

2014

The Exception That Doesn't Prove the Rule: Why Congress Should Narrow ENDA's Religious Exemption to Protect the Rights of LGBT Employees

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Recommended Citation

Dabrowski, Julie. "The Exception That Doesn't Prove the Rule: Why Congress Should Narrow ENDA's Religious Exemption to Protect the Rights of LGBT Employees." *American University Law Review* 63, no.6 (2014): 1957-1984.

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The Exception That Doesn't Prove the Rule: Why Congress Should
Narrow ENDA's Religious Exemption to Protect the Rights of LGBT
Employees

NOTE

THE EXCEPTION THAT DOESN'T PROVE THE RULE: WHY CONGRESS SHOULD NARROW ENDA'S RELIGIOUS EXEMPTION TO PROTECT THE RIGHTS OF LGBT EMPLOYEES

JULIE DABROWSKI*

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INTRODUCTION

The current state of protections for lesbian, gay, bisexual, and transgender (LGBT) employees in the workplace is far from adequate. Anywhere from 15–40% of gay and lesbian employees and nearly 90% of transgender employees have experienced discrimination or harassment at some point in their careers.¹ Yet victims of discrimination based on sexual orientation or gender identity must navigate a patchwork of federal, state, and local laws and regulations that often provide insufficient or no protection for employees.²

The Employment Non-Discrimination Act (ENDA) would remedy this inadequate regulatory scheme by creating a national standard of LGBT protection that prohibits employers from discriminating on the basis of sexual orientation and gender identity. ENDA would provide employees with recourse for their employers' discriminatory decisions regarding hiring and firing or wages, as well as any workplace harassment or other discriminatory treatment regarding the terms and conditions of employment.³ An overwhelming majority of Americans support a federal law banning such discrimination,⁴ and ENDA has received bipartisan support in Congress.⁵

1. Jeff Krehely, *Polls Show Huge Public Support for Gay and Transgender Workplace Protections*, CENTER FOR AM. PROGRESS (June 2, 2011), <http://www.americanprogress.org/issues/lgbt/news/2011/06/02/9716/polls-show-huge-public-support-for-gay-and-transgender-workplace-protections> (noting that 44% of transgender individuals missed a job opportunity because of their status, while 26% percent lost a job and 23% lost a promotion). See generally Stuart Biegel, *Unfinished Business: The Employment Non-Discrimination Act (ENDA) and the K-12 Education Community*, 14 N.Y.U. J. LEGIS. & PUB. POL'Y 357, 367 (2011) (documenting the history of discrimination against LGBT employees, both within the education sector and in the workplace generally).

2. *Non-Discrimination Laws: State by State Information—Map*, AM. C.L. UNION, <https://www.aclu.org/maps/non-discrimination-laws-state-state-information-map> (last visited Aug. 3, 2014) (mapping the various levels of LGBT protections offered under state non-discrimination laws). Though many states, including California and Washington, protect LGBT employees from discrimination based on sexual orientation and gender identity, a majority of states provide no LGBT discrimination protections. Three states, including New York and New Hampshire, prohibit discrimination based on sexual orientation but not gender identity. *Id.*

3. S. 815, 113th Cong. § 4(a) (2013).

4. Maggie Haberman, *Poll: Big Support For AntiDiscrimination Law*, POLITICO (Sept. 20, 2013, 5:05 AM), <http://www.politico.com/story/2013/09/poll-big-support-for-anti-discrimination-law-97540.html> (citing a poll by TargetPoint Consulting in conjunction with the Americans for the Workplace Opportunity campaign indicating that 68% of registered voters across the country support federal legislation to protect LGBT Americans from workplace discrimination, including 56% of Republicans).

5. See, e.g., Ed O'Keefe, *Who Voted For the Employment Non-Discrimination Act?*, WASH. POST (Nov. 7, 2013, 4:43 PM), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/11/07/who-voted-for-the-employment-non-discrimination-act>

Critics of the bill argue, however, that antidiscrimination laws infringe on First Amendment rights when unaccompanied by exemptions for faith-based organizations with religiously-grounded objections to the conduct the antidiscrimination laws seek to protect.⁶ These critics argue that under ENDA, religious organizations that object to homosexuality and transgenderism could be forced to employ individuals whose conduct is opposed to the organizations' religious missions and beliefs.⁷ This criticism has led Congress to include a broad religious exemption allowing organizations that qualify as religious employers to discriminate against LGBT employees without regard to any of ENDA's provisions.⁸

This Note seeks to make sense of ENDA's religious exemption, which is significantly broader than the religious exemption included in Title VII. It recommends narrowing the scope of ENDA's exemption to provide more comprehensive protections to LGBT employees while simultaneously safeguarding employers' First Amendment rights. Part I provides background on both Title VII and ENDA and their respective religious exemptions, which, although seemingly identical, apply to very different groups of employees. Part II argues that ENDA's religious exemption is overbroad because it allows religious employers to discriminate against LGBT employees even in cases where the discrimination is not based on a religiously-grounded objection. Because the exemption provides employers with protection beyond that which is necessary to safeguard their First Amendment rights, it fails to appropriately balance the protection of religious freedom and the individual rights of LGBT employees. Part III recommends that Congress amend ENDA's religious exemption to allow religious

(describing the breakdown of the U.S. Senate vote to pass ENDA, which included ten Republicans in favor of the bill).

6. Steven H. Aden & Stanley W. Carlson-Thies, *Catch or Release? The Employment Non-Discrimination Act's Exemption for Religious Organizations*, 11 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS, no. 2, Sept. 2010, at 4.

7. *See, e.g., id.* (contending that anti-discrimination laws such as ENDA are themselves discriminatory if they do not provide exemptions for employers with religiously-grounded objections to homosexual conduct because they would require religious organizations "to affirm conduct that is in diametric opposition to the moral principles of their faith"); *Religious Activist Group Says ENDA Would Discriminate Against Christians*, TAMPA BAY TIMES, <http://www.politifact.com/truth-o-meter/statements/2013/dec/16/traditional-values-coalition/religious-activist-group-says-enda-would-discriminate> (last visited Aug. 15, 2014) (discussing the Traditional Values Coalition's claim that ENDA "discriminates against Christian daycare, Christian parents, Christian business owners, and the rights of religious freedom" because it does not provide an exemption for secular companies and organizations that are run by "committed Christians").

8. S. 815 § 6; *see infra* Part II.A (describing ENDA's broad religious exemption and its failure to safeguard the rights of LGBT employees).

employers to discriminate against only those employees who fall under Title VII's ministerial exception, which allows religious organizations the freedom to discriminate in the hiring and firing of employees who publicly represent the religious views of the organization. This Note concludes by explaining how the proposed amendment, though an imperfect response to the gap in coverage for LGBT employees, will provide an acceptable balance between protecting the individual rights of LGBT employees and the religious freedom of their employers.

I. BACKGROUND

A. *Religious Employers and the First Amendment*

The First Amendment of the U.S. Constitution gives religious employers the power to make religiously-based employment decisions free from government interference.⁹ The Amendment states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”¹⁰ The first clause of the Amendment, known as the Establishment Clause, prohibits the government from establishing a national religion or giving preference to one religion over another.¹¹ Accordingly, a statute violates the Establishment Clause if it favors employers or employees of a particular religion, or favors religious employees over non-religious employees.¹² The Amendment's Second clause, known as the Free Exercise Clause, requires that laws provide individuals and organizations with the freedom to exercise their religion without excessive government interference.¹³ Courts have interpreted the

9. U.S. CONST. amend. I, cls. 1–2.

10. *Id.* amend. I, cl. 1.

11. *Id.*

12. See, e.g., *Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 709 (1985) (holding that a Connecticut statute violated the Establishment Clause where it provided Sabbath observers with an absolute and unqualified right not to work on their Sabbath, thereby “command[ing] that Sabbath religious concerns automatically control . . . all secular interests at the workplace”). Beyond the plain text of the Establishment Clause, the Clause has been interpreted to ensure that neither a state nor the federal government can, among other things, affiliate itself with any religious doctrine; pass laws that aid any particular religion; indicate a preference for religion to irreligion, or vice versa; or force a person to profess a belief or disbelief in any religion. 16A C.J.S. *Constitutional Law* § 753 (2005). The Clause is intended to protect against the support and involvement of the government in religious activity. *Id.*

13. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 706 (2012) (holding that, because the Free Exercise Clause “protects a religious group’s right to shape its own faith and mission through its appointments,” the government is prohibited from involving itself in selection of church ministers); *Conestoga Wood Specialties Corp. v. Sec’y of U.S. Dep’t of Health & Human Servs.*, 724 F.3d 377, 388 (3d Cir. 2013), *rev’d sub nom.* *Burwell v. Hobby Lobby Stores, Inc.*,

Free Exercise Clause narrowly to require religious organizations to follow neutral and generally applicable employment laws such as Title VII.¹⁴ The Free Exercise Clause does not require an exemption from any governmental program unless inclusion in the program would prevent an organization from freely exercising its religion.¹⁵

Courts have made a number of efforts to reconcile Title VII and other antidiscrimination laws¹⁶ with the Free Exercise Clause in order to provide religious organizations with more freedom from government interference. The judicially created “ministerial exception” affords religious organizations free rein to select clergy without regard to any of Title VII’s protections.¹⁷ While courts of appeals have recognized a ministerial exception since the passage of Title VII,¹⁸ it was not until 2012, in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.*, that the U.S. Supreme Court first

No. 13-354 (U.S. June 30, 2014) (holding that a secular, for-profit corporation cannot engage in the “exercise of religion” under the Free Exercise Clause); *Elane Photography, LLC v. Willock*, 309 P.3d 53, 77 (N.M. 2013) (determining that the New Mexico Human Rights Act does not violate the Free Exercise clause because its exemptions, which are common to a variety of laws, do not prefer secular conduct over religious conduct and do not evince any hostility toward religion).

14. See *Vigars v. Valley Christian Ctr.*, 805 F. Supp. 802, 809 (N.D. Cal. 1992) (quoting *Emp’t Div., Dep’t of Human Res. of Oregon v. Smith*, 494 U.S. 872, 878 (1990), *superseded by statute*, 42 U.S.C. § 2000cc (2012), *as recognized in* *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354, slip op. at 3-4 (U.S. June 30, 2014)) (stating that free exercise claims will “fail if prohibiting the exercise of religion . . . is not the *object* of the [law] but merely the incidental effect of a generally applicable and otherwise valid provision. . .” (alterations in original) (internal quotations omitted)); see also *Smith*, 494 U.S. at 890 (finding that because states are not required to accommodate otherwise illegal acts done to further religious beliefs, a state could deny unemployment benefits to a person fired for using peyote as part of a religious ritual).

15. *E.g.*, *Tony & Susan Alamo Found. v. Sec’y of Labor*, 471 U.S. 290, 303-04 (1985) (holding that a church is not exempt from minimum wage and recordkeeping requirements because its religious objection is not to receiving any form of wages, but rather to receiving *cash* wages, which the law does not require).

16. See *infra* notes 37-38 (discussing antidiscrimination laws that have augmented Title VII by extending its protections to other minority groups).

17. See, *e.g.*, *Hosanna-Tabor*, 132 S. Ct. at 709 (holding that a “called” teacher was a “minister” covered by the ministerial exception, which is grounded in the First Amendment and which bars government interference with the internal governance of the church); *McClure v. Salvation Army*, 460 F.2d 553, 560-61 (5th Cir. 1972) (determining that Congress, in enacting Title VII, did not intend to allow the government to interfere in the relationship between a church and its ministers even though the statute did not state specifically that ministers were protected).

18. See, *e.g.*, *Rweyamamu v. Cote*, 520 F.3d 198, 209 (2d Cir. 2008) (holding that a priest’s race discrimination claim was barred by a “ministerial exception” based on his religious duties and the nature of his dismissal); *Natal v. Christian & Missionary Alliance*, 878 F.2d 1575, 1578 (1st Cir. 1989) (exempting a not-for-profit religious corporation from the requirements of anti-discrimination laws on the grounds that “a religious organization’s fate is inextricably bound up with those whom it entrusts with the responsibilities of preaching its word and ministering to its adherents”). The ministerial exception has also been applied outside of the Title VII context. See, *e.g.*, *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192, 1210 (Conn. 2011) (finding that the ministerial exception applied to bar a school principal’s contract and tort law claims).

acknowledged the validity of this exception.¹⁹ In doing so, the Court reasoned that depriving the church of the power to select those who would personify its religious beliefs—a matter that is “strictly ecclesiastical”—violates the First Amendment.²⁰ Although the ministerial exception covers all employers deemed to be religious corporations for purposes of Title VII,²¹ it appears to except only the hiring and firing of religious leaders and does not allow employers to discriminate with regard to the terms and conditions of employment.²²

In applying the ministerial exception, the Supreme Court has declined to “adopt a rigid formula for deciding when an employee qualifies as a minister.”²³ Instead, it considers all “circumstances of . . . employment,” including the employee’s formal title, whether the employee identifies him or herself as a minister, and whether and how much the employee engages in religious functions as part of his or her employment.²⁴ The employee’s job title is not controlling, nor is the fact that an employee performs work that is primarily religious or primarily secular in nature.²⁵

19. See *Hosanna-Tabor*, 132 S. Ct. at 705 (stating that the ministerial exception “precludes application of [employment] legislation to claims concerning the employment relationship between a religious institution and its ministers”).

20. *Id.* at 709 (citing *Kedroff v. Saint Nicholas Cathedral of Russian Orthodox Church in N. Am.*, 344 U.S. 94, 119 (1952)); see *id.* at 697 (“Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision . . . [it] interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.”).

21. See *infra* notes 40–46 and accompanying text (explaining how the courts have interpreted the term “religious corporation”).

22. *Hosanna-Tabor*, 132 S. Ct. at 703 (“The Establishment Clause prevents the Government from appointing ministers, and the Free Exercise Clause prevents it from interfering with the freedom of religious groups to *select their own*.” (emphasis added)); see CYNTHIA BROUGH, CONG. RESEARCH SERV., RS22745, RELIGION AND THE WORKPLACE: LEGAL ANALYSIS OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 AS IT APPLIES TO RELIGION AND RELIGIOUS ORGANIZATIONS 4 (2011) (explaining that the ministerial exemption reconciles Title VII with the Establishment Clause because it allows churches to freely select their own clergy without endorsing discrimination as a basis for wage and compensation determinations).

23. *Hosanna-Tabor*, 132 S. Ct. at 707; see, e.g., *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177 (5th Cir. 2012) (holding that the music director and pianist role at a church was covered by the ministerial exception because he served an integral role at church services and helped to convey the church’s message to its congregation).

24. *Hosanna-Tabor*, 132 S. Ct. at 707; see CYNTHIA BROUGH, CONG. RESEARCH SERV., RS22745, RELIGIOUS DISCRIMINATION IN EMPLOYMENT UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 5 (2013) (breaking down the Court’s considerations concerning whether an employee qualifies as a minister into four factors: formal title, substantive actions, understanding and use of the title, and religious functions performed).

25. See *Hosanna-Tabor*, 132 S. Ct. at 708–09 (holding that a title alone cannot “automatically ensure coverage” and that, although the amount of time an employee spends on secular duties is relevant to determining whether that employee is a minister, “that factor cannot be considered in isolation”).

Title VII's exemptions for religiously-grounded hiring provide another means of tempering the statute's effect on religious organizations. Its exemptions allow religious employers to discriminate in the hiring and firing of employees whose religious beliefs do not align with those of the organization. For example, under Title VII, a Catholic organization would be free to hire only individuals who hold themselves out as Catholic, regardless of whether those individuals will serve in a ministerial capacity.²⁶ Proponents argue that Title VII's exemptions ensure the autonomy of churches and faith-based organizations.²⁷ The Supreme Court has held that shielding religious expression from antidiscrimination laws "is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas," including those regarding homosexuality and transgenderism.²⁸ Title VII's religious exemptions thus seek to bring the statute into accord with the First Amendment.

Title VII of the Civil Rights Act of 1964 prohibits discrimination by covered employers on the basis of race, color, religion, sex, and national origin.²⁹ It applies to federal, state, and local governments, as well as private employers with fifteen or more employees.³⁰ With limited exceptions,³¹ Title VII applies only to employees who receive monetary compensation for their work.³² Over time, Title VII has been augmented by legislation prohibiting discrimination on the basis of pregnancy³³, age,³⁴ and disability.³⁵

26. EQUAL EMP'T OPPORTUNITY COMM'N, NOTICE NO. N-915.016, RELIGIOUS ORGANIZATION EXEMPTION UNDER TITLE VII ¶ 235(1987).

27. See *infra* Part I.B (describing Title VII's religious exemptions for religiously grounded hiring in depth).

28. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 647–48, 656 (2000) (upholding the right of the Boy Scouts to dismiss an openly gay scoutmaster because his presence affected the group's ability to advocate its viewpoints).

29. 42 U.S.C. § 2000e-2(a) (2012).

30. *Id.* § 2000e(b).

31. See *O'Connor v. Davis*, 126 F.3d 112, 116 (2d Cir. 1997) (differentiating the case at hand, where the Court held that an intern who did not receive compensation for her work was not covered by Title VII, from *Haavistola v. Cmty. Fire Co. of Rising Sun, Inc.*, 6 F.3d 211, 221–22 (4th Cir. 1993), where the Fourth Circuit found that a volunteer firefighter who did not receive monetary remuneration but did receive indirect economic remuneration through a disability pension, survivors' benefits for dependents, life insurance, and other benefits, was protected by Title VII).

32. See, e.g., *id.* at 119 (finding the plaintiff-intern outside Title VII's protections because she received federal work study funding from her school, rather than her employer, and did not receive any employee benefits, such as health insurance or vacation time).

33. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e(k)).

34. Age Discrimination in Employment Act of 1967, Pub. L. No. 90-202, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621–634).

Title VII allows private religious employers to discriminate in the hiring of employees whose religious beliefs do not align with those of the employer.³⁶ It includes two separate exemptions: a general exemption for religious employers³⁷ and a more specific exemption for religious educational institutions.³⁸ These exemptions derive from the First Amendment principles of free exercise and separation of church and state and serve as a check on Congress's power to restrict private entities from freely engaging in religious affairs.³⁹

The first provision of Title VII's religious exemption applies specifically to religious employers' religiously-grounded hiring and firing decisions.⁴⁰ The provision states that Title VII

shall not apply to an employer with respect to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities.⁴¹

The statute does not explicitly define "religious corporation," and courts have broadly interpreted the phrase to include places of worship, religious educational institutions, and not-for-profit organizations with clear religious affiliations.⁴² Although courts have

35. Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified as amended at 42 U.S.C. §§ 12101-12117). Amending the iconic Civil Rights Act is no small feat. After several failed attempts to do so, LGBT advocates have chosen to instead push for the passage of ENDA as an alternate means of providing equal rights to LGBT employees. See Jennifer S. Hendricks, *Instead of ENDA, a Course Correction for Title VII*, 103 NW. U.L. REV. COLLOQUY 209, 209-10, 212-15 (2008) (describing these failed attempts and explaining that proponents thought they would have a better chance at passing separate legislation). ENDA, unlike Title VII, does not include a means for bringing disparate impact claims and does not address affirmative action. *Id.*

36. Federal, state, and local governments are not covered under this exemption, since they may not, in accordance with the Establishment Clause, have any religious affiliation. See U.S. CONST. amend. I, cl. 1; *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (declaring that the "fundamental concept of liberty embodied in [the Fourteenth] Amendment" includes the liberty guaranteed by the First Amendment, thereby applying the Establishment Clause against the states to prohibit them from establishing a state religion).

37. 42 U.S.C. § 2000e-1(a) (2012).

38. *Id.* § 2000e-2(e).

39. See *supra* Part I.A (discussing the relationship between the First Amendment and employment discrimination legislation).

40. 42 U.S.C. § 2000e-1(a).

41. *Id.*

42. See, e.g., *Saemodarae v. Mercy Health Servs.*, 456 F. Supp. 2d 1021, 1037 (N.D. Iowa 2006) (holding that a Catholic hospital was exempt from the requirements of Title VII because it was religious in both "nature" (because the Catholic church supported and controlled it) and "atmosphere" (due to the regular practice of religious services and the fact that the building was "permeated with religious overtones")); *Gosche v. Calvert High Sch.*, 997 F. Supp. 867, 871 (N.D. Ohio 1998), *aff'd*, 181 F.3d 101 (1999) (allowing a Catholic school to terminate a

declined to apply the exemption to non-church affiliated organizations whose owners have strongly held religious beliefs, the Supreme Court's recent decision in *Burwell v. Hobby Lobby Stores, Inc.*⁴³ could prompt a broader interpretation where a closely held corporation can show that it has a sincerely held religious objection to Title VII.⁴⁴ In addition, courts have literally interpreted the exemption to include *all* activities of religious organizations as opposed to solely those activities that directly involve the exercise of religion.⁴⁵ Although an organization that qualifies under the religious exemption is free to discriminate on the basis of religion in all hiring and firing decisions, it may not discriminate based on membership in any other class protected by Title VII.⁴⁶

The second provision of Title VII's religious exemption is more specific in nature: it allows religious educational institutions to take religious affiliation into account in the hiring and firing of personnel. The provision 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 [the institution] . . . is . . . owned, supported, controlled, or man-

teacher for engaging in an adulterous relationship on the theory that a religious organization could condition continued employment on conformity to the religious standards of the church); *EEOC v. Presbyterian Ministries, Inc.*, 788 F. Supp. 1154, 1155, 1157 (W.D. Wash. 1992) (exempting from the protections of Title VII a Christian retirement home whose employee manual stated that "[e]mployees shall be persons who acknowledge the Christian purposes of Presbyterian Ministries, Inc. and agree to abide by and support them").

43. No. 13-354 (U.S. June 30, 2014).

44. See *infra* notes 107–08 (discussing the *Hobby Lobby* decision and its implications for federal antidiscrimination laws like ENDA); Jillian T. Weiss, *The First Amendment Right to Free Exercise of Religion, Nondiscrimination Statutes Based on Sexual Orientation and Gender Identity, and the Free Exercise Claims of Non-Church-Related Employers*, 12 FLA. COASTAL L. REV. 15, 46 (2010) (explaining that non-religious employers may not raise the Free Exercise Clause as a defense to neutral, generally applicable laws such as those prohibiting discrimination based on sexual orientation and gender identity).

45. See, e.g., *Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 339–40 (1987) (holding that a religiously affiliated non-profit organization may make employment decisions based on religion without violating the Establishment Clause, even if those decisions relate to nonreligious activities of the organization). But see Duane E. Okamoto, *Religious Discrimination and the Title VII Exemption for Religious Organizations: A Basic Values Analysis for the Proper Allocation of Conflicting Rights*, 60 S. CAL. L. REV. 1375, 1377–79 (1987) (suggesting that there may be exceptions to the rule that Title VII exempts all activities of a religious organization because "neither the Act nor its judicial interpretation has provided a clear, definitive, or consistent standard concerning religious organizations' statutory liberty to discriminate in employment").

46. See BROUGHER, RELIGION AND THE WORKPLACE, *supra* note 22, at 3 (explaining that an exempt religious organization can still violate Title VII if it considers an employee's sex, race, color, or national origin).

aged by a particular religion or by a particular religious [organization] . . . 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.⁴⁷

Courts have generally required that religious organizations pass either a “control” test or a “curriculum” test to show that they fall under this provision.⁴⁸ However, there is a limited amount of case law pertaining to the provision, in part because of its redundancy with the religious exemption’s first provision, which lists “religious educational institutions” as one type of religious organization.⁴⁹ Taken together, these two provisions provide religious employers the freedom to make hiring and firing decisions that take into account an individual’s religious background and beliefs.

B. The Origins of ENDA and Its Religious Exemption

1. Overview and legislative history

ENDA, if passed, would prohibit employment discrimination on the basis of sexual orientation or gender identity.⁵⁰ It would allow employees to sue their employers for discriminatory treatment in hiring, firing, promotion, or other terms and conditions of employment.⁵¹ Such discrimination could include, for example, refusing to hire an employee who is openly gay, terminating an employee who expresses his intent to undergo a gender transition, or failing to promote an LGBT employee to a management position where she would have greater public visibility. Like Title VII, ENDA would apply only to employers with fifteen or more employees and would generally not apply to volunteers who receive no compensation.⁵² The bill’s stated purpose is

47. 42 U.S.C. § 2000e-2(e)(2) (2012).

48. See, e.g., *EEOC v. Kamehameha Sch./Bishop Estate*, 990 F.2d 458, 464 (9th Cir. 1993) (interpreting “curriculum” narrowly to mean “coursework and required school activities”). Compare *Myers v. Chestnut Hill Coll.*, No. 95-6244, 1996 WL 67612, at *5 (E.D. Pa. Feb. 13, 1996) (holding that a private Catholic college passed the “control” test because the church maintained its operations), with *Siegel v. Truett McConnell Coll., Inc.*, 13 F. Supp. 2d 1335, 1340 (N.D. Ga. 1994) (requiring an organization to have “extremely close ties” to organized religion to be considered under church control and thereby exempt from the requirements of Title VII), *aff’d sub nom.* 73 F.3d 1108 (11th Cir. 1995).

49. See Aden & Carlson-Thies, *supra* note 6, at 5 (speculating that the “paucity of case law” surrounding Title VII’s second religious exemption is related to the fact that many consider it redundant).

50. S. 815, 113th Cong. § 4(a) (2013).

51. FAMILY EQUALITY COUNCIL, THE EMPLOYMENT NON-DISCRIMINATION ACT: FACT SHEET 1 (2013), available at http://www.familyequality.org/_asset/xh3z4t/ENDA-Fact-Sheet-6.7.13.pdf.

52. S. 815 § 3(a)(1)–(5).

to address the history and persistent, widespread pattern of discrimination on the bases of sexual orientation and gender identity by private sector employers and local, State, and Federal Government employers . . . [and] to reinforce the Nation's commitment to fairness and equal opportunity in the workplace *consistent with the fundamental right of religious freedom*.⁵³

Over the years, Congress has come close to passing several versions of ENDA, and the bill has undergone numerous changes designed to facilitate its passage. U.S. Representative Bella Abzug sponsored the first gay employee rights bill in collaboration with the National Gay and Lesbian Task Force during the 1970s. In 1994, supporters of this bill reframed it as ENDA and offered it as an alternative to the gay civil rights omnibus bill under consideration in the House at that time.⁵⁴ ENDA narrowed the scope of Abzug's bill by limiting protection to the employment context.⁵⁵ Although transgender advocates began lobbying gay and lesbian leaders to amend ENDA in the mid-1990's,⁵⁶ Congress did not introduce a trans-inclusive version of the bill until 2007.⁵⁷ This bill was short-lived, as the House decided instead to consider a version limited to sexual orientation, which later passed in the House only.⁵⁸ However, in 2009, trans-inclusive bills were introduced in both the House and Senate.⁵⁹ Though some LGBT rights advocates have argued that a trans-inclusive ENDA is too extreme for many Americans and is the reason the bill has not yet become law, a consensus has developed among advocates that ENDA must include protection for LGBT employees.⁶⁰ Thus, the transgender provision remains an important part of the current bill.⁶¹

53. *Id.* § 2(1), (4) (emphasis added).

54. *Task Force History*, NAT'L GAY & LESBIAN TASK FORCE, http://www.thetaskforce.org/about_us/history (last visited Aug. 14, 2014).

55. Jerome Hunt, *A History of the Employment Non-Discrimination Act: It's Past Time to Pass This Law*, CENTER FOR AM. PROGRESS (July 19, 2011), <http://www.americanprogress.org/issues/lgbt/news/2011/07/19/10006/a-history-of-the-employment-non-discrimination-act>.

56. *Task Force History*, *supra* note 54.

57. *Id.*; H.R. 3686, 110th Cong. § 3(a)(1) (2007) (forbidding employers from refusing to hire or discharging any individual due to the "individual's actual or perceived gender identity"); *id.* § 2(a)(6) (defining "gender identity" as "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").

58. H.R. 3685, 110th Cong. § 4(a)(1) (2007) (prohibiting employers from making hiring and firing decisions based on actual or perceived sexual orientation but declining to address gender identity); *Task Force History*, *supra* note 54.

59. *Task Force History*, *supra* note 54.

60. Hunt, *supra* note 55.

61. See, e.g., Katrina C. Rose, *Where the Rubber Left the Road: The Use and Misuse of History in the Quest for the Federal Employment Non-Discrimination Act*, 18 TEMP. POL. & CIV. RTS. L. REV. 397, 397 (2009) (describing how, when U.S. Representative Barney Frank dropped protection for transgendered employees from the 2007 bill, many gay

On July 10, 2013, the Senate Health, Education, Labor & Pensions Committee approved ENDA by a 15–7 vote.⁶² When the bill came before the Senate, Pennsylvania Republican Pat Toomey proposed an amendment that would have expanded the religious exemption to religiously affiliated employers taking part in primarily secular activities.⁶³ After rejecting this amendment and accepting by unanimous vote an amendment preventing government retaliation against religious organizations, the Senate approved ENDA on November 7, 2013.⁶⁴

2. ENDA's religious exemption

Much like the rest of the bill, ENDA's religious exemption has undergone a number of modifications over the years.⁶⁵ In the 110th Congress, Representative Barney Frank introduced H.R. 2015, which included a narrower exemption stating that ENDA “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 or the teaching or spreading of religious doctrine or belief.”⁶⁶ When this bill died in committee, Frank introduced H.R. 3685, which defined a religious organization more narrowly as:

- (A) a religious corporation, association, or society; or
- (B) a school, college, university, or other educational institution or institution of learning, if—

rights activists and national and local gay rights groups “demanded that gender identity be put back in the bill, guaranteeing its defeat for years to come”); John Aravosis, *How Did the T Get in LGBT?*, SALON (Oct. 8, 2007, 7:10 AM), <http://www.salon.com/2007/10/08/lgbt> (acknowledging that civil rights legislation, like other types of legislation, is a series of compromises, and advocating for the passage of a non-trans-inclusive ENDA on these grounds).

62. Lisa Milam-Perez & Pamela Wolf, *ENDA Passes in Senate; Faces Tough Hurdle in House—Pending Legislation*, HUM. RESOURCES MGMT. COMPENSATION GUIDE (CCH) 2013, ¶ 32,682 (2013), available at 2013 WL 5963567; Chris Johnson, *HISTORIC: Senate Panel Advances Trans-Inclusive ENDA*, WASH. BLADE (July 10, 2013), <http://www.washingtonblade.com/2013/07/10/historic-senate-panel-advances-trans-inclusive-enda>.

63. See Sunnivie Brydum, *In Historic First, Senate Approves ENDA*, ADVOCATE.COM (Nov. 7, 2013, 1:53 PM), <http://www.advocate.com/politics/2013/11/07/breaking-senate-approves-enda-initial-vote> (quoting Senator Toomey, who said that “the agreement is that religious institutions, including those engaging in some secular activities, should be exempt from engaging in activities that contradict their religious beliefs”); see also *infra* Part I.B.2 (describing the religious exemptions in various versions of ENDA).

64. Brydum, *supra* note 63.

65. Some of the early versions of the bill include: S. 1705, 108th Cong. §§ 3(a)(8), 9 (introduced Oct. 2, 2003); H.R. 2692, 107th Cong. §§ 3(a)(8), 9 (introduced July 31, 2001); S. 869, 105th Cong. §§ 3(a)(8), 9(a) (introduced June 10, 1997); H.R. 4636, 103d Cong. §§ 6(a)–(b), 17(9)(A)–(B) (introduced June 23, 1994).

66. H.R. 2015, 110th Cong. § 6(a) (2007).

- (i) the institution is in whole or substantial part controlled, managed, owned, or supported by a particular religion, religious corporation, association, or society; or
- (ii) the curriculum of the institution is directed toward the propagation of a particular religion.⁶⁷

Although the bill's supporters maintained that the above definition of a religious organization was synonymous with that of Title VII, opponents argued that courts could interpret the language to exempt a smaller range of organizations than are exempt under Title VII.⁶⁸ Among the amendments offered in response to these concerns was one that would have significantly expanded the scope of the religious exemption to include organizations that "maintain a faith-based mission."⁶⁹ The House Labor and Education Committee rejected this amendment on the grounds that it was overbroad, given that the bill already "adopt[ed] Title VII's definition of a religious organization and thereby import[ed] long-standing existing law on who is or is not a religious organization."⁷⁰

However, some members of the religious community continued to oppose the definition of a "religious organization" by maintaining that the exemption would unfairly relieve seminaries and religious colleges from their obligations under ENDA while failing to exempt non-denominational faith-based colleges.⁷¹ In response, Congressman George Miller, co-sponsor of the bill, introduced an amendment that incorporated the language of Title VII's religious exemption: "This Act shall not apply to a corporation, association, educational institution, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Act of 1964 pursuant to section 702(a) or 703(e)(2) of such Act (42 U.S.C. 2000e-1(a); 2000e-2(e)(2))."⁷² Congressman Miller's amendment passed, and this language appears in the current version of ENDA recently passed by the Senate.⁷³ Congress has not attempted to clarify this

67. H.R. 3685, 110th Cong. § 3(a)(8) (2007).

68. H.R. REP. NO. 110-406, pt. 1, at 49 (2007) (noting that although the authors of H.R. 2015 intended to exempt a broader range of religious institutions than Title VII, the language of H.R. 2015's religious exemption is "more prescriptive" than that of earlier versions).

69. *Id.* at 10.

70. *Id.*

71. See Aden & Carlson-Thies, *supra* note 6, at 5 (describing the U.S. House of Representatives debate over the religious exemption of H.R. 3685 and the concern that it would exempt church-controlled colleges and universities based on denominational control but would not exempt a non-denominational Christian college such as Wheaton College in Illinois).

72. H.R. REP. NO. 110-422, at 3 (2007).

73. S. 815, 113th Cong. § 6(a) (2013).

language or to distinguish ENDA's religious exemption from that of Title VII.⁷⁴ Thus, should ENDA become law, its religious exemption will likely apply at a minimum to those organizations covered by Title VII, including religious corporations and faith-based educational institutions.⁷⁵

Presently, ENDA's fate remains uncertain due to partisan politics. The bill is stalled in the House of Representatives, and House Speaker John Boehner has stated that he will continue to block it from coming to vote.⁷⁶ While House Democrats could theoretically use a discharge petition to bypass Republican leadership, such a maneuver is used only rarely.⁷⁷ Despite the existing political obstacles, ENDA enjoys broad support in the House: it currently has 202 co-sponsors, six of whom are Republican.⁷⁸ While the current Congress is unlikely to pass ENDA, recent support for and momentum behind the bill suggest that it may become law in the coming years.⁷⁹

From its inception to its passage in the Senate, ENDA's religious exemption has been a key component of the bill and has been crucial in garnering support from religious organizations.⁸⁰ While it is clear that an exemption is politically necessary, it is less clear how courts

74. *See id.* (providing no additional guidance on exemptions for religious organizations under ENDA).

75. *See infra* notes 88–101 and accompanying text (discussing the likelihood that, in the case of ENDA, courts will find that the term “religious employer” covers places of worship, religiously affiliated non-profits, and religious educational institutions, and entertaining the possibility that courts will interpret the phrase even more broadly in light of policy concerns underlying ENDA).

76. Amanda Terkel, *Harry Reid Predicts House Passage of ENDA If John Boehner Stops Blocking It*, HUFFINGTON POST (Nov. 5, 2013, 3:58 AM), http://www.huffingtonpost.com/2013/11/05/house-enda_n_4218700.html (noting that Speaker Boehner believes the bill will lead to an increase in frivolous litigation and negatively affect small business).

77. A discharge petition is a legislative maneuver that would require the minority party to obtain 218 signatures to override the Speaker's decision and force a floor vote. *See* Justin Snow, *Amid House Intransigence, Democrats Could Attempt to Force ENDA Vote*, METRO WKLY. (Mar. 26, 2014), <http://www.metroweekly.com/poliglot/2014/03/amid-house-intransigence-democrats-could-attempt-t.html>.

78. *Id.*; *see also* Terkel, *supra* note 76 (“If [ENDA] came up for a vote in the House, it would pass.” (quoting Senate Majority Leader Harry Reid)).

79. *See* Haberman, *supra* note 4 (citing a 2013 studying finding that 68% of voters support the passage of federal legislation prohibiting discrimination based on sexual orientation or gender identity). Furthermore, most large businesses have already shown their support for ENDA's policy goals by putting in place their own discrimination policies: 88% of Fortune 500 companies have sexual orientation non-discrimination policies, while 57% have gender identity non-discrimination policies. Dan Rafter, *Nation's Leading Businesses Support Employment Non-Discrimination Act as Senate Hearing Nears*, HUM. RTS. CAMPAIGN (July 9, 2013), <http://www.hrc.org/blog/entry/nations-leading-businesses-support-employment-non-discrimination-act-as-sen>.

80. *See, e.g., Employment Non-Discrimination Act of 2009: Hearing on H.R. 3017 Before the H. Comm. on Educ. & Labor*, 111th Cong. 57–58 (2009) (statement of Rabbi David Saperstein, Director and Counsel, Religious Action Center of Reform Judaism) (testifying that ENDA's “exemption for religious organizations[] is an essential part of the legislation” because it “protect[s] the freedom of religious organizations with differing beliefs to practice their faith as they see fit”).

will interpret the exemption as written and whether ENDA will be effective in ensuring that LGBT employees are protected from discrimination in the workplace.

II. ENDA'S RELIGIOUS EXEMPTION SHOULD ALLOW DISCRIMINATION ONLY IN CASES WHERE AN EMPLOYER'S FIRST AMENDMENT RIGHTS ARE IMPLICATED

Among ENDA's stated purposes is this objective: "[T]o reinforce the Nation's commitment to fairness and equal opportunity in the workplace consistent with the fundamental right of religious freedom."⁸¹ However, ENDA's religious exemption provides employers with protections that extend beyond what is required by the First Amendment. The exemption applies to all organizations that are exempt from the religious discrimination provisions of Title VII regardless of whether the discrimination in question bears any relation to the organization's religious mission or beliefs.⁸² Thus, as written, ENDA's religious exemption is overly broad because it allows employers to discriminate even in cases where employing LGBT individuals poses no conflict with the employer's religious views.⁸³ As a result, the exemption undermines the purpose of the law by eliminating coverage for a large group of employees.

A. ENDA's Religious Exemption Is Overbroad Because It Allows Discrimination Irrespective of an Employer's Religious Beliefs or Its Employee's Role in Conveying Those Beliefs

ENDA's religious exemption is significantly broader than that of Title VII because it allows a religious employer to discriminate against an LGBT employee without requiring the employer to show that the

81. S. 815, 113th Cong. § 2(4) (2013). This stated purpose, coupled with ENDA's extensive religious exemption, suggests that ENDA's drafters intended to afford religious organizations special discretion in the case of discrimination against LGBT individuals as compared with discrimination against women, minorities, and other protected groups. See J. Banning Jasiunas, Note, *Is ENDA the Answer? Can A "Separate but Equal" Federal Statute Adequately Protect Gays and Lesbians from Employment Discrimination?*, 61 OHIO ST. L.J. 1529, 1553–54 (2000) (suggesting that ENDA's broad religious exemption "sends a mixed message" because it claims to stamp out sexual orientation discrimination but excludes a large class of employers from its requirements).

82. Jasiunas, *supra* note 81, at 1153; see JODY FEDER & CYNTHIA BROUGHER, CONG. RESEARCH SERV., R40934, SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION IN EMPLOYMENT: A LEGAL ANALYSIS OF THE EMPLOYMENT NON-DISCRIMINATION ACT (ENDA) 7 (2013) (arguing that ENDA's religious exemption broadens religious organizations' ability to discriminate in hiring beyond that provided by Title VII).

83. See *infra* notes 87–92 and accompanying text (describing two scenarios in which the religious exemption applies to bar discrimination suits by employees who perform primarily secular job duties and play no role in preaching the message of the church).

discrimination is grounded in a religious objection.⁸⁴ The exemption therefore provides employers with protections beyond those that are necessary to safeguard their First Amendment rights. The exemption does not require discrimination to be consistent with the religious tenets of an organization, nor does it limit discrimination to employees holding religious leadership roles in the organization.⁸⁵ Instead, it allows discrimination against LGBT employees irrespective of any religious objection or conflict with homosexuality or transgenderism.⁸⁶

Congress's failure to include any limitations on ENDA's religious exemption will result in a gap in protection for LGBT employees that will manifest in two likely scenarios. First, ENDA allows religious employers to discriminate against LGBT employees even in cases where the employer has no religious objection to homosexuality or transgenderism. By including a blanket exemption for religious corporations, ENDA leaves the door open for supervisors with personal biases against LGBT employees to make discriminatory employment decisions based on their own views rather than the tenets of the religion with which their employer is associated. Consider, for example, an applicant to a position at a religiously affiliated community center that has no stated objection to homosexuality. If a hiring manager, without the knowledge or consent of the organization's administration, were to refuse to hire the hypothetical applicant on the basis of sexual orientation, the employee would have no grounds for an employment discrimination suit because the community center would be exempt from coverage under ENDA. Both the organization and the hiring manager would escape liability for discrimination even though the discrimination in question was completely unrelated to the organization's religious mission and teachings. Although this scenario may prove to be rare, discrimination based on personal bias is nonetheless an unintended consequence of ENDA's religious exemption and could easily occur should ENDA pass in its current form.

84. In contrast, in order to receive protection under Title VII's religious exemption, an employer must show that the objection is based specifically on a religious objection to homosexuality and does not implicate another protected category. FEDER & BROUGHER, *supra* note 82, at 7.

85. *Supra* notes 71–75 and accompanying text (noting the open-endedness of ENDA's religious exemption, which adopts Title VII's religious exemption in full but does not supplement it with clarifying language).

86. See FEDER & BROUGHER, *supra* note 82, at 7 (observing that ENDA's religious exemption "does not appear to limit the permissibility of religious organizations' discrimination based on sexual orientation or gender identity to instances in which those factors may conflict with religious beliefs" and concluding that the exemption would therefore permit an organization to refuse to hire a gay applicant even if its religious teachings did not oppose homosexuality).

ENDA's religious exemption also fails to distinguish between those employees who serve as religious leaders and those who engage in secular work or serve in non-leadership roles. It allows employers to discriminate against employees without regard to whether those employees have any role in conveying the religious organization's message or promoting its views, including workers who have little or no contact with congregants or members of the public.⁸⁷ Take, for example, a line cook in the cafeteria of a religious school who spends workdays in the school's kitchen and interacts very little with students and visitors to the school. Because the work takes place behind closed doors, this employee does not play a role in conveying the organization's message. Yet, as currently written, ENDA's religious exemption would allow school officials to fire or choose not to hire this individual based on his or her sexual orientation or gender identity.

The exemption's over-inclusiveness is not limited to employees who work behind the scenes. While certain employees of religious organizations, such as receptionists and secular teachers, do have significant contact with church members and members of the public, they do not necessarily have any role in representing the religious organizations themselves. Because these employees' work-related duties primarily benefit the religious organizations' secular activities rather than their religious missions, the organizations would have a difficult time demonstrating that ENDA's protections infringe upon their First Amendment rights.⁸⁸ Consider, for instance, a salesperson for a church-operated commercial enterprise who has substantial contact with the public on a daily basis. Although this employee's clients may not be aware that the employee works for a religious institution because his or her work is primarily commercial in nature, the institution would probably still be exempt from ENDA's provisions because it would likely qualify as a religious corporation.⁸⁹ This example further illustrates that ENDA's religious exemption is overbroad in that it allows discrimination beyond that which is necessary to guarantee employers the freedom to exercise their religious beliefs.

Given the case law pertaining to Title VII's religious exemption, it is unlikely that courts will effectively address these gaps in protection

87. Jasiunas, *supra* note 81, at 1553 (observing that ENDA does not require that a particular sexual orientation or gender identity be a "bona fide occupational qualification" for a job in order to allow a religious employer to discriminate).

88. See *Tony & Susan Alamo Found. v. Sec'y of Labor*, 471 U.S. 290, 305–06 (1985) (distinguishing between a church's evangelical and secular commercial activities).

89. See *supra* text accompanying notes 86–87 (explaining that no religiously-grounded objection is required for a religious corporation to discriminate against an LGBT employee).

for LGBT employees. The question of whether an employer is a “religious corporation” under the statute is always the threshold question for a court’s consideration when reviewing an allegation of employment discrimination.⁹⁰ Once an organization demonstrates that it qualifies as a “religious corporation” under Title VII, the organization is exempt from the Act’s requirements concerning hiring and firing and is given broad discretion in making religiously-grounded employment decisions.⁹¹ This safeguard, according to the Supreme Court, ensures that the organization has the freedom to exercise its religion without government interference.⁹²

Courts are likely to find that ENDA exempts organizations that would qualify as religious corporations under Title VII. Given that ENDA adopts Title VII’s definition of a “religious corporation” in its entirety, it is possible, but highly doubtful, that courts will interpret ENDA’s exemption more narrowly than that of Title VII.⁹³ Thus, at a minimum, courts will likely exempt places of worship, religiously affiliated non-profits, and religious educational institutions from ENDA’s requirements without regard for whether a particular instance of discrimination is necessary to protect an employer’s First

90. See *supra* note 42 (listing cases in which the primary question for the court was whether the employer in question qualified as a religious corporation).

91. *Supra* note 46 and accompanying text; see also, e.g., Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 330–31, 337 (1987) (allowing, for the first time, a not-for-profit facility of the Mormon Church to discharge an employee for not being a member of the church); Zoë Robinson, *Rationalizing Religious Exemptions: A Legislative Process Theory of Statutory Exemptions for Religion*, 20 WM. & MARY BILL RTS. J. 133, 161–62 (2011) (suggesting that the *Amos* court accepted as legitimate “Congress’s decision to accord religion a broad exemption from laws of general application”). But see *Spencer v. World Vision, Inc.*, 633 F.3d 723, 735, 737–41 (9th Cir. 2011) (O’Scanlain, J., concurring) (proposing three new tests for determining whether an entity qualifies as a religious organization under Title VII, including status as a not-for-profit entity, self-identification as being organized for a religious purpose, and the organization’s engagement in activity “consistent with[] and in furtherance of[] [its] religious purposes”); *id.* at 741–42, 748 (Kleinfeld, J., concurring) (rephrasing Judge O’Scanlain’s test); Roger W. Dyer, Jr., Note, *Qualifying for the Title VII Religious Organization Exemption: Federal Circuits Split over Proper Test*, 76 MO. L. REV. 545, 547, 554–59, 567 (2011) (describing the various tests historically used by courts to determine whether an employer may be considered religious and arguing that *Spencer* created greater uncertainty for organizations that seek to invoke the religious exemption).

92. See, e.g., *Amos*, 483 U.S. at 339 (asserting that Title VII’s religious exemption “effectuates a more complete separation” of church and state and prevents unnecessary judicial inquiry into religious belief). But see *Robinson*, *supra* note 91, at 161 (arguing that Title VII’s religious exemption is a “solid example of Congress providing for religious free exercise beyond what is constitutionally required”).

93. In fact, it would be within the courts’ discretion to interpret the definition of a “religious corporation” more broadly in the context of ENDA. See *infra* notes 95–96 and accompanying text (discussing the possibility that courts interpreting ENDA may not recognize those legal theories that have developed under Title VII and instead favor an interpretation of “religious corporation” that goes beyond the limits of Title VII’s definition).

Amendment Rights.⁹⁴ In light of these gaps in coverage, it is inevitable that LGBT employees will continue to face discrimination at the hands of some religious employers.

Courts may find that a larger category of organizations satisfies the definition of “religious organization” and is thereby exempt from ENDA’s requirements. Because ENDA exists as stand-alone legislation separate from the Civil Rights Act, courts would be within their discretion to find that the policy concerns underlying ENDA are sufficiently distinct from those underlying Title VII to permit a broader interpretation of the definition of a “religious corporation” under ENDA.⁹⁵ Indeed, courts could theoretically expand this definition to include even those employers that are unable to demonstrate a connection between the owners’ religious beliefs and the organization’s purpose or identity, such as a retail store that is not affiliated with a church or religious institution but whose owners have strongly held religious beliefs regarding homosexuality.⁹⁶ The fact that courts do not uniformly recognize sexual orientation as a suspect class for the purposes of judicial scrutiny suggests that courts interpreting ENDA may take a less restrictive approach in defining the phrase “religious corporation.”⁹⁷ Absent any guidance in the text of the Act, it is difficult to predict precisely how courts will resolve this

94. See *supra* notes 42–45 and accompanying text (discussing the court’s broad interpretation of the term “religious corporation” in the Title VII context).

95. See FEDER & BROUGHER, *supra* note 82, at 9 (suggesting that courts may conclude from the fact that ENDA was introduced as stand-alone legislation rather than as an amendment to Title VII that the two laws implicate different policy considerations); cf. Jasiunas, *supra* note 81, at 1554–56 (noting that while the American Discrimination in Employment Act and the Americans with Disabilities Act are both based on the same framework as Title VII courts have read these statutes very differently).

96. See Jasiunas, *supra* note 81, at 1556 (providing an example of “a hypothetical employer whose customers are predominantly religious organizations” and suggesting that courts would be hesitant to find that this employer is subject to ENDA’s requirements).

97. The Supreme Court has declined to identify a level of scrutiny to be used in cases of sexual orientation and gender identity discrimination. See *United States v. Windsor*, 133 S. Ct. 2675, 2693, 2695–96 (2013) (finding it unnecessary to use heightened scrutiny to hold the Defense of Marriage Act, a law restricting the federal interpretation of “marriage” and “spouse” to apply only to heterosexual unions, unconstitutional under the Due Process and Equal Protection Clauses); *Lawrence v. Texas*, 539 U.S. 558, 593–94 (2003) (holding that there is only a protected liberty interest in same-sex sexual activity, not a fundamental right to same-sex activity, and that the government needs a legitimate state interest to justify an intrusion into that right). While the majority of lower courts continue to evaluate claims of sexual orientation discrimination using only rational basis review, a number of courts have used strict or intermediate scrutiny in such cases. See *Witt v. Dep’t of the Air Force*, 527 F.3d 806, 819 (9th Cir. 2008) (holding that “when the government attempts to intrude upon the personal and private lives of homosexuals . . . the government must advance an important governmental interest, the intrusion must significantly further that interest, and the intrusion must be necessary to further that interest”); *Varnum v. Brien*, 763 N.W.2d 862, 895–96 (Iowa 2009) (finding that homosexuals are a quasi-suspect class and that laws concerning them are therefore subject to heightened scrutiny).

issue, but it is certainly within the realm of possibility that courts will interpret the term “religious organization” more broadly than they have in the context of Title VII.⁹⁸

Further complicating the matter is the Supreme Court’s 2014 decision in *Hobby Lobby*, where the Court held that the Religious Freedom Restoration Act of 1993 (RFRA)⁹⁹ protects a closely held corporation’s right to deny its employees a federal entitlement to health coverage for contraceptives based on the religious objections of the corporation’s owners.¹⁰⁰ RFRA, the basis of the decision, provides that the government “shall not substantially burden a person’s exercise of religion” unless that burden “is the least restrictive means of furthering [a] compelling governmental interest.”¹⁰¹ The majority in *Hobby Lobby* held that the company was exempt from the contraception coverage provision because the provision required the company’s owners to “engage in conduct that seriously violat[ed] their religious beliefs.”¹⁰² The Court asserted that it is not within the discretion of the federal courts to consider whether a religious belief asserted in a RFRA case is reasonable; instead, the inquiry is limited to whether the belief is “sincerely held.”¹⁰³ The Court’s determination was therefore based not on whether the contraception coverage provision imposed a substantial burden on the organization, but whether the company’s objection to the coverage was based on a sincerely held religious belief.¹⁰⁴ Although the Court addressed “the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction,” it did not directly reference ENDA or discuss how the decision would affect cases of discrimination against LGBT employees.¹⁰⁵ Justice Ginsburg’s dissent lamented the “startling breadth” of the decision, suggesting that it would allow any corporation to obtain a RFRA exemption simply by showing that the law in question was in conflict with its religious beliefs.¹⁰⁶

98. See FEDER & BROUGHER, *supra*, note 82, at 9 (asserting that without express statutory clarification, judicial elaboration will be needed to clarify the scope of the definition of “religious organization” as it relates to ENDA).

99. Pub. L. No. 103-141, 107 Stat. 1488 (1993) (codified as amended at 42 U.S.C. § 2000bb (2012)).

100. *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354, slip op. at 1-2 (U.S. June 30, 2014).

101. 42 U.S.C. § 2000bb-1(a)-(b).

102. *Hobby Lobby*, No. 13-354, at 32.

103. *Id.* at 35.

104. *Id.*

105. *Id.* at 46.

106. *Id.* at 29 (Ginsburg, J., dissenting) (“Suppose an employer’s sincerely held religious belief is offended by health coverage of vaccines, or paying the minimum wage . . . or according women equal pay for substantially similar work . . . ?”).

If the dissent's fears are realized, *Hobby Lobby* could give courts the green light to extend RFRA's protections to corporations posing religious objections to discrimination laws such as ENDA—*regardless of any religious exemptions* that might be included in those laws.¹⁰⁷ Because the Court has already found that RFRA applies to closely held corporations, these corporations could be exempt from ENDA's requirements even though they are not explicitly included in its religious exemption. Thus, even a narrower religious exemption will not guarantee protection for any LGBT employees in the event of a RFRA challenge. However, this does not render ENDA's religious exemption any less crucial. In cases where RFRA does not bar the application of ENDA, a narrower religious exemption will ensure that courts have less leeway to expand the definition of a religious corporation.¹⁰⁸ Furthermore, a narrower exemption will reaffirm Congress's commitment to protecting individual rights in a post-*Hobby Lobby* world.

Thus, a number of factors will influence the courts' interpretation of ENDA and its religious exemption. Recent cases complicate this picture even further. Without additional clarification by Congress, ENDA's religious exemption is bound to lead to disagreement among the courts and confusion for plaintiffs attempting to bring discrimination claims.¹⁰⁹ Part B of this Note will argue that by narrowing ENDA's religious exemption, Congress could ensure a more predictable judicial response while upholding the purpose of the bill more fully.

107. During oral arguments, Justice Kagan predicted that if employers' free exercise claims were given deference, "you would see religious objectors come out of the woodwork with respect to all of these laws," and referred to the "parade of horrors" that could result, including objections to anti-discrimination laws, Social Security contributions, or minimum wage requirements. Transcript of Oral Argument at 14:3–9, 16:5–19, *Sebelius v. Hobby Lobby Stores, Inc.*, No. 13-354 (U.S. Mar. 25, 2014). See generally Ruth Marcus, *Ruth Marcus: Supreme Court Hobby Lobby Ruling Could Start a "Parade of Horribles,"* WASH. POST (Mar. 25, 2014), http://www.washingtonpost.com/opinions/ruth-marcus-supreme-court-hobby-lobby-ruling-could-start-a-parade-of-horribles/2014/03/25/e803675a-b45e-11e3-8cb6-284052554d74_story.html (discussing the issues and competing interests at stake in claims brought under RFRA).

108. In recognition of the need to expand ENDA's protections for employees of religious organizations, a number of major LGBT rights groups have withdrawn their support for the bill following the *Hobby Lobby* decision on the grounds that its religious exemption is overbroad. See Ed O'Keefe, *Gay Rights Groups Withdraw Support of ENDA After Hobby Lobby Decision*, WASH. POST (July 8, 2014), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/07/08/gay-rights-group-withdrawing-support-of-enda-after-hobby-lobby-decision>.

109. See, e.g., Jasiunas, *supra* note 81, at 1554–56 (discussing how a law's stand-alone status affects how courts interpret its provisions).

B. Congress Should Amend ENDA's Religious Exemption to Allow Employers to Discriminate Only in Cases Where Employees Would Be Exempt From Coverage Under the Ministerial Exception

While it remains to be seen how courts will interpret ENDA's religious exemption, one thing is certain: LGBT employees will continue to be subject to discrimination by religious employers under the exemption as written. Should ENDA become law, the only way to guarantee LGBT employees complete protection from discrimination will be to remove ENDA's religious exemption entirely. Removing the exemption would represent a significant step toward equality for LGBT people in the workplace and would pose little threat to employers' First Amendment rights. Sexual orientation and gender identity, like race and sex, are immutable characteristics that do not reflect a person's character and do not necessarily bear any relation to his or her religious beliefs.¹¹⁰ Thus, just as Title VII prohibits religious employers from discriminating against individuals on the basis of race, sex, and national origin while respecting those employers' First Amendment rights, ENDA can and should protect LGBT employees from such discrimination on the basis of sexual orientation and gender identity in the same manner. Failure to provide these safeguards affirms that protecting employees from discrimination based on sexual orientation or gender identity is somehow less important than protecting employees from discrimination on the basis of other immutable characteristics such as race and sex.

However, removing the religious exemption from the bill is almost certainly a political impossibility. Much of the bill's support has been contingent on the inclusion of a broad religious exemption, and removing it entirely could prompt even the staunchest backers to withdraw their support.¹¹¹ Therefore, in the interest of ensuring ENDA's passage, it will be necessary to consider other options for extending coverage to a larger number of employees.

Assuming some exemption should be granted to religious employers, it should be kept as narrow as possible to protect the rights of LGBT employees. The drafters of ENDA modeled the bill closely after Title VII, and this decision suggests that it would be

110. See Kari Balog, Note, *Equal Protection for Homosexuals: Why the Immutability Argument Is Necessary and How It Is Met*, 53 CLEV. ST. L. REV. 545, 571 (2006) (arguing that sexual orientation is "a trait as immutable as race or gender" and basing this argument on a broad consensus of scientific research).

111. See *supra* Part I.B.2 (describing in depth the key role the religious exemption has played in garnering support for ENDA); see also Aden & Carlson-Thies, *supra* note 6, at 4 (noting that ENDA draft bills have routinely included an exemption for religious organizations to protect the rights of these organizations to express their religious views).

appropriate to craft a religious exemption for ENDA that is consistent with that of Title VII rather than one that merely adopts Title VII's language.¹¹² If Congress chooses to include a religious exemption in ENDA, it should enact a narrow exemption that allows religious employers to discriminate against LGBT employees only in cases where the ministerial exception would apply in the Title VII context.

Congress could accomplish this change in a number of ways. The House could introduce an amendment, either prior to passage of the bill or following its passage. Alternatively, Congress could wait for the courts to interpret the bill once it has been signed into law and respond with an amendment nullifying any negative precedent, as it did in response to the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*.¹¹³ In other words, if Congress disagrees with the result of the courts' interpretation of ENDA, it could expand the religious exemption retroactively. In either case, Congress should amend ENDA to state that, applying the Supreme Court's language in *Hosanna-Tabor*, any employee with "a role in conveying the Church's message and carrying out its mission" will be exempt from ENDA's coverage.¹¹⁴ This approach will provide an acceptable

112. See FEDER & BROUGHER, *supra* note 82, at 1 (describing ENDA as "[p]atterned on" Title VII and noting that ENDA, like Title VII, will be enforced by the Equal Employment Opportunity Commission). As discussed, although ENDA adopts in full the language of Title VII's religious exemption, the result is an exemption that applies to a much broader category of employees. See *supra* Part II.A (explaining why ENDA's religious exemption is effectively much broader than that in Title VII despite using the same language).

113. 490 U.S. 642, 650–51, 659, 661 (1989) (holding that, in determining the legitimacy of a disparate impact claim, "the proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified . . . population . . . in the relevant labor market," a decision that made it more difficult for plaintiffs to bring disparate impact claims (alterations in original) (internal quotations omitted)), *superseded by statute on other grounds*, 42 U.S.C. § 2000e-2(k) (2012), *as recognized in* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011). Congress responded with the Civil Rights Act of 1991, which expanded the scope of the legal protections for employees and essentially nullified the *Wards Cove* decision. 42 U.S.C. § 2000e-2; see Michael J. Songer, Note, *Decline of Title VII Disparate Impact: The Role of the 1991 Civil Rights Act and the Ideologies of Federal Judges*, 11 MICH. J. RACE & L. 247, 253 (2005) (explaining how the Civil Rights Act of 1991 reversed parts of the Supreme Court's narrow interpretation of disparate impact claims by making an exception to the *Wards Cove* analysis "for criteria that are not capable of separation for analysis" (internal quotation marks omitted)). A similar approach could be useful in the case of ENDA because it would allow the courts to weigh in on the law prior to Congress amending it. In addition, opponents of the amendment might be more inclined to support it after observing the negative effects of an expansive judicial interpretation of the religious exemption.

114. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 708 (2012) (holding that because the plaintiff's job duties consisted of "transmitting the Lutheran faith to the next generation," she was covered by the ministerial exemption).

balance between protecting employers' religious freedom and employees' individual rights.

Adopting the ministerial exception will give religious employers the ability to select clergy free from government interference while providing LGBT employees the same level of protection as employees who experience discrimination on the basis of race, sex, and national origin. Although this exemption is significantly narrower than ENDA's current language, it adequately exempts all of those employees who have a role in preaching the message and teachings of a religious organization and whose protection under ENDA would therefore implicate First Amendment rights. In addition to covering all of those employees commonly thought of as ministers, the ministerial exemption has generally been held to cover teachers at religious schools, choir directors, and other employees whose jobs require them to openly express the organization's message.¹¹⁵ The formal job title itself is not decisive, and courts analyzing claims under the ministerial exemption also consider the practical role of the employee and the extent to which an employee holds herself out as a religious representative of the church.¹¹⁶ An employee may be considered a minister within the meaning of the ministerial exemption even if her job duties are primarily secular.¹¹⁷ Therefore, this exemption sufficiently protects the free exercise rights of religious employers because it allows those employers to be selective in choosing religious leaders while at the same time providing full protection for those employees who do not serve in leadership roles.

Beyond political necessity, there are a number of benefits to narrowing ENDA's religious exemption rather than removing it from the bill entirely. Giving religious employers the ability to discriminate

115. See, e.g., *Cannata v. Catholic Diocese of Austin*, 700 F.3d 169, 177–78 (5th Cir. 2012) (exempting from the requirements of the ADA and the ADEA a music director and pianist who made “unilateral, important decisions regarding the musical direction at Mass”); *Dayner v. Archdiocese of Hartford*, 23 A.3d 1192, 1195, 1201 (Conn. 2011) (holding that the ministerial exception barred a former school principal's tort and contract law claims); *Temple Emanuel of Newton v. Mass. Comm'n Against Discrimination*, 975 N.E.2d. 433, 434 (Mass. 2012) (concluding that a teacher at a Jewish Sunday school was covered by the ministerial exception and thereby exempt from bringing a claim of age discrimination). *But see* *Archdiocese of Wash. v. Moersen*, 925 A.2d 659, 660, 665–66 (Md. 2007) (holding that the ministerial exception did not apply to a church organist who had no discretion in choosing the music he played, did not lead choirs or teach hymns, and was not required to have any religious training).

116. See *supra* notes 18–20 (laying out factors courts have considered in determining whether an employee falls under the ministerial exception).

117. See *Hosanna-Tabor*, 132 S. Ct. at 708–09 (noting that even the heads of congregations generally have a mix of secular and religious duties and asserting that these circumstances do not preclude them from falling under the ministerial exception).

in the hiring and firing of religious leaders will help ensure that ENDA is not struck down by the Court for violating religious liberties, since the exemption would prevent the government from interfering with an employer's right to select clergy who represent its faith.¹¹⁸ This approach will also help to shield ENDA from attack under RFRA. Though such an attack is probable given that the Court found that RFRA applied in *Hobby Lobby*, courts will be less likely to find that ENDA substantially burdens the free exercise of religion if it contains at least some religious exemption.¹¹⁹ Because the language and purpose of ENDA so closely mirror those of Title VII, courts are likely to look to the growing body of case law surrounding Title VII's ministerial exception when interpreting a similar exception in ENDA. Thus, implementation of the proposed religious exemption should be relatively straightforward, as judicial disagreement will likely be limited primarily to that which currently exists in the Title VII ministerial exception context.¹²⁰ Finally, a narrower exemption will afford religious employers discretion in hiring and other employment practices while at the same time giving them an incentive to provide antidiscrimination training for their workers and to develop clearly stated policies concerning discrimination against LGBT employees.¹²¹

Moreover, as it is currently written, ENDA's religious exemption does nothing to serve the needs of the vast majority of religious employers because these employers have no intention of discriminating against LGBT employees. A large number of religious organizations have supported ENDA, both in its current form and in previous forms.¹²² Respect for the dignity of all people is the basis for

118. See Aden & Carlson-Thies, *supra* note 6, at 4 (noting that critics of ENDA have argued that its protections "inevitably clash with the right to free exercise and expression of religion, including the right to believe and express that homosexual conduct is sinful"). See generally Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189, 340-47 (1999) (outlining the First Amendment concerns for religious organizations implicated by anti-discrimination laws).

119. See *supra* notes 107-08 (discussing possible implications of *Hobby Lobby*); Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-day Saints v. Amos, 483 U.S. 327, 345 (1987) (Brennan, J., concurring) ("Such an exemption demarcates a sphere of deference with respect to those activities most likely to be religious.").

120. See, e.g., *Hosanna-Tabor*, 132 S. Ct. at 707 ("We are reluctant, however, to adopt a rigid formula for deciding when an employee qualifies as a minister.").

121. Cf. CONG. BUDGET OFFICE, S. 815: EMPLOYMENT NON-DISCRIMINATION ACT OF 2013 3 (2013), available at <http://cbo.gov/sites/default/files/cbofiles/attachments/s815.pdf> (predicting that the costs associated with modifying employment procedures in response to ENDA would be limited to updating employment manuals and building on training procedures already in place).

122. A coalition of religious advocacy organizations has declared their support for ENDA, stating that they "[could not] tolerate arbitrary discrimination against millions of Americans just because of who they are." *FCNL and Faith Organizations*

every major religion, and even those religions that are openly opposed to homosexuality and transgenderism generally do not condone discrimination based on basic human rights principles.¹²³ Religious employers may well decline to exercise their right to discriminate against their employees based on these principles, which would suggest that ENDA's expansive religious exemption has more to do with politics than with religious opposition.¹²⁴ In addition, irrespective of any religious objections, not all religious organizations will be willing to outwardly condemn their employees' behavior. Religious corporations that are not diametrically opposed to homosexuality and transgenderism will be unlikely to make a claim of religious opposition and risk losing the support of their members.¹²⁵ Thus, only a narrow religious exemption is needed to protect the rights of LGBT employees from the small number of employers who would engage in this type of discrimination.

ENDA's current religious exemption is unprecedented and excessive, and it illustrates Congress's willingness to prioritize the rights of employers over the protection of employees' individual liberties. Furthermore, the exemption does not effectively represent the interests of the majority of religious organizations, most of which would choose not to discriminate if given the opportunity. An exemption that mirrors the ministerial exception applied in the Title VII context

Support the Employment Non-Discrimination Act, FRIENDS COMM. ON NAT'L LEGISLATION (July 15, 2010), http://fcnl.org/issues/discrimination/fcnl_and_faith_organizations_support_the_employment_nondiscrimination_act. These groups include the Alliance of Baptists, the American Jewish Committee, Catholics in Alliance for the Common Good, Muslims for Progressive Values, the Episcopal Church, the Sikh Coalition, the United Synagogue of Conservative Judaism, the United Methodist Church—General Board of Church and Society, and many others. *Id.*

123. See, e.g., Christopher Kaczor, *Seven Principles of Catholic Social Teaching*, CATHOLIC.COM, <http://www.catholic.com/magazine/articles/seven-principles-of-catholic-social-teaching> (last visited Aug. 15, 2014) ("The foundation for Catholic social thought is the proper understanding and value of the human person."); *Seven Themes of Catholic Social Teaching*, U.S. CONF. OF CATH. BISHOPS, <http://www.usccb.org/beliefs-and-teachings/what-we-believe/catholic-social-teaching/seven-themes-of-catholic-social-teaching.cfm> (last visited June 25, 2014) (asserting that the basic rights of workers must be respected if the dignity of work is to be protected).

124. See, e.g., Laura Meckler, *Religious Exemptions at Center of ENDA Debate*, WALL ST. J. (Nov. 1, 2013, 12:29 PM), <http://blogs.wsj.com/washwire/2013/11/01/religious-exemptions-at-center-of-enda-debate> (discussing the political maneuvering surrounding the ministerial exemption, including Senator Rand Paul's suggested amendment that would exempt any for-profit business that alleged that hiring LGBT people would "burden the employer's exercise of religion").

125. See *supra* note 122 (listing numerous religious advocacy groups that have declared their support for ENDA). For example, 74% of Catholic voters are in favor of workplace protections for gay and transgender employees. Krehely, *supra* note 1. Thus, it may be in the interest of Catholic institutions to align themselves with their own employees by supporting ENDA's protections.

represents a better compromise between protecting the First Amendment rights of employers and the civil rights of LGBT employees.

Although ENDA will provide essential protections to LGBT employees, there is no evidence that it will significantly increase the amount of litigation in federal courts. Critics of ENDA have warned that expanding the bill's scope will lead to an increase in both valid and frivolous claims that could create a substantial burden for small businesses.¹²⁶ However, the existing data from states that have already passed legislation prohibiting discrimination based on sexual orientation and gender identity suggests that this supposed flood of frivolous discrimination suits has no basis in reality. A recent General Accountability Office (GAO) report found that these states have seen no significant increase in litigation since the passage of antidiscrimination laws.¹²⁷ The report found that LGBT employees are bringing discrimination claims under these statutes at approximately the rate at which employees bring federal claims under Title VII.¹²⁸ There is consequently nothing to suggest that a federal law would have the effect of increasing litigation to the point of threatening any employer's ability to stay in business. On the contrary, the GAO report suggests that state antidiscrimination laws are in fact serving their intended purpose: to allow LGBT employees a means of redress for discrimination in the workplace.

Though few argue that gay and transgender employees should be denied equality in employment, ENDA's legislative history has been filled with frustration and compromise. Congress intended the religious

126. In announcing his opposition ENDA, House Speaker John Boehner stated that the bill "will increase frivolous litigation and cost American jobs, especially small business jobs." *Spinning ENDA*, FACTCHECK.ORG, <http://www.factcheck.org/2013/11/spinning-enda> (last updated Nov. 7, 2013) (internal quotation marks omitted).

127. By way of an example, California has enacted statutory provisions protecting against employment discrimination on the basis of sexual orientation and gender identity. CAL. GOV'T CODE § 12490(a) (West 2014). Of the total 19,839 employment discrimination complaints filed in 2012, only 1104 contained allegations of discrimination based on sexual orientation. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-13-700R, UPDATE ON STATE STATUTES AND ADMINISTRATIVE COMPLAINT DATA ON EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY I-2 & n.4 (2013) (listing the twenty-two states that have enacted legislation against employment discrimination based on sexual orientation and the eighteen states that have also added legislation against employment discrimination based on gender identity).

128. See UPDATE ON STATE STATUTES AND ADMINISTRATIVE COMPLAINT DATA, *supra* note 127, at 2 (reporting that generally, administrative complaint data collected from states with laws prohibiting discrimination based on sexual orientation and gender identity showed "relatively few employment discrimination complaints" from LGBT employees (internal quotation marks omitted)); see also *Spinning ENDA*, *supra* note 126 (debunking John Boehner's claim that ENDA will burden small businesses by encouraging frivolous litigation based on the above GAO report and the fact that the bill exempts employers with fewer than fifteen employees, which account for nearly 90% of small businesses).

exemption to be a minor exception to the rule created by ENDA, but the exemption's excessive scope calls into question Congress's commitment to protect the rights of LGBT employees. Congress could reaffirm this commitment by narrowing the Act's religious exemption to allow discrimination against only those employees who qualify as religious leaders under the ministerial exception.

CONCLUSION

Despite having bipartisan support in Congress, ENDA's immediate future remains uncertain thanks to partisan politics that have impeded its progress in the House of Representatives.¹²⁹ However, the broad support and recent momentum behind the bill strongly suggest that it will become law in the coming years. Though the passage of ENDA in any form will be a huge step toward guaranteeing LGBT employees equal rights in the workplace, its overbroad religious exemption leaves a major gap in coverage for employees of religious organizations. Congress should amend ENDA's religious exemption to apply only to employees who fall under the ministerial exception established in *Hosanna-Tabor Evangelical Lutheran Church and School v. E.E.O.C.* Though far from a perfect solution, narrowing ENDA's religious exemption offers an acceptable balance between protecting the civil rights of LGBT employees and ensuring the religious freedom of employers.

129. See *supra* notes 76–79 and accompanying text (discussing ENDA's current status in the House).