weakened ENDA Means Less Protection for Everyone*, http://www.lambdalegal.org/news/pr/weakened-enda-means-less-protections.html.

Lambda Legal first argues that a non-inclusive ENDA will deny protection to those who identify as transgendered and also to those who are perceived as gender nonconforming.[235] In response to Lambda's transgendered argument, it must first be recognized that a non-inclusive ENDA has the best chance of passage at this time. Representative Frank and other House leaders, such as Nancy Pelosi, determined by vote that an inclusive ENDA would not pass the House and would make both Senate passage and a presidential signature less likely. Joe Solmonese,[236] President of the Human Rights Campaign (HRC), recognized this fact in a letter written to Representative Frank endorsing H.R. 3685.[237] In the endorsement, Mr. Solmonese conceded that, although the HRC continues to believe H.R. 2015 is a better approach due to pervasive and severe bias transgender individual's face in the workplace, a compromise must take place for equal protection for all Americans.[238] Citing the Civil Rights Act of 1967 and the District of Columbia House Voting Rights Act of 2007 as examples, Mr. Salmonese acknowledged legislative progress in the area of civil and human rights has been incremental in nature.[239] Speaker of the House, Nancy Pelosi, agreed and in a statement made after the House passed the non-inclusive H.R. 3685, she stated that "history teaches us that progress on civil

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[235] *See* Lambda Legal's Analysis of H.R. 3685: *Narrow Version of ENDA Provides Weaker Protections for Everyone*, http://data.lambdalegal.org/pdf/enda_llanalysis_20071016.pdf [hereinafter Lambda Legal's Analysis of H.R. 3685].

[236] Joe Solmonese was appointed President of the Human Rights Campaign of the United States and its affiliate, the Human Rights Campaign Foundation, on March 9, 2005. He graduated from Boston University in 1987 with a Bachelor of Science degree in communications. Joe Solmonese - Biography, http://en.wikipedia.org/wiki/Joe_Solmonese.

[237] *See* letter endorsing H.R. 3685 by HRC's President, Joe Salmonese, to Representative Barney Frank on behalf of the American Federation of State, County, Municipal Employees; Human Rights Campaign; Leadership Conference on Civil Rights; National Association for the Advancement of Colored People; National Education Association; National Employment Lawyers Association; and Religious Action Center of Reform Judaism. JOE SALMONESE, LEADERSHIP CONFERENCE ON CIVIL RIGHTS (2007), http://www.hrc.org//documents/LCCRENDASupportletter.pdf [hereinafter HRC Endorsement].

[238] *Id.*

[239] *Id.*

rights is never easy, it is often marked by small and difficult steps."[240] Mr. Solmonese further expressed frustration on behalf of the HRC that other organizations would rather see no one protected at all than to pass a non-inclusive ENDA.[241] As Mr. Salmonese indicated, Civil Rights Legislation proceeds incrementally through a process of educating the public and allowing for a period of adjustment.[242]

Liberal critics ignore the political momentum created by House passage of the non-inclusive ENDA and the political realities in which passage occurred.[243] The House passed the bill by a vote of 235 to 184.[244] Of the 255 Democratic representatives in the House, only 25 voted against it.[245] Of those 25 Democrats, 18 were from conservative, rural areas.[246] Only 7 of those democrats that voted no did so because the bill did not include gender identity, and 6 of those 7 represented states that already protect gays from employment discrimination.[247] In addition, 35 Republicans voted for this bill and all but one of those Republicans was from districts outside the conservative south.[248]

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[240] Johanna Neuman, *Bill to expand job protections to gay workers passes House* , L.A. Times, Aug. 11, 2007. http://articles.latimes.com/2007/nov/08/nation/na-gay. (last viewed 11/05/2008).

[241] HRC Endorsement, *supra* note 237.

[242] *Id.*

[243] Dale Carpenter, *Barney Frank's ENDA*, The Volokh Conspiracy. Oct. 15, 2008. http://volokh.com/posts/1194533888.shtml#contact. (last viewed 09/12/2008).

[244] *Id.*

[245] *Id.*

[246] *Id.*

[247] *Id.*

[248] *Id.*

House votes in favor of passage may reflect recent polls indicating that a significant number of Americans feel that homosexuality should be accepted as an alternative lifestyle.[249] Furthermore, another poll taken by the HRC found seventy percent of gay, lesbian, bisexual and transgender Americans preferred passing an ENDA that does not include transgender people over not passing a bill at all.[250] Those polled were also questioned as to whether they agreed that "national gay, lesbian, bisexual and transgender organizations should oppose this proposal because it excludes transgender people."[251] Only 20% of those polled agreed with that statement.[252] While seventy percent polled still believe protections for transgender people should be included in ENDA, they also favored passing the non-inclusive ENDA as a path to gaining protections for transgendered workers in the future.[253] Senator Susan Collins (R-ME) was quoted in the New York Times stating that the House vote "provides important momentum" and that "there is growing support in the Senate for strengthening federal laws to protect American workers from discrimination based on sexual orientation."[254] Joe Solmonese was quoted in the same article pronouncing, "Today's vote in the House sends a powerful message

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[249] Americans interviewed in Gallup's 2008 Values and Beliefs poll are evenly divided over the morality of homosexual relations, with 48% considering them morally acceptable and 48% saying they are morally wrong. Despite Americans' divided reaction to homosexuality on a moral Basis, the majority believes homosexual relations should be legal (55%) and accepted as an alternative lifestyle (57%). Results are based on telephone interviews with 1,017 national adults, aged 18 and older, conducted May 8-11, 2008. Lydia Saad, *American Evenly Divided on Morality of Homosexuality, However, majority supports legality and acceptance of gay relations*, GALLUP, June 8, 2008, http://www.gallup.com/poll/108115/americans-evenly-divided-morality-homosexuality.aspx.

[250] The poll, commissioned by the Human Rights Campaign and conducted October 26, surveyed 500 members of the LGBT community across the country.

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] David Herzszenhorn, *House Approves Broad Protections for Gay Workers* , N.Y. Times, Nov. 7, 2008. United States Politics: Washington: Education. http://www.nytimes.com/2007/11/08/washington/08employ.html.

about equality to the country, and it's a significant step forward for our community"[255] Therefore, while protection for transgendered individuals is of equal importance, it is widely recognized that passage of a non-inclusive ENDA provides a path to protection for all GLBT individuals and momentum created by House passage must be preserved.

Lambda Legal's assertion that the revised version of ENDA leaves unprotected those who are perceived as gender nonconforming is far from the case. Today, there are thirty states that provide no employment protection to gay, lesbian and bisexual employees.[256] In those thirty states, gender nonconforming individuals have greater legal protection under Federal law than gender conforming gays. Congressman Barney Frank (D-MA) wrote a response to Lambda Legal's analysis of the new ENDA.[257] In the letter, Congressman Frank stated that a careful review of case law and the legislative history of ENDA found no indication that the exclusion of gender identity from the bill would inadequately protect those who do not conform to gender stereotypes.[258]

Oncale v. Sundowner Services[259] grants individuals the right to challenge an employer's discrimination based on their gender conforming expectations. The Supreme Court held in *Oncale* that Title VII prohibits sexual harassment as long as the plaintiff is able to prove the

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[255] *Id.*

[256] *See supra* note 12.

[257] Congressman Barney Frank (D-MA), Barney Frank on Lambda Legal's analysis, Online posting, Oct. 3, 2007, The Bilerico Project; Daily Experiments is LBGTQ, http://www.bilerico.com/2007/10/barney_frank_on_lambda_legals_analysis.php [herinafter Frank, Lambda Legal's Analysis].

[258] *Id.*

[259] *Oncale v. Sundowner Offshore Servs*., 523 U.S. 75 (1998). (male plaintiff filed a sex discrimination case under Title VII alleging he was physically assaulted and was threatened to be raped by other make co-workers. The district court and appellate court both held he had no cause of action under Title VII for harassment by male co-workers. On certiorari, the Court held "nothing in Title VII necessarily barr[s] a claim of discrimination because of sex merely because the plaintiff and the defendant are of the same sex." *Id.* at 79).

harassment occurred because of the victim's sex.[260] *Oncale* provides a cause of action to individuals who are harassed because of their non-gender conforming status. Such individuals may also file a sex discrimination claim under a sex-role stereotyping theory developed in *Price Waterhouse v. Hopkins*.[261] The Supreme Court ruled in *Price Waterhouse* that sex-role stereotyping can be an actionable form of employment discrimination.[262] Theoretically, using the reasoning under this case, "feminine" men or "masculine" women may file claims for adverse treatment at work based on their failure to conform to their employers' sex-role expectations.[263]

Lambda also alleges that the exclusion of gender identity provides a loophole that employers could use to discriminate against gays and lesbians. According to Lambda, "employers will claim they have nothing against lesbians, gay men and bisexuals per se, but that they do not want men whom they see as unmanly or women who they believe are not feminine enough, and under the current version of ENDA the employer would claim that they fired "the lesbian for being too mannish" and not because she was gay."[264] The Committee on Education

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[260] *Id*. at 81.

[261] *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). (female plaintiff passed up for a partnership in an accounting firm after evaluations by male partners suggested she could improve her chances for partnership by walking, talking, and dressing more femininely. Plaintiff filed a claim under Title VII alleging the firm had discriminated against her on the basis of sex in that the evaluations had been based on sexual stereotyping. The Court held that "once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role." *Id*. at 244–45).

[262] *Id*. at 251.

[263] Joanna Grossman, *The House Passes the Employment Non-Discrimination Act of 2007: A Limited Symbolic Victory for Gay and Lesbian Employees, and One that Will Likely Result in a Presidential Veto*, November 13, 2007, http://writ.news.findlaw.com/grossman/20071113.html. (last viewed 09/06/2008).

[264] Lambda Legal's Analysis of H.R. 3685, *supra* note 235.

and Labor noted that were "perceived" sexual orientation excluded from H.R. 3685, this might be the case.[265]

However, as written, H.R. 3685 creates a cause of action for any American, whether they are in fact homosexual or merely heterosexual, when that individual has been discriminated against because they are "perceived" as being gay on account of the fact they do not conform to an employer's expectations of sex or gender stereotypes.[266] Under this language, if an employer "perceives" that an employee is a lesbian based on her gender nonconforming behavior or appearance and discriminates against her for this reason, the employer has violated the non-inclusive ENDA.[267]

The new revised version of ENDA does not protect transsexuals or cross dressers as fully as adding "gender identity" to the bill would have, but the bill moves in that direction.[268] H.R. 3685 will offer some protection to employees whose gender nonconformity leads others to assume they are gay and then suffer discrimination on that basis.[269] With the protections provided through both the non-inclusive ENDA and through Title VII, an employer will be placed "between the rock of the gay protections of a limited ENDA and the hard place of the gender nonconforming protection of Title VII."[270] Should an employer attempt an end run around ENDA by claiming the employee is nonconforming to their expectation of gender

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[265] Labor Report, *supra* note 13, at 9.

[266] H.R. 3685, 110th Cong. § 4 (2007).

[267] Joanna Grossman, *The House Passes the Employment Non-Discrimination Act of 2007: A Limited Symbolic Victory for Gay and Lesbian Employees, and One that Will Likely Result in a Presidential Veto*, November 13, 2007, http://writ.news.findlaw.com/grossman/20071113.html. (last viewed 09/06/2008).

[268] Dale Carpenter, *Lambda's ENDA*, http://lists.powerblogs.com/pipermail/volokh/2007-October/010966.html (last viewed 09/16/2008) [hereinafter Carpenter, Lambda's ENDA]

[269] *Id.*

[270] *Id.*

stereotypes, that employer will walk right into Title VII and if the employer tries to thwart Title VII by alleging an employee is claiming sexual orientation discrimination, then the employer has walked right into ENDA.[271] Therefore, Lambda's contention that gender non-conforming individuals will be left without protection under the revised ENDA is unfounded. Not only will a gender non-conforming individual be protected under Title VII and the *Price Waterhouse* or *Oncale* interpretations, but a gender non-conforming individual may have a claim under ENDA's "perceived sexual orientation" clause.

Lambda's next argues that "if gender identity is deliberately stripped from ENDA, 'increasingly conservative' courts might interpret this as signaling Congress' desire to eliminate gender-stereotyping claims of the type recognized under *Price Waterhouse*, thus exposing effeminate gay men and masculine lesbians to discrimination for gender nonconformity rather than sexual orientation."[272] This interpretation of Congress' silence by Lambda is an exceptionally conservative view. A court may interpret Congress' silence on the issue of gender identity as indicating that Congress believes there is already sufficient protection for non-conforming gays or lesbians under Title VII and the *Price Waterhouse* or *Oncale* interpretations.[273] An interpretation that Congress' silence intended to overrule twenty years of Federal Court precedent based on a standing Supreme Court decision would be the least likely interpretation.[274] Even assuming that the courts did find that Congress intended to eliminate gender stereotyping claims under Title VII, a gay, lesbian or bisexual employee would still be able to file a sexual orientation claim under ENDA because there are no cases on record where

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[271] *Id.*

[272] Lambda Legal's Analysis of H.R. 3685, *supra* note 235.

[273] Carpenter, Lambda's ENDA, *supra* note 268.

[274] *Id.*

an employer was successfully able to claim that they like gays but not nonconforming gays as hypothesized by Lambda.[275]

The *Price Waterhouse* majority included Justice Scalia, considered to be a core member of the conservative wing of the court, and Justice Kennedy who has been known to usually take a conservative viewpoint.[276] The decision of the court in *Price Waterhouse* indicated no disagreement within the court regarding the proposition that sex-stereotyping is impermissible.[277] Notwithstanding changes in court personnel, the Supreme Court has never abandoned, overruled or narrowed its holding.[278] Thus, concerns that a conservative judge would hold that Congress has impliedly overruled *Price Waterhouse* are unfounded.

Furthermore, ENDA does not proclaim to be an amendment to Title VII as nothing in ENDA states that it is overruling part of Title VII. As a factual matter, Section 15 of H.R. 3685, entitled "Relationship to Other Laws" expressly states that "[t]his Act shall not invalidate or limit the rights, remedies, or procedures available to an individual claiming discrimination prohibited under any other Federal law or regulation of a state or political subdivision of a state."[279] There is no disharmony in having Title VII to protect an individual against discrimination based on gender nonconformity and an ENDA that will protect discrimination against sexual orientation. They are complementary.

Nonetheless, Lambda Legal fears that since *Price Waterhouse* has not been codified into the law, protection against discrimination based on nonconformity will fail since

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[275] *Id.*

[276] *Id.*

[277] *Id.*

[278] *Id.*

[279] H.R. 3685, 110th Cong. § 15 (2007).

courts are wary of nonconformity cases under Title VII brought by gays and lesbians because they may be trying to bootstrap protection under a sexual orientation theory.[280] In fact, implementation of ENDA into law will relieve these concerns. Favorable gender-stereotyping claims may be brought under Title VII once the new version of ENDA becomes law, because now federal law will encompass protection for gay people from discrimination. Courts need no longer be apprehensive about gender-stereotyping claims blurring into sexual orientation claims.[281] The courts will no longer have to be careful about gay plaintiffs sneaking sexual orientation protection into federal law because it will already be there.[282] Consequently, based on this analysis, Lambda's fear that courts will interpret Congress' silence on the issue of gender identity as eliminating these types of claims should be relieved.

Lambda Legal also objects to the reintroduced bill's lack of the provision that would override federal law preventing states from passing laws involving employee benefits.[283] The Employee Benefits Clauses of both H.R. 2015 and H.R. 3685 set forth that an employer is not required to treat a non-married couple, including same-sex couples, in the same manner as a married couple for purposes of employee benefits.[284] However, H.R. 2015 went on to add permission for State and local governments to establish their own "rights, remedies, or procedures for the provision of employee benefits to an individual for the benefit of the domestic

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[280] Lambda Legal's Analysis of H.R. 3685, *supra* note 235.

[281] Carpenter, Lambda's ENDA, *supra* note 268.

[282] *Id.*

[283] Lambda Legal's Analysis of H.R. 3685, *supra* note 235.

[284] *See* respectively, Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. § 8 (2007); and Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. § 8 (2007).

partner of such individual."[285] Congressman Barney Frank felt it was a mistake to add this provision in the earlier version of ENDA because those that have fought for ENDA's passage have always insisted the bill was about job discrimination in the sense of hiring, firing and promotions and not about domestic partner benefits or civil unions.[286] This provision would assure opposition from organizations such as the Chamber of Commerce, The National Federation of Independent Business and a large number of other business organizations that would guarantee defeat of the bill.[287] Congressman Frank insisted the provision was dropped wholly apart from the transgender issue and was mostly decided upon by the fact that Members of the Committee voting on the bill strongly urged that it be discarded.[288] As a result, it was necessary for Congress to eliminate this provision.

Finally Lambda Legal was concerned that the narrow religious organizations exemption included in the earlier version of ENDA was substituted with a broader exemption in the revised translation.[289] As noted previously, the exemption in the revised ENDA is the same broad exemption that has been provided to religious organizations in prior versions of ENDA.[290] Again, Lambda's criticism ignores political realities. The original ENDA of 2007 proposed in April 2007 by Congressman Frank contained a narrower version of the religious organization exemption for the first time since ENDA's inception. Religious groups expressed such

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[285] H.R. 2015, 110th Cong. § 8 (2007).

[286] Frank, Lambda Legal's Analysis, *supra* note 257.

[287] *Id.*

[288] *Id.*

[289] Lambda Legal's Analysis of H.R. 3685, *supra* note 235.

[290] Frank, Lambda Legal's Analysis, *supra* note 257.

opposition as to keep the bill from going forward.[291] One such expression was sent on behalf of the Union of Orthodox Jewish Congregations of America, the U.S. Conference of Catholic Bishops and the General Conference of Seventh Day Adventists.[292] The letter expressed serious concerns over H.R. 2015 due its substantial revision of the religious exemption provision.[293] The organization believed that H.R. 2015's multi-part matrix left religious institutions without protection from the infringement of their religious liberties as guaranteed by the U.S. Constitution and federal civil rights statutes.[294] In light of the fierce opposition, ENDA's proponents had little choice but to revert to the broader exemption.

In conclusion, although Lambda's arguments for an inclusive ENDA make some valid points and express legitimate concerns, the current version of ENDA was the only version with any chance of passage. As such, it represents the best chance to advance the cause for elimination of sexual orientation discrimination in general. The choice was passing a gay only ENDA that would provide protections for millions of gay Americans or passing no ENDA at all

IV. CONCLUSION

As of today, gay, lesbian and bisexual employees are left to rely on a patchwork of local and state laws that fail to protect them due to lack of Federal protection. Passing the

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[291] *Id.*

[292] Letter from the General Conference – Seventh Day Adventist Church, the Union of Orthodox Jewish Congregations of America and U.S. Conference of Catholic Bishops to Hon. Robert Andrews, Chairman, Hon. John Kline, Ranking Member, Subcommittee of Health, Education, Labor and Pensions, and the U.S. House of Representatives (September 4, 2007). JAMES STANDISH ET AL, GENERAL CONFERENCE OF SEVENTH DAY ADVENTISTS (2007), http://www.bilerico.com/2007/10/religorg090407.pdf.

[293] *Id.*

[294] *Id.*

Employment Non-Discrimination Act as proposed by H.R. 3685 into law is a crucial step toward ensuring that gay, lesbian and bisexual workers are not discriminated against due to their sexual orientation.

This article demonstrates that arguments that the Employment Non-Discrimination Act is unconstitutional are unfounded. First, the Employment Non-Discrimination Act will not violate an organization's right to the free exercise of religion because the same exemption is found within Title VII, and courts interpreting the exemption have provided ample protection to employers under the First Amendment. Next, the Act will not violate the State's Eleventh Amendment immunity as Congress has the authority to enforce legislation against the States under its Section 5 Enforcement Power or by utilizing its Spending Power. Lastly, Congress has the authority to propose and enact the Employment Non-Discrimination Act by utilizing its power under the Commerce Clause and under the Fourteenth Amendment.

Furthermore, fears that the new revised Employment Non-Discrimination Act will not provide protection to all gay, lesbian, bisexual and transgendered individuals because gender identity was eliminated from H.R. 3685 are unsound. Protection for all gay, lesbian, bisexual and transgendered individuals will be provided for either under Title VII and the *Price Waterhouse* or *Oncale* interpretations, or under the new revised H.R. 3685 "perceived sexual orientation" clause.

The revised ENDA will act to ensure that individuals will be protected regardless of their sexual orientation by the same fundamental principles of fairness and equality at work exemplified in this country's civil rights protections based on race, religion, sex, national origin, age or disability. These basic protections are long overdue, as gay, lesbian and bisexual, as well as heterosexual, employees have been susceptible to unfair treatment for many years and

millions of hard working tax-payers have been left without Federal protection. ENDA merely furthers the spirit of existing civil rights law and extends similar protections to gay, lesbian and bisexual employees.