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Religious Exemption or Exceptionalism? Exploring the Tension of First Amendment Religion Protections & Civil Rights Progress within the Employment Non-Discrimination Act

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Religious Exemption or Exceptionalism?

Exploring the Tension of First Amendment Religion Protections & Civil Rights Progress within the Employment Non-Discrimination Act

Richael Faithful*

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I. Introduction

The District of Columbia (D.C.) marked a landmark civil rights achievement in December 2009 when the city passed the Religious Freedom and Civil Marriage Equality Amendment Act.[1] The law's enactment allowed D.C. to become the sixth jurisdiction to sanction same-sex marriage in the United States.[2] Supporters hailed the law as a

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[1] A18-0248, enacted as L18-0110, Dec. 18, 2009. *See* D.C. City Council, "Religious Freedom and Civil Marriage Equality Amendment Act of 2009," http://www.dccouncil.washington.dc.us/lims/legislation.aspx?LegNo=B18-0482&Description=RELIGIOUS-FREEDOM-AND-CIVIL-MARRIAGE-EQUALITY-AMENDMENT-ACT-OF-2009.&ID=23204.

[2] Ian Urbina, *D.C. Council Approves Gay Marriage*, N.Y. Times, Dec. 15, 2009 *available at* http://www.nytimes.com/2009/12/16/us/16marriage .html.

victory for lesbian and gay equality, while detractors vowed that their efforts to traditionally define marriage would continue.[3]

Among the most public opponents of the law was the Catholic Archdiocese of Washington, which operates Catholic Charities, a leading service provider to low-income residents in the metropolitan area.[4] The Catholic Archdiocese warned the D.C. City Council that it would sever its professional relationship with the city if the same-sex marriage law passed because same-sex unions are inconsistent with the Church's core theological teachings.[5] Once the law went into effect, over a year later, the D.C. City Council cancelled the foster and adoption program that the city's Child and Family Services Agency and the Catholic Archdiocese co-administered for eighty years, citing that the religious organization was no longer eligible to provide services.[6] Weeks later, the Catholic Archdiocese announced that it would no longer offer spousal benefits to its new employees.[7] The political battle between the D.C. City Council and the Catholic Archdiocese remains heated, as the law's full fall-out is yet to be realized. However, there are two observations from this conflict that should inform lawmakers and policy advocates alike.

The first observation is that Catholic Charities's choice to cut its employee benefits demonstrates the lengths to which some religious organizations will go to deny lesbian and gay equality.[8] D.C.'s same-sex marriage law itself did not require that Catholic Charities discontinue its employee spousal benefits. Rather, the Catholic Archdiocese chose to eliminate spousal benefits for *all* of its employees to comply

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[3] *Id.*

[4] *See* Catholic Charities, "History and Mission," *available at* http://www.catholiccharitiesdc.org/about/history_mission/ (stating that Catholic Charities is the largest private service provider in the D.C. area).

[5] William Wan, *Same-sex marriage leads Catholic Charities to adjust benefits*, WASH. POST, Mar. 2, 2010 *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/03/01/AR2010030103345.html (discussing Catholic Charities' decision to termination spousal benefits for new employees).

[6] *See* Catholic News Agency, *Same-sex 'marriage' law forces D.C. Catholic Charities to close adoption program*, CATHOLIC NEWS AGENCY, Feb. 17, 2010 *available at* http://www.catholicnewsagency.com/news/same-sex_marriagelaw_forces_d.c._catholic_charities_to_close_adoption_program (discussing Catholic Charities' decision to shut down its foster care program). A similar kind of conflict led to Catholic Charities of Boston to close its adoption program. *See generally,* Theresa Rutledge, *Caught in the Crossfire: How Catholic Charities of Boston Was Victim to the Clash Between Gay Rights and Religious Freedom*, 15 DUKE J. GENDER L. & POL'Y 297 (2008) (explaining the conflict between religious liberty and gay rights as shown through the Catholic Charities of Boston adoption program closure after the state of Massachusetts passed its gay marriage law based on the organization's opposition to same-sex adoption).

[7] *Id.*

[8] This statement does not suggest that every Catholic Archdiocese would take similar action, but it is meant to illustrate an extreme example.

with the Equal Pay Act[9] and Title VII of the Civil Rights Act of 1964,[10] which both were triggered by the same-sex marriage law. The Equal Pay Act requires equal compensation for substantially similar work,[11] and Title VII bans employer discrimination on the basis of sex,[12] both of which mandate equal compensation for employees performing similar work, including fringe benefits.[13] Catholic Charities, therefore, would have been exposed to legal liability if the organization did not extend equal employee benefits to those with same-sex spouses. The Catholic Archdiocese ultimately elected to cut spousal benefits for every new employee rather than to offer the same benefits to their new lesbian or gay employees. In other words, Catholic Charities' administrative decision hurt all of its new workers — gay and straight alike.

The second observation is that the D.C. City Council elected to carve out a narrow religious activity exemption in its same-sex marriage law, which states:

> Notwithstanding any other provision of law, a religious society, or nonprofit organization that is operated, supervised, or controlled by or in conjunction with a religious society, shall not be required to provide services, accommodations, facilities, or goods *for a purpose related to the solemnization or celebration of a marriage, or the promotion of a marriage* through religious programs, counseling, courses, or retreats, that is in violation of the religious society's beliefs (emphasis added).[14]

The Act's religious organization exemption, related only to marriage activities, strikes a reasonable balance between religious freedom and civil rights. On one hand, the exemption states that a religious organization may refuse to sanction same-sex unions, but, on the other hand, the exemption also implicitly recognizes that civil society may

[9] 29 U.S.C. § 206(d) (1963) *available at* http://www.eeoc.gov/laws/ statutes/epa.cfm ("The Equal Pay Act is more limited in scope because it only covers employers 'engaged in commerce or the production of goods for commerce'; therefore, it is possible, though unlikely, that the Equal Pay Act would apply to Catholic Charities. . . .").

[10] 42 U.S.C. § 2000e et seq., as amended, *available at* http://www.eeoc.gov /laws/statutes/titlevii.cfm (establishing equal employment opportunities).

[11] *See supra* note 9.

[12] *See supra* note 10.

[13] *See* U.S. Equal Emp. Opportunity Comm'n, Compensation Discrimination Compliance Manual under "Definitions of 'Wages' and 'Wage Rate,' *available at* http://www.eeoc.gov/policy/docs/compensation .html#N_40 ("The term 'wages' encompasses all forms of compensation, including fringe benefits.").

[14] D.C. Code 46-401(e)(1) (2009) *available at* http://www.dcregs.dc.gov/ Gateway/NoticeHome.aspx?noticeid=114380 (clarifying that "Marriage between 2 people in the District of Columbia shall not be denied or limited on the basis of gender."). *See also* D.C. Code 46-401(d) ("Each religious society has exclusive control over its own theological doctrine, teachings, and beliefs regarding who may marry within that particular religious society's faith.").

exercise its institutional prerogative to confer benefits to whomever it chooses. Religious freedom and civil rights, in this way, can harmonize to accommodate a plurality of beliefs and interests.

The D.C. law is an exception, however, as many lesbian, gay, bisexual, and transgender civil rights laws fail to strike a reasonable balance between religious freedom and robust discrimination protection.[15] Most notably, the Employment Non-Discrimination Act (ENDA),[16] designed to extend federal employment discrimination protection to gay, lesbian, bisexual, and transgender (LGBT) people,[17] contained a religious organization exemption much broader than the existing Title VII exemption. ENDA's religious exemption, taking different iterations over fifteen years, begs an important question: why were religious organizations permitted to discriminate against LGBT people but not against other statutorily protected groups?[18]

This comment discusses ENDA's long history of broad religious exemption and its meanings for LGBT civil rights progress ahead. Part I traces ENDA's religious exemption transformation from 1994 to present, noting a narrowing of the exemption as the LGBT movement witnessed increasing political success. Part II examines the delicate balance between the First Amendment Religion Clauses, as well as LGBT civil rights and religious freedom, and argues that ENDA's previous exemptions tipped this delicate balance toward religious over-accommodation prohibited by the Establishment Clause. Part III concludes that the LGBT movement experienced a significant victory with the modified religious exemption in the 2009 version of ENDA, which challenged the conservative Christian bloc's political and cultural monopoly over LGBT rights' narrative, and represents the defeat of a potentially dangerous precedent for future civil rights struggles.

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[15] Many state and local LGBT civil rights statutes wholly exempt religious organizations. *See e.g.*, CONN. GEN. STAT. § 46a-81p (West 2009); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 2009).

[16] ENDA was originally introduced in 1994. *See* S. 2238, 103d Cong. (1994) *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname= 103_cong_bills&docid=f:s2238is.txt.pdf. Iterations of the bill have been introduced in almost every subsequent year to date.

[17] It was not until the most recent ENDA version, the 2009 bill, that the law included "gender identity" and "gender expression" which protects transgender and gender non-conforming people. *See* Nat'l Center for Lesbian Rights, Employment Non-Discrimination Act, *available at* http://www.nclrights.org/site/PageServer?pagename=issue_federallegislation_enda (describing the provisions and background of ENDA).

[18] There is one statutorily protected status that is not protected against religious organization discrimination: religion. This exception will be discussed in further detail later in Part I.

II. The Evolution of ENDA's Religious Organization Exemption

ENDA has been introduced in almost every Congress from 1994 to 2009.[19] Its amendment to its religious exemption in 2009 is consistent with the bill's numerous religious exemption iterations since 1994.[20] ENDA's religious exemption began as an extremely broad measure, but it has steadily narrowed since.[21] These changes reflect the bill's political viability for passage from session-to-session, in which the bill's sponsors conceded broader exemptions as a bargaining tool, despite its ill-fated chances for passage.[22] As ENDA's likelihood for passage was greater during the 111th Congress than any other time, the religious organization exemption is both a crucial provision, and indicator about the political climate on gay rights, more generally.

A. ENDA's Evolution from 1994 to 2007

The 1994 version of ENDA contained a very broad religious exemption, providing that the Act "shall not apply to religious organizations."[23] It did, however, provide a for-profit exception whose application reached "for-profit activities subject to taxation under section 511(a) of the Internal Revenue Code of 1986."[24] This exception was comparatively insignificant because many religiously-affiliated, secular organizations are not-for-profit organizations.[25] ENDA's initial

[19] *See* S. 2238, 103d Cong. §7(a) (1994) *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=103_cong_ bills&docid=f:s2238is.txt.pdf; H.R. 1863, 104th Cong. §6 (1995) *available at* thomas.loc.gov/cgi-bin/query/D?c104:1:./temp/~mdbszcMrs3; S.869, 105th Cong. § 9 (1997) *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong_bills&docid=f:s869is.txt.pdf; S. 1276, 106th Cong. §9 (1999) *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_bills&docid=f:s1276is.txt.pdf ; S. 1284, 107th Cong. §9 (2001) *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:s1284is.txt.pdf; S.1705, 108th Cong. §9 (2003) *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:s1705is.txt.pdf; H.R. 3685, 110th Cong. § 6 (2007), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h3685pcs.txt.pdf.

[20] *See id*.

[21] *Compare, e.g*., S. 2238, 103d Cong. §7(a) (1994) *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=103_cong_ bills&docid=f:s2238is.txt.pdf with H.R. 3685, 110th Cong. § 6 (2007), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h3685pcs.txt.pdf.

[22] *See* Matt Baume, *Pressure mounts to pass ENDA*, Bay Area Reporter, May 20, 2010 *available at* http://www.ebar.com/news/article.php? sec=news&article=4795 ("It's been 16 years since the Employment Non-Discrimination Act was first introduced in Congress, and according to organizers of a Tuesday rally at Speaker Nancy Pelosi's San Francisco office, it's closer than ever to being finally passed.").

[23] S. 2238, 103d Cong. §7(a) (1994) *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=103_cong_ bills&docid=f:s2238is.txt.pdf.

[24] *Id*. at §7(b).

[25] *See* Andrew C. Nichols, *Exemptions for "Religious Corporations" from Employment Discrimination Statutes: Should Non-Profit Status Be Required?*, 3 Geo. J.L. & Pub. Pol'y 133, 137 (2005) (noting

broad exemption is not surprising considering that lawmakers were unlikely to jeopardize the legislation amidst a Republican-controlled Congress at the height of the "Republican Revolution."[26]

During the bill's subsequent re-introduction from 19942001, the legislation's exemption did not change at all until 2001. The 1995 and 1996 Senate bills retained the 1994 language.[27] The legislation's first House hearings in the Government Programs Subcommittee of the Committee on Small Business took place in 1996.[28] Georgetown University Law Center Associate Professor Chai R. Feldblum, testifying in support of the bill, acknowledged that the bill contained a "broad religious exemption." She explained the exemption scope was "significantly broader than the scope in Title VII" because "ENDA exempts religious organizations completely" except for profit-making activities, which was a sharp contrast to similar exemptions, including Title VII, which remained "subject to the other requirements of Title VII with regard to such bases as race or gender (consistent with constitutional limitations)."[29] In 1997, lawmakers tweaked part B of the exemption related to the not-for-profit exception; however, the exception remained ostensibly the same.[30]

Years of ENDA rejection finally led to a small victory when President Bill Clinton issued Executive Order 13087, which extended employment protections to federal employees.[31] The revised order added "sexual orientation" to Executive Order 11478, "Equal Employment Opportunity in the Federal Government," which protected federal employees from

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that no court has held that Title VII's religious exemption codified in 702 applies to a for-profit corporation).

[26] *See, e.g.,* Robert Woodberry & Christian Smith, *Fundamentalism et al: Conservative Protestants in America*, 24 ANNUAL REVIEW OF SOCIOLOGY, 25, 44 (1998) (describing the conservative, evangelical, Moral Majority movement's evolution into the Republican Revolution of the 1990s which maintained opposition to social valued-based issues, such as the gay rights movement); *see also* JACOB S. HACKER & PAUL PIERSON, OFF CENTER: THE REPUBLICAN REVOLUTION AND THE EROSION OF AMERICAN DEMOCRACY (2005) (contextualizing the conservative Republican Revolution mid-90s success as led by Newt Gingrich).

[27] *See* S.932, 104th Cong. § 8 (1995) *available at* http://thomas.loc.gov/cgi-bin/query/z?c104:S.932 (re-introduced in 1996 as S.2056).

[28] Human Rights Campaign, Timeline: The Employment Non-Discrimination Act, http://www.hrc.org/issues/5636.htm (tracking the legislative history of ENDA).

[29] *H.R. 1863: The Employment Non-Discrimination Act Hearing Before the Subcomm. on Gov't Programs of the H. Comm. on Small Businesses*, 104th Cong. 143 (1996) (statement of Chai Feldblum) *available at* http://ia311312.us.archive.org/2/items/hr1863employment00unit/hr1863employment00unit.pdf. (explaining differences in the legislation).

[30] *See* S.869, 105th Cong. § 9 (1997) *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=105_cong _bills&docid=f:s869is.txt.pdf (providing religious organization exception).

[31] *See* Exec. Order No. 1308, 3 C.F.R. 191 (1998) *available at* http://www.opm.gov/er/EO13087.HTM (amending Executive Order 11478 "by substituting 'age, or sexual orientation' for 'or age'").

discrimination on the bases of race, color, sex, religion, and national origin.[32] Later in the year, the House of Representatives handily rejected the Hefley Amendment, which was designed to prohibit federal funds in the executive order's enforcement.[33] The following year ENDA was re-introduced with the same 1997 exemption language, [34] but it again failed to pass Congress, making President Clinton's executive order the height of the bill's success approaching the new century.

ENDA's religious organization exemption ballooned in 2001 when the for-profit exception was stripped from the provision.[35] The revised provision simply read, "[t]his Act shall not apply to a religious organization."[36] It is unclear from the legislative history why the broad exception was further expanded in 2001. In 2002, however, several bill witnesses supported the legislation during the Senate Health, Education, Labor and Pensions Committee hearing, including primary bill sponsor, Patty Murray (D-Washington).[37] The religious exemption, like in years' past,[38] became an even more attractive proverbial carrot for LGBT advocates, instead of being seen as a stumbling block to the legislation's efficacy. In other words, the broadness of the religious exemption remained a political selling point in 2003,[39] even when such language, as the proverbial "stick," had the potential to hurt gay workers at religious organizations.

This history reveals an interestingly nuanced evolution since 1994. The original ENDA bill contained a broad exception that only contained a small for-profit exception; however, seven years later in 2001, the religious exemption expanded to even broader to become a blanket exception for religious organizations. The politics of compromise trace closely to the bill's political palpability. ENDA transformed to become increasingly viable to lawmakers facing tremendous pressure from

[32] Exec. Order No. 11478, 3 C.F.R. 803 (1966-1970) *available at* http://www.archives.gov/federal-register/codification/executive-order/11478.html (providing for equal employment opportunity in the Federal Government).

[33] *See* Human Rights Campaign, *supra* note 28.

[34] *See* S. 1276, 106th Cong. §9 (1999) *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_ bills&docid=f:s1276is.txt.pdf (prohibiting employment discrimination on the basis of sexual orientation).

[35] S. 1284, 107th Cong. § 9 (2001) *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_ bills&docid=f:s1284is.txt.pdf (exempting religious organizations).

[36] *Id.*

[37] *The Employment Non-Discrimination Act Hearing Before the Comm. on Health, Education, Labor, and Pensions*, 107th Cong. 5 (2002) (statement of Sen. Patty Murray), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_senate_hearings&docid=f:78032.pdf. *See also id.* at 18 (statement by Senator Hillary Clinton); *id.* at 39 (statement by Senator Edward Kennedy); *id.* at 34 (statement by Richard Womack, Dir. AFL-CIO Civil Rights Dep't).

[38] *See, e.g*, H.R. 1863: The Employment Non-Discrimination Act Hearing Before the Subcomm. on Gov't Programs of the H. Comm. on Small Businesses, *supra* note 29, at 2 ("ENDA is not a law that would require religious organizations to follow it, as religious organization would be exempt, as would very small businesses, those with 15 or fewer employees.").

[39] *See* S.1705, 108th Cong. §9 (2003) *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_ bills&docid=f:s1705is.txt.pdf.

powerful conservative constituencies as the LGBT movement made tangible gains in the marriage equality battle, and gained more favorable visibility among Americans, in general.[40] Upon approaching the legislative climax in 2007, a year in which it appeared as if the ENDA could make real progress, lawmakers and leading advocates accepted concessions that would deeply divide the LGBT communities.[41] During the "year of compromise," the religious exemption was modified once again, yet gained very little attention.

B. THE YEAR OF COMPROMISES

Representative Barney Frank (D-Mass.) re-introduced ENDA in 2007 with an infamous omission — the bill did not include "gender identity" in its protections. Since 2003, the activist political landscape had changed, and many LGBT advocates expected "gender identity" to be included in the new version of the bill.[42] As a protected status, "gender identity"[43] primarily protects transgender[44] people from discrimination. It also provides broader protection for lesbian, gay, bisexual, and some heterosexual people who do not conform to conventional gender norms.[45] Widely seen as a full set of protections, "sexual orienta-

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[40] *See* Jeffrey M. Jones, *Americans' Opposition to Gay Marriage Eases Slightly*, GALLUP ORGANIZATION (May 24, 2010) http://www.gallup.com/ poll/128291/americans-opposition-gay-marriage-eases-slightly.aspx (documenting a positive trend toward same-sex marriage since 2004).

[41] *See infra* note 49.

[42] *See, e.g.,* Julie R. Enzer, *Legislative Bargain Frays Some in LGBT Community*, WOMEN'S ENEWS (Nov. 16, 2007) *available at* womensenews.org/ story/lesbian-and-transgender/071116/legislative-bargain-frays-some-in-lgbt community ("gender identity" was in the original version of the bill submitted to the House, only to be stripped during committee to ensure House passage) ("The original bill was expected to pass out of the House and the Senate relatively easily . . . But in late September, Frank, who is openly gay and the bill's lead sponsor, told advocates that ENDA — the Employment Non-Discrimination Act — did not have the votes to pass the House if it included gender identity").

[43] *See* UNDERSTANDING TRANSGENDER: FREQUENTLY ASKED QUESTIONS ABOUT TRANSGENDER PEOPLE, NATIONAL CENTER FOR TRANSGENDER RIGHTS 6 (May 2009), *available at* http://www.transequality.org/Resources/ NCTE_UnderstandingTrans.pdf ("Gender identity refers to the way you understand yourself and your gender. It is about the internal sense of masculinity or femininity that a person feels.").

[44] *Id.* at 1–2.

[45] *Cf. Lambda Legal's Analysis of Stripped Down Version of ENDA: Gender Identity Protections Gone and Inadequate Protections for Lesbians, Gay Men and Bisexuals*, LAMBDA LEGAL (Oct. 1, 2007), *available at* http://www.lambdalegal.org/news/pr/lambda-legals-analysis-enda.html (discussing how the absence of language protecting lesbians, gays, and bisexuals that do not conform to the employer's idea of how a man or woman should look and act is a loophole that allows employers to escape liability for discrimination by claiming their conduct was based on gender expression).

tion, gender identity and expression" became the policy archetype for non-discrimination laws for which activists across the country fought.[46]

Transgender-inclusive non-discrimination laws passed in several jurisdictions during the intervening time between ENDA's 2003 and 2007 introductions.[47] Therefore, the absence of "gender identity," and its justification from Barney Frank and other prominent LGBT advocacy groups, most notably the Human Rights Campaign, ignited a firestorm of controversy.[48] The bill ultimately passed the House of Representatives but it died at Senate chambers.[49] Some moderate lawmakers were reluctant to support a version of the bill that included "gender identity,"[50] but the political compromise was not an acceptable conciliation to many in the LGBT community, as evidenced by the sharp division arising from the national debate.

Lawmakers' failure to update ENDA to include "gender identity" protections earned the bill a great deal of attention, but the 2007 version contained a critical change that was overshadowed by the controversy — a slightly narrower religious exemption provision. The 2007 exemption was narrower than recent years' provisions that granted wholesale

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[46] *See Scope of Explicitly Transgender-Inclusive Anti-Discrimination Laws,* Transgender Law & Pol'y Inst & Nat'l Gay & Lesbian Task Force (Apr. 2006) (showing that eight states and eighty-one localities ban discrimination on the basis of gender identity and expression). Many of these jurisdictions recently passed these laws within the last ten years.

[47] *See id*; *see also* Kate Linthicum, *Transgender Rights Advocates See a Gradual Series of Victories*, L.A. Times, May 26, 2010, *available at* http://articles.latimes.com/2010/may/26/nation/la-na-transgender-20100526 (mentioning that many state and local ordinances have banned discrimination based on gender identity); *Non-Discrimination Laws That Include Gender Identity and Expression*, Transgender Law & Pol'y Inst & Nat'l Gay & Lesbian Task Force (Feb. 17, 2001), *available at* http://www.transgenderlaw.org/ndlaws/index.htm (detailing the state jurisdictions that have laws prohibiting discrimination on the basis of gender expression and prohibiting discrimination in public employment on the basis of gender identification); *Years Passed Between Sexual Orientation and Gender Identity Expression*, Transgender Civ. Rts. Project (July 2007), *available at* http://www.thetaskforce.org/downloads/reports/fact_sheets/years_passed_gie_so_7_07.pdf (displaying the county, city, or states that added sexual orientation to its anti-discrimination laws, with 50 counties, cities, or states adding the provision since 2003). Transgender advocates stressed the importance to include gender protections in the 2007 version of ENDA due to the significant lag between the passage of lesbian and gay anti-discrimination laws and transgender anti-discrimination laws.

[48] *See, e.g.*, Kilian Melloy, *Dropping the 'T: New Version of ENDA Does Not Protect Trans People*, EDGE Bos. (Oct. 1, 2007), *available at* http://www.thetaskforce.org/TF_in_news/07_1009/stories/14_dropping_the_t.pdf ("LGBT leaders are furious over Frank's maneuver, reported 365Gay.com, adding that Rep. Tammy Baldwin — other than Frank, Congress' only openly gay member — had withdrawn her sponsorship of ENDA with the announcement of the new version.").

[49] *See* David Crary, *New Impetus For Bill Banning Anti-Gay Bias for bill banning anti-gay bias at work*, Guardian (Aug. 28, 2009), *available at* http://www.guardian.co.uk/world/feedarticle/8678991?FORM=ZZNR10 ("Frank pushed ENDA in 2007, but it foundered because of insufficient backing in the Senate and a split within the gay and transgender communities.").

[50] *See* Julie Bolcer, *Centrist Democrats Balking at ENDA Vote*, Advocate, May 10, 2010, *available at* http://www.advocate.com/News/Daily_News /2010/05/10/Centrists_Democrats_Balking_at_ENDA_Vote_/ (explaining the concerns moderates had over the transgender inclusive legislation affecting their chances at reelection).

exemptions; however, it still remained much broader than Title VII of the Civil Rights Act of 1964, under which the 2009 bill's exemption is modeled.[51] Title VII's religious organization exemption provides in relevant part:

> This subchapter 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.[52]

Title VII's religious organization exemption, also known as the ministerial exception,[53] is narrowly applicable to discrimination on the basis of religion by a religious organization. In some circumstances, religious organizations' secular activities may fall under this exemption as well. In 1978, the United States Supreme Court held in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Amos*.[54] that the exemption's application to secular organizations run by religious entities does not violate the First Amendment's Establishment Clause,[55] which bars religious endorsement by Congress. The Court applied the three-part test set out in *Lemon v. Kurtzman*[56] to determine whether the exemption's application to secular activity amounted to religious "sponsorship."[57] It concluded that the exemption did not rise to the level of an Establishment Clause violation, and re-affirmed that a law may exhibit "'benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.'"[58]

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[51] *Compare infra* note 57 with H.R. 2981, 111th Cong. (2009) *available at* thomas.loc.gov/cgi-bin/query/F?c111:1:./temp/~c111JnzOcb:e11096:.

[52] 42 U.S.C. §2000e-1(a).

[53] *See, e.g.*, Note *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776, 1776 (2007 — 2008) (describing the ministerial exception as "allow[ing] religious employers to avoid liability for discrimination when making employment decisions concerning employees who qualify as ministers." *Cf.* Employment Div., Dep't of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990) (qualifying the ministerial exception that was expanded by *Amos* to include religious function employees). *But see* Jack M. Battaglia, *Religion, Sexual Orientation, and Self-Realization: First Amendment Principles and Anti-Discrimination Laws*, 76 U. DET. MERCY L. REV. 189, 271–73 (1999) (noting that an eminent legal scholar believes that the Smith holding will not affect the broader ministerial rule announced in Amos that permits religious organizations to engage in religious and certain non-religious discrimination, against religious function employees).

[54] 483 U.S. 327 (1987) [hereinafter "Amos"].

[55] *Id.* at 330.

[56] *Lemon v. Kurzman*, 403 U.S. 602 (1971) ("First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster 'an excessive government entanglement with religion.'").

[57] *See Amos*, 483 U.S. at 337.

[58] *Id.* at 334 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 669 (1970)).

Despite the Court's sweeping language, its ruling kept the ministerial exemption limited to religious discrimination by secular, but religiously-affiliated organizations. Altogether, Title VII's exemption is not tantamount to wholesale religious organization exemption.

The ENDA of 2007 is not as limited in its religious exceptions as Title VII. Under 2007's Section 6 of ENDA:

> (a) In General- This 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 or the teaching or spreading of religious doctrine or belief.
> (b) Certain Employees- For any religious corporation, association, educational institution, or society that is not wholly exempt under subsection (a), this Act shall not apply with respect to the employment of individuals whose primary duties consist of teaching or spreading religious doctrine or belief, religious governance, supervision of a religious order, supervision of persons teaching or spreading religious doctrine or belief, or supervision or participation in religious ritual or worship.
> (c) Conformity to Religious Tenets- Under this Act, a religious corporation, association, educational institution, or society may require that applicants for, and employees in, similar positions conform to those religious tenets that such corporation, association, institution, or society declares significant. Under this Act, such a declaration by a religious corporation, association, educational institution or society stating which of its religious tenets are significant shall not be subject to judicial or administrative review. Any such declaration made for purposes of this Act shall be admissible only for proceedings under this Act.[59]

This exemption is much broader than Title VII's exemption for two reasons. First, the exemption's language does not contain a narrowing principle that restricts religious organizations to discriminate on religious grounds only, as seen in the Title VII's language, "*individuals of a particular religion to perform work* connected with the carrying on by such corporation, association, educational institution, or society of its activities" (emphasis added).[60] Instead, ENDA's exemption is

[59] H.R. 3685, 110th Cong. § 6 (2007) *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_ bills&docid=f:h3685pcs.txt.pdf.

[60] *See* Melloy, *supra* note 48.

applicable to "individuals whose primary duties consist of teaching or spreading religious doctrine or belief, religious governance, supervision of a religious order, supervision of persons teaching or spreading religious doctrine or belief, or supervision or participation in religious ritual or worship."[61] The narrowing principle — that religious organizations can only discriminate on religious grounds — is absent in ENDA's exemption, which permits religious organizations to discriminate against individuals whose primary duties consist of a range of activities within the organization. Although, at first glance it appears that the 2007 ENDA language may simply be more specific than Title VII, the absence of the principle is paramount as the principal language is missing an analytical analogue pertaining to LGBT people and religious activities. In other words, a loophole can be read into the legislative language, in which the exemption excuses religious organizations if organizations' teachings reject homosexuality (broadly conceived to include transgender people). A religious organization may easily argue that an openly gay person, a person engaging in sex with same-sex partner(s), or a gender non-conforming person violates the organization's tenants, and therefore, cannot perform their work-related duties as a person expressly violating core teachings, even if that person's work performance is in no way implicated. Therefore, the absence of a meaningful narrowing principle for LGBT people within the 2007 version of ENDA effectively broadens the religious exemption.[62]

Moreover, Section 6(c) of ENDA contained explicit language that precluded judicial review of the invocation of the religious exemption. The section provided that, "[u]nder this Act, such a declaration by a religious corporation, association, educational institution or society stating which of its religious tenets are significant shall not be subject to judicial or administrative review."[63] Although there are legitimate reasons to dissuade courts from scrutinizing professed beliefs,[64] it has

[61] 483 U.S. 327, 330 (1987).

[62] There was explicit language in the legislation itself that displayed the bill's authors' intent to broaden the exemption in this regard. *See* H.R. 2015, Section 6(c), *available at* thomas.loc.gov/cgi-bin/query/F?c110:1:./temp /~c11014HekY:e11850: ("Under this Act, a religious corporation, association, educational institution, or society may require that applicants for, and employees in, similar positions conform to those religious tenants that such corporation, association, institution, or society declares significant."). It is my personal speculation that such plainly biased language would have been stripped in the Senate, which would not have come at such a huge cost to the language's proponents, because of the other exemption language is the bill could have been construed to have a similar effect.

[63] *Id*.

[64] The governing standard among U.S. courts is to avoid scrutinizing religious beliefs. *See* Richard Garnett, *A Hands-Off Approach to Religious Doctrine: What Are We Talking About?*, 84 NOTRE DAME L. REV. 837, 837 (2009) ("[T]he program organized by the Section on Law and Religion presented for consideration the claim that 'the United States Supreme Court has shown an increasing unwillingness to engage in deciding matters that relate to the interpretation of religious practice and belief.' The Court, it was proposed, is — more and more — taking a 'hands-off approach to religious doctrine . . .'")(citations omitted). *See* Watts v. Florida Intern. University, 495 F.3d 1289, 1294 (11th

been a historically prudential issue for the courts. The concern is that if codified into law, then many religious organizations could have been shielded from judicial review. Such construction was probably a means, as a practical matter, to guard religious organizations from legal liability.[65]

Some commentators interpreted the religious exemption to still maintain some coverage, however small, despite its far-reaching language.[66] These commentators argued that the provision contained narrowing principles like those that within Title VII because the exemption did not apply to religious organizations that did not have "religious ritual or worship or the teaching or spreading of religious doctrine or belief" as its primary purpose.[67] The exemption, it was argued, also did not extend to "employment of individuals whose primary duties consisted of something other than" core religious activities.[68]

This argument ignores two aspects of the provision. First, it ignores the common-sense fact that virtually all religious organizations possess a primary purpose to engage in religious worship or spread a religious doctrine, even if such doctrine is in the form of service to the community. Second, regarding religious activity, this position ignores the absence of a *relevant* narrowing principle to preclude religious organizations from claiming the exemption under the pretense that a "gay lifestyle" disrupts the "teaching or spreading religious doctrine or belief." A critical examination of the provision shows that its parts, notwithstanding its facial language, are tantamount to a wholesale exemption, when paired with the judicial review preclusion provision. Importantly, the 2009 ENDA bill finally amended the religious exemption provision to be consistent with Title VII, which more reasonably provides LGBT people with robust civil rights protections.

The history of ENDA's broad religious organization exemption is a breath-taking development in civil rights law. It is difficult to imagine the Civil Rights Act of 1964, for example, granting blanket exemptions to Southern states. Such broad exceptions, as drafted in the 2007 and prior ENDA bills, exclude many LGBT people who wish to work at religious and religiously-affiliated organizations. This has been particularly onerous as the religious for-profit industry grows into a vast

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Cir. 2007) (explaining that core religious beliefs must be 'sincerely held' to fall within Free Exercise Clause).

[65] *See* Watts v. Florida Intern. Univ., 495 F.3d 1289, 1294 (11th Cir. 2007) (explaining that core religious beliefs must be 'sincerely held' to fall within Free Exercise Clause).

[66] *See, e.g.*, Memorandum from Drew Asbby and Matt Clark, American Center for Law & Justice, to Drew Ryan and Erik Zimmerman, American Center for Law & Justice on the Employment Non-Discrimination Act of 2007 5 (May 1, 2007), *available at* http://www.advanceusa.org/pdf/ENDA _Memo.pdf.

[67] *Id.*

[68] *Id.*

enterprise[69] to include gyms,[70] music labels and publishing houses.[71] Worse, it is a remarkable example of religious over-accommodation in policy-making that is unsettling for civil rights supporters.

Conservative Christian political organizations, known collectively as the "Religious Right,"[72] possess significant political capital that likely influenced ENDA's religious exemption construction over the last sixteen years. This political movement is led by a number of well-financed and visible organizations, such as Focus on the Family and the Family Research Council.[73] These and other related organizations have vigorously opposed LGBT civil rights, effectively slowing federal legislative efforts to extend rights to LGBT people.[74] ENDA has also met strong opposition from the Religious Right. In 2009, the National Religious Broadcasters testified before the Senate, arguing that the current Title VII-like exemption is "fatally insufficient" to protect religious employers.[75]

Religious Right organizations oppose ENDA and other LGBT civil rights laws based on a Christian evangelical belief that homosexuality is immoral.[76] The nexus among sexuality, gender identity, workplace

[69] *See Mega Churches Mean Big Business*, CNN, Jan. 21, 2010, *available at* http://www.cnn.com/2010/WORLD/americas/01/21/religion.mega.church.christian/index.html (detailing that mega-churches make about $6.5 million a year and can accommodate up to 15,000 people).

[70] *See* Lisa L. Colangelo, *United Presbyterian Church Pays Bills pays bills with Rock Fitness Center for Body and Soul*, N.Y. DAILY NEWS (May 8, 2010), *available at* http://www.nydailynews.com/ny_local/queens/2010/05/09/2010-05-09_united_presbyterian_church_pays_bills_with_rock_fitness_center_for_body_and_soul.html (noting that the church now shares its building with the Fitness Center to cover maintenance costs).

[71] *See* Luisa Kroll, Christian Capitalism: Megachurches, Megabusinesses, FORBES (Sept. 17, 2003), *available at* http://www.forbes.com/2003 /09/17/cz_lk_0917megachurch.html (listing the vast enterprises of mega-churches, including record deals, television programs, and books sold at Walmart, Costco, Barnes and Noble, and Borders).

[72] *See, e.g.*, WILLIAM MARTIN, WITH GOD ON OUR SIDE: THE RISE OF THE RELIGIOUS RIGHT IN AMERICA (1996) (tracing the old Religious Right movement, which was borne in the 1960s, and its evolution into the New Religious Right, which carries on the conservative political mantel to forge Christian power in politics as part of a righteous vision to restore traditional "American" values).

[73] *See* Bill Berkowitz, *Religious Right Bringing in 'More Money Than Ever,'* IPS NEWS (Dec. 21, 2007), *available at* http://ipsnews.net/ print.asp?idnews=40575) (listing the amount of money amassed by Focus on Families and similar organizations) Focus on Families took in $142.2 million in 2006; Focus on Families Action, $14.6 million; the Family Research Council, $10.3 million; the Alliance Defense Fund, $26.1 million; American Family Association, $16.9 million; and CBN, $236.3 million.

[74] *See* Cece Cox, *To Have or To Hold — Or Not: The Influence of the Christian Right on Gay Marriage Laws in the Netherlands, Canada, and the United States*, 14 LAW & SEXUALITY: REV. LESBIAN, GAY, BISEXUAL & TRANSGENDER LEGAL ISSUES 1, 40-47 (2005) (explaining that the Religious Right played an instrumental role in blocking gay marriage in the United States as compared to other countries that extended marriage rights to LGBT people who did not have strong conservative religious opposition).

[75] *E.g., Employment Non-Discrimination Act of 2009: Hearing of S. 1584 Before the Sen. Comm. on Health, Educ., Labor & Pensions*, 111th Cong. (2009) (written testimony of Craig L. Parshall, Senior Vice-President and General Counsel of the National Religious Broadcasters), *available at* http://content.nrb.org/ webdocs/Advocacy/ENDA_Senate_Test_11_2009.pdf.

[76] *See, e.g.*, Family Research Council, Help Stop the ENDA. *Religious Liberty*, http://www.frc.org/get.cfm?i=AL10D01 ("ENDA will give Washington liberals virtually unlimited power to force ev-

protection, and morality is unclear,[77] but Religious Right organizations have long-advanced the position that civil rights laws that mandate non-discrimination infringe religious freedom.[78] ENDA's perceived threat is even more deeply felt as the religious exemption has been narrowed to Title VII's scope. Few other religious voices have taken the anti-LGBT civil rights mantel like the conservative Christian bloc,[79] have been as consistently vocal against ENDA,[80] suggesting that the Religious Right has been a driving force behind the religious exemption since ENDA's inception. This comment will not elaborate on the Religious Right's long-fought opposition to ENDA; however, it is important to emphasize that a particular religious constituency has profoundly influenced ENDA's religious exemption. Lawmakers have catered to this specific constituency in the past, but finally seem willing to abandon its past over-accommodation.

III. Tipping the Balance Toward Religious Over-Accommodation

In *Lemon v. Amos*, Justice Sandra Day O'Connor noted:

> These cases involve a Government decision to lift from a nonprofit activity of a religious organization the burden of demonstrating that the particular nonprofit activity is religious as well as the burden of refraining from discriminating on the basis of religion . . . [I]n my view the objective observer should perceive the Government action as an accommodation of the exercise of religion rather than as a Government endorsement of religion.[81]

Justice O'Connor's concurrence highlighted the long-debated tension between First Amendment principles that constitutionally permit the federal government to uphold the free exercise of religion, and, at

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ery business with more than 15 employees to embrace immoral sexual behavior as normal and worthy of celebration . . . or face harsh federal sanctions.").

[77] *Infra* Part II.

[78] *See* James Tillman, *New Documentary on Homosexual Threat to Religious Freedom*, Lifesitenews.com (May 13, 2010) (reporting on a Family Research Council documentary warning about ENDA's threat to religious freedom to reject homosexuality as moral).

[79] *See supra* note 26 (describing the Religious Right as a fundamentalist, conservative Christian coalition).

[80] *See, e.g.*, *supra* note 26 (Parshall from the National Religious Broadcasters, a Religious Right programming organization, is the only other religious group represented at the hearings other than the Reform Jewish organization, as it served as a nominal voice for the conservative bloc for the most recent round of ENDA hearings; other Religious Right organizations have testified against the bill in the past).

[81] Amos, 483 U.S. at 348–49 (concurring opinion).

the same time, mandate against excessive entanglement with religion.[82] The First Amendment seemingly creates a balance in its limited text, which provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."[83] However, the meaning behind the Establishment Clause and Free Exercise Clause regarding federal statutory regulation is a constant subject of debate.[84]

The theoretical balance between these two principles — government's preservation of free religious exercise and its limitations — creates a tension that sometimes makes them competing principles.[85] In the context of LGBT rights and religious organizations that object to homosexuality, lawmakers are forced to choose which rights to more firmly secure. Based on ENDA's former blanket exceptions it appears as if this choice has been relatively easy, but as LGBT relationships becomes normalized, lawmakers had to approach a fairer balance. This section will discuss judicial interpretations of the Establishment and Free Exercise Clauses, examine the principles' tensions within LGBT civil rights, analyze the nexus between First Amendment principles with employment, and conclude by arguing that ENDA's previous exemptions over-accommodated certain religious organizations.

A. THE ESTABLISHMENT CLAUSE AND RELIGIOUS FREEDOM TIGHTROPE

Courts have been called upon to discern the Establishment and Free Exercise Clauses meanings because the United States Constitution provides precious little textual guidance regarding Congress' role in upholding religious freedom and avoiding its entanglement with religion.[86] The Establishment Clause contains a much clearer jurisprudential history than the Free Exercise Clause, yet the relationship between these clauses in case application remains equivocal.

The leading case interpreting the Establishment Clause in a government regulatory context is *Lemon v. Kurtzman*, decided in 1971.[87]

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[82] *Id.* at 346–49.

[83] U.S. CONST. amend. I.

[84] *See, generally,* Daniel Conkle, Constitutional law: the religion clauses (2d ed. 2009); EUGENE VOLOKH, THE RELIGION CLAUSES AND RELATED STATUTES: PROBLEMS, CASES, AND POLICY ARGUMENTS (2006); JESSE CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES (1995).

[85] The prevalent view among law scholars is that the Religion Clauses are often in conflict. *See* Jesse H. Choper, *The Religion Clauses of the First Amendment: Reconciling the Conflict*, 41 U. PITT. L. REV. 673, 673-701 (1980) (explaining the courts have developed independent jurisprudence to harmonize the Religion Clauses despite their seemingly disparate mandates). In my view, the Religion Clauses are not necessarily in conflict; instead, they create the confines between which the government must reasonably balance. This perspective, unlike the prevalent view, appears throughout the essay.

[86] *See* Kent Greenawalt, *Secularism, Religion, and Liberal Democracy in the United States*, 30 CARDOZO L. REV. 2383, 2392–2400 (2009) (explaining that the Constitution's Religion Clauses fail to inform the law as to religion's proper governmental and public roles).

[87] 403 U.S. 602 (1971).

The case created a three-part test designed to "draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'"[88] The *Lemon* test requires that a statute must have a secular legislative purpose; contain a primary effect that neither advances nor inhibits religion; and it must not foster an "excessive entanglement" with religion.[89] The Burger Court broadly construed the Establishment Clause's purpose, in which a statute that "respects" religion may be impermissible if it may lead to state religious endorsement.[90]

Later Establishment Clause cases have elaborated on the *Lemon* test's final element — excessive entanglement — as an inquiry into "the character and purposes of the benefited institutions, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority."[91] The "entanglement" element is generally viewed as the government's attempt to maintain neutrality toward religion.[92] Some courts, where appropriate, have utilized Justice O'Connor's "refined Lemon test"[93] which replaces the entanglement element with the "endorsement test" that holds "the government impermissibly endorses religion if its conduct has either (1) the purpose or (2) the effect of conveying a message that religion or a particular religious belief is favored or preferred."[94] Therefore, governmental action that appears to endorse or disapprove of religion from the perspective of an objective and informed observer is violative of the Establishment Clause.[95]

The Free Exercise Clause is usually interpreted as protecting against infringements against individuals' religious beliefs or practice.[96] A free exercise religious claim must only show that it is religious in nature and sincerely held belief.[97] The criterion to determine whether a proffered belief is religious is governed by a three-factor test, including "an attempt to address fundamental and ultimate questions involving deep and imponderable matters; a comprehensive belief system; and

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[88] *Id.* at 612 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 668 (1970).
[89] *Id.* at 613.
[90] *Id.* at 612.
[91] Agostini v. Felton, 521 U.S. 203, 206 (1997). *See also* Van Orden v. Perry, 545 U.S. 677 (2005); Mitchell v. Helms, 530 U.S. 793, 793–94 (2000).
[92] McCreary Cnty. v. ACLU, 545 U.S. 844, 860 (2005).
[93] *See* Lynch v. Donnelly, 465 U.S. 668, 687–94 (1984) (concurring opinion) (using the refined Lemon test).
[94] *See, e.g.,* Bauchman for Bauchman v. West High School, 132 F.3d 542, 551 (10th Cir. 1997) (applying Justice O'Connor's refined analysis).
[95] *See* Catholic League for Religious & Civil Rights v. City and Cnty. of San Francisco, 567 F.3d 595 (9th Cir. 2009); Green v. Haskell Cnty. Bd. Board of Com'rs, 568 F.3d 784 (10th Cir. 2009).
[96] *See* School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203 (1963).
[97] *See* Sutton v. Rasheed, 323 F.3d 236 (3d Cir. 2003); U.S. v. DeWitt, 95 F.3d 1374 (8th Cir. 1996); Thomas v. Review Bd. of Indiana Emp't Sec. Div., 450 U.S. 707 (1981).

the presence of formal and external signs like clergy and observance of holidays."[98]

The Supreme Court's jurisprudence on governmental regulatory interests related to religious freedom is uneven. In *Sherbert v. Verner*,[99] the Court held that a government must possess a compelling interest in its religious exercise regulation.[100] Nearly thirty years later, the Court changed course in *Employment Division v. Smith* by permitting governmental action merely to be neutral toward religion.[101] Congress restored the *Verner* strict scrutiny requirement for governmental regulation in the Religious Freedom Restoration Act[102] in 1993. Yet the Supreme Court, in *City of Boerne v. Flores*, ruled the Act's application to state and local governments as unconstitutional on the grounds that its remedial reach was incongruent to achieve its ends.[103] This jurisprudential history is instructive on individual religious freedom issues but may not fully inform religious organization protections, particularly in light of secular civil rights regulation.[104]

The closest courts have come is placing limitations on the governmental role to preserve individual religious beliefs. In *Bowen v. Roy*, the Supreme Court argued that the First Amendment does not "require the Government *itself* to behave in ways that the individual believes will further his or her spiritual development or that of his or her family" (italics in original).[105] This form of over-accommodation is rejected in recent federal Circuit cases, such as *Cornerstone Christian Schools v. University Interscholastic League*,[106] which held that a not-for-profit, inter-collegiate organization's regulatory preclusion of non-public school participation did not infringe on the plaintiff's religious right to enroll his son in private school.[107] Federal courts' rationales in *Roy* and *Cornerstone* reinforce the necessary balance between reasonable and unreasonable accommodation.

The federal government, within a constitutional context, occupies a precarious role as the removed protector of religious freedom. Moreover, as Congress legislates within a pluralistic society, it becomes increasingly difficult to reconcile this dual role. Accordingly, the ten-

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[98] *Id.* at 251 (quoting Africa v. Commonwealth of Pa., 662 F.2d 1025, 1030 (3d Cir. 1981) (describing three indicia of religion).
[99] 374 U.S. 398 (1963).
[100] *Id.* at 404.
[101] 494 U.S. 872 (1990).
[102] 42 U.S.C. § 2000b(b).
[103] 521 U.S. 507, 529 (1997).
[104] *See* Stephen D. Smith, *The Jurisdictional Establishment Clause, A Reappraisal,* 81 NOTRE DAME L. REV. 1844 (2006) (arguing that competing views about the government's regulatory role in safeguarding religious freedom are emerging that advance the position that the Establishment Clause only meant to restrict federal endorsement of state religion — not all governmental endorsement).
[105] Bowen v. Roy, 476 U.S. 693, 699 (1986).
[106] 563 F.3d 127 (5th Cir. 2009).
[107] *Id.* at 135.

sion between the religion clauses surfaces in the federal government's institutional law-making capacity.[108] Should Congress fully accommodate religious organizations as a constitutional right or should it protect religious organizations as a discretionary matter, if at all?[109] Religious exemption critics have argued that they are unwise policy choices.[110] This essay does not take a position on religious exemptions *per se*; rather, it seeks to examine its meaning within the ENDA for LGBT people and other justice-seeking groups. The religious exemption issue is of interest because it emphasizes the deep tension living between the religion clauses and civil rights progress.

B. Reconciling Religious Freedom and LGBT Rights

Attitudes toward LGBT people and rights have changed considerably from ENDA's inception in 1994. Today, Americans are relatively divided on the morality of same-sex relationships[111] and LGBT rights, including marriage and open military service.[112] Opinions, however, are trending more favorably for LGBT rights, despite overall opposition.[113] Traditionally, Abrahamic religions' teachings reinforce that homosexuality is sinful but within the United States, a majority of "mainline" Protestants now believe that homosexuality is an acceptable way of life.[114] Certain denominations have even welcomed LGBT

[108] *See* Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DePaul L. Rev. 1 (2001) (explaining that the government's rights arbiter role poses difficulty when it is responsible for allocating or protecting conflicting interests).

[109] *Id.*

[110] *See* Frederick M. Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U.A.L.R. L. J. 555 (1998); Angela C. Carmella, *Responsible Freedom Under the Religion Clauses: Exemptions, Legal Pluralism, and the Common Good,* 110 W. Va. L. Rev. 403 (2008). *But see* Laura S. Underkuffler, *Religious Exemptions and the Common Good: A Reply to Professor Carmella*, 110 W. Va. L. Rev. 449 (2008). *See also* Christopher L. Eisgruber & Lawrence G. Sager, Religious Freedom and the Constitution (2007) (arguing against religious exemptions because they are unfair to non-religious people).

[111] *See* Gallup Organization, Americans Evenly Divided on Morality of Homosexuality (2008) *available at* http://www.gallup.com/poll/ 108115/Americans-Evenly-Divided-Morality-Homosexuality.aspx (reporting that 48% of survey participants considered homosexuality to be morally acceptable and 48% of survey participants considered homosexuality to be morally wrong).

[112] *See* Gallup Organization, Majority of Americans Continue to Oppose Same-Sex Marriage (2009), *available at* http://www.gallup.com/ poll/118378/majority-americans-continue-oppose-gay-marriage.aspx (reporting that a slight majority — 57% — of survey participants opposed same-sex marriage and 40% support same-sex marriage; support for same-sex marriage is "significantly" higher than in 1996; sixty-nine percent of survey participants support open lesbian and gay military service).

[113] *See id.* (reporting that sixty-seven percent of survey participants support hate crimes coverage for LGBT people; sixty-seven percent support domestic partner healthcare coverage; and seventy-three percent support partner inheritance rights).

[114] *See* The Pew Forum on Religion & Public Life, Most Mainline Protestants Say Society Should Accept Homosexuality (2009), *available at* http://pewforum.org/Gay-Marriage-and-Homosexuality/Most-Mainline-Protestants-Say-Society-Should-Accept-Homosexuality.aspx (reporting that 56% of survey participants believed that homosexuality should be accepted).

people, such as the Presbyterian Church,[115] the Anglican Church,[116] the United Church of Christ,[117] and Reform Judaism.[118] The American Reconstructionist and Conservative Judaism faiths permit gay and lesbian rabbis as well as same-sex marriage.[119] LGBT people are gaining greater acceptance at the same time as their political movements grow.[120]

America, nevertheless, remains one of the most religious nations in the world.[121] Americans attend religious worship services and contemplate religious questions at a higher rate than other industrialized nations.[122] While America is a decisively Christian nation, it is among the most religiously diverse countries in the world as well.[123] The inevitability of pluralistic divisions around LGBT protections and religious freedom is clear when considering that the United States is among the most deeply-religious, religiously diverse, and openly-gay populated nations worldwide.[124]

It is important to first contextualize the tension between civil rights and religious freedom as an historic one. LGBT people are not the first

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[115] *See* Human Rights Campaign, Stances of Faiths on LGBT Issues: Presbyterian Church (USA), *available at* http://www.hrc.org/issues/ religion/5021.htm.

[116] *See* Human Rights Campaign, Stances of Faiths on LGBT Issues: Episcopal Church, *available at* http://www.hrc.org/issues/religion/ 4990.htm.

[117] See Human Rights Campaign, Stances of Faiths on LGBT Issues: United Church of Christ, *available at* http://www.hrc.org/issues/religion/ 5055.htm.

[118] *See Employment Non-Discrimination Act Hearing Before the H. Comm. on Education and Labor,* 111th Cong. (2009) (statement of Rabbi David Saperstein) *available at* http://edlabor.house.gov/documents/111/pdf/testimony/ 20090923DavidSapersteinTestimony.pdf ("Our belief in ENDA's importance stems from a core teaching shared by an array of faith traditions, Jewish and non-Jewish alike. In the words of Genesis (1:27) 'And God created humans in God's own image, in the image of God, God created them; male and female God created them.' We oppose discrimination against all individuals, including gay, lesbian, bisexual, and transgender men and women, for the stamp of the divine is imprinted on the souls of each and every one of us.").

[119] *See* Alan Cooperman, *Conservative Rabbis Allow Ordained Gays, Same-Sex Unions*, WASH. POST, Dec. 7, 2006, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2006/12/06/AR2006120601247.html (explaining that conservative rabbis fell short of endorsing same-sex marriage and homosexuality generally, but allowed for discretion when ordaining homosexual rabbis and performing same-sex commitment ceremonies).

[120] Perhaps the most visibly successful gay rights political movement is the gay marriage movement. Ironically one of the clear signs of its building strength was its backlash to it by some segments of the population. *See* Gilbert Herdt, *Gay Marriage: The Panic and the Right* in MORAL PANICS, SEX PANICS: FEAR AND FIGHT OVER SEXUAL RIGHTS 157–193 (2009) (describing President's Bush reelection on an anti-gay marriage campaign and recent history in gay rights movement's growth and evolution that led to that particular political moment).

[121] *See* Diane Swanbrow, *U.S. one of the most religious countries,* UNIV. OF MICH. NEWS SERVICE, Nov. 24, 2003, *available at* http://www.ur.umich.edu/ 0304/Nov24_03/15.shtml (reporting on a worldwide study conducted by the university, one of the leading polling universities in the world).

[122] *Id*.

[123] *See* Diana Eck, A NEW RELIGIOUS AMERICA: HOW A "CHRISTIAN COUNTRY" HAS BECOME THE WORLD'S MOST RELIGIOUS DIVERSE NATION (2001).

[124] *See* THE WILLIAMS INSTITUTE, SAME-SEX COUPLES AND THE GAY, LESBIAN, BISEXUAL POPULATION: NEW ESTIMATES FROM THE AMERICAN COMMUNITY SURVEY (2006), *available at* http://www.law.ucla.edu/williamsinstitute/ publications/SameSexCouplesandGLBpopACS.pdf (reporting that there are at least 8.8 million lesbian and gay people in the United States).

group to experience religiously-justified discrimination. Religiosity placed a significant role in slavery's continuation and resistance for black descendents.[125] Southern whites, in particular, relied on Biblical support to oppose slave emancipation.[126] Religious LGBT civil rights opposition is a distinctively unique position but it resonates with historical legacies in which some segments' religious attitudes lagged behind civil rights advancement.[127] This history also demonstrates that not every socio-political ethical belief is an enduring religious belief that is preserved over time.

Courts also have served as a barrier to LGBT civil rights, especially in terms of employment protection. ENDA is necessary because federal courts have refused to extend sex-based Title VII protections to lesbian, gay, and transgender people.[128] In the seminal case, *DeSantis v. Pacific Telephone & Telegraph Co.*,[129] three gay males who each experienced workplace discrimination had their Title VII petitions rejected by the Equal Employment Opportunity Commission, federal district court, and Ninth Circuit, on the basis that the court lacked jurisdiction.[130] The Circuit Court's rationale was that Congress only intended to incorporate "traditional notions" of sex under the Title VII prohibition.[131]

More recent court decisions have affirmed this interpretation, even though other decisions have departed from the Court's holding

[125] *See generally* Religion and Slavery (Paul Finkelman ed.) (1989) (highlighting the vigorous religious debate over slavery in early America).

[126] *See* Rev. W.S. Brown, Preface to the Fifth Edition of Rev. Josiah Priest, Bible Defense of Slavery; ororandor Origin Fortunes, and, History of the Negro Race, at vi (1852–1853) ("Is it not time, then, that the South should begin to defend herself against the aggressions of these time-serving votaries of error and fanaticism, and show to the world that her peculiar policy and institutions are in harmony with the genius of republicanism, and the spirit of Christianity??!? Believing that such is her true policy, and that this proposition is much more consistent and reasonable, as well as more easily established than its converse, we have been induced to give publicity to the following pages in vindication of Southern rights and institutions.").

[127] Religion and sexual identities have a complex relationship in which America has witnessed a reversal in the primacy of these identities from the previous century where religion was once the strongest identity that is now replaced by sexual and other identities. *See* William N. Eskridge Jr., *A Jurisprudence of "Coming Out": Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 Yale L.J. 2411, 2412 (1997) ("In this century, in fact, sexual orientation has steadily been replacing religion as the identity characteristic that is both physically invisible and morally polarizing. In 1900, one's group identity was largely defined by one's ethnicity, social class, sex, and religion . . . . In 2000, one's group identity will be largely defined by one's race, income, sex, and sexual orientation"). *But see id.* at 2412 ("America has internalized the idea of benign religious variation, that there are a number of equally good religions, and one's religion says little or nothing about one's moral or personal worth. The opposite is true of sexual orientation . . . . Most Americans reject the idea of benign sexual variation, that there are a number of equally good sexual orientations, and that one's sexuality says little or nothing about one's moral or personal worth."). (citations omitted).

[128] *See Why DOMA and Not ENDA? A Review of Recent Federal Hostility to Expand Employment Rights and Protection Beyond Traditional Notions* (Note), 15 Hofstra Lab. & Emp. L. J. 177, 181 (1998) (citing examples of federal cases where the courts have refused to apply Title VII protections).

[129] DeSantis v. Pacific Telephone & Telegraph Co., 608 F.2d 327 (9th Cir. 1979).

[130] *See supra* note 128, at 181.

[131] 608 F.2d 327, 392 (9th Cir. 1979).

in *DeSantis*.[132] The jurisprudence remains significantly uneven as to whether Title VII's "sex" protections are applicable to lesbians and gays. Similarly, transgender and gender non-conforming people also maintain asymmetrical protection, depending on a variety of factors. These include plaintiff's gender identity and expression, whether the plaintiff plans to transition genders, and other peculiarly conditional factors.[133] Title VII's legislative history has prevented LGBT people from claiming federal statutory protection against employment discrimination,[134] which strengthens the urgency for which ENDA is being advocated by LGBT advocates and lawmakers.

Scholars have weighed in on the inherent tension between religious freedom and civil rights, particularly for LGBT people.[135] Professor Chai Feldblum, a prominent voice on LGBT policy and morality, explains that liberal political theory locates proper governmental action in the safeguarding individuals' rights to pursue their conception of a "good" moral life, rather than endorsing a specific normative moral position on the "good" life.[136] She goes on to argue that there must be "something more" than a law's moral assessment to illegitimately burden individuals' "belief liberty."[137] Failure to acknowledge that laws carry

[132] *See* Smith v. City of Salem, Ohio, 378 F.3d 566 (6th Cir. 2004) (rehearing *en banc* denied) (Oct. 18, 2004) (holding that employee's allegations of discrimination based upon gender non-conforming behavior were actionable under Title VII); Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864 (9th Cir. 2001) (holding employer liable for harassment of former homosexual employee).

[133] *See* Katie Koch & Richard Bales, *Transgender Employment Non-Discrimination*, 17 U.C.L.A. WOMEN'S L.J. 243, 250–62 (2008) (arguing that transgender should be included in the definition of "sex" like pregnancy is and citing state court examples of such construction).

[134] *See supra* note 128, at 186 (citing federal court holding that Title VII does not protect employees from sexual orientation discrimination).

[135] *See, e.g.,* Martha Minow, *Should Religious Groups Be Exempt From Civil Rights Laws?*, 48 B.C. L. REV. 781, 786 (2007) (civil rights protect both religious rights and sexual rights which may be in conflict); Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 63 (2006) (advocates of non-discrimination support equality whereas the other may seek religious freedom); Josiah N. Drew, *Caught Between the Scylla and Charybdis: Ameliorating the Collision Course of Sexual Orientation Anti-discrimination Rights and Religious Free Exercise Rights in the Public Workplace*, 16 B.Y.U. J. Pub. L. 287, 300 (2002); ("gay rights advocates should turn toward, rather than away from religion"); Jack M. Battaglia, *supra* note 53.

[136] *See* Chai Feldblum, *supra* note 135, at 84 ("major liberal political theory postulates that morality is not the proper objective of government action"). Commentators have also argued that the normative value of governmental neutrality is challenged when individuals invoke religious exemptions for idiosyncratic religious beliefs or practices. *See Religious Exemptions and the Limits of Neutrality* (Note) 74 TEX. L. REV. 120 (1996) ("It is tempting to think that neutrality forbids the government from making any normative judgments when religion is at issue. If we indulge this temptation, we will be inclined to insist that courts disregard the extent to which a party seeking a mandatory exemption on religious grounds embraces beliefs or values that deviate from familiar religious beliefs or values. But the notion of neutrality cannot possibly relieve us of the task of bringing normative concerns to bear on the views of those who seek mandatory religion exemptions.").

[137] *Id.* at 89–122.

moral assessments and alienate some members of society's beliefs, she argues, is intellectually dishonest, and ignores reality.[138]

Feldblum's analysis leads to other scholars' religious exemption critiques. As a backdrop to these critiques, Louis Fisher observes, "[w]hile constitutional limits apply to the creation of statutory protections for religious purposes, the courts have not invalidated any of the special exemptions adopted by Congress."[139] Fisher contends that the responsibility for safeguarding religious freedom is shared among courts, governmental institutions, and political forces that apply pressure to government.[140] The Constitution's high value on civil rights and religious freedom produces high stakes for policy choices that must express a moral *preference* one way or the other.[141]

Conversely, some commentators have pointed out that LGBT nondiscrimination laws and religious freedom protections seek similar goals: to exercise a negative right to free expression, and to invoke positive right against infringement.[142] Professor William Eskridge, for this reason, advances a comparative-need accommodation approach that allows parties to mediate their differences toward a mutually beneficial resolution.[143] This approach, in other words, seeks to ascertain the core needs of conflicting parties and to accommodate these identified needs. This approach is useful because it moves away from the dichotomous framework placed around these interests, although it is unclear how this approach can be institutionalized within federal statutory regulation.

Importantly, there still remain divergent views about how to reconcile LGBT civil rights and religious freedom interests. Most commentator suggestions, however, fall into three categories: 1) the preservation or elimination of religious exemptions or adjustment of their scope; 2) mediation as a methodological remedy; and 3) alternative, non-religious accommodations. The following section of this comment will further evaluate this tension within the area of employment.

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[138] *Id.* at 89. Professor Feldblum also criticizes gay rights leaders for claiming that LGBT civil rights laws are morally neutral. *See* Chai Feldblum, *Moral Rhetoric of Legislation,* 72 N.Y.U. L. Rev. 992, 996 (1997).

[139] Louis Fisher, Statutory Exemptions for Religious Freedom, 44 J. Church & St. 291 (2002).

[140] *Id.*

[141] *See* Laura K. Klein, *Rights Clash: How Conflicts Between Gays Rights and Religious Freedoms Challenge the Legal System*, 98 Geo. L.J. 505, 514–18 (2010) (framing the religious exemption debate for LGBT rights as which side should be accommodated most of the time as most scholars agree that a narrow exception should exist).

[142] *See, e.g., supra* note 127, at 2430. ("state should be encouraged to prohibit private censorship or discrimination on the basis of religion or sexual orientation.").

[143] *Id.* at 2449–54.

C. THE ISSUE OF RELIGIOUS EXEMPTION NEXUS: DISSECTING THE COMPELLING INTEREST FOR RELIGIOUS EXEMPTION UNDER ENDA

Many scholarly debates on LGBT civil rights and religious freedom address the issue of same-sex marriage.[144] The issue of employment, in contrast, only tangentially implicates faith-based beliefs. The relevance of religious freedom arguments is diminished when the civil rights in question indirectly relate to religion because the attenuation between religious belief and infringement is remote. The scope of religious freedom is broad but not unconstrained.[145] The Supreme Court has consistently held that when the federal government creates a neutral law that incidentally burdens the free exercise of a particular religious practice or belief, it does not infringe on an individual's free religious exercise.[146] Chai Feldblum's "belief liberty" theory is central to an accommodationist analysis that seeks to balance state religious endorsement, religious freedom, and non-discrimination rights, specifically when addressing employment non-discrimination for LGBT people.

Most Americans believe that LGBT people face "a lot" of discrimination,[147] more in fact, than any other group.[148] A majority of religiously-identified people subscribes to this belief as well.[149] A poll on transgender discrimination reported that 37% of transgender survey participants felt as if they had experienced discrimination.[150] Consequently, most Americans oppose employment discrimination against lesbians and gays, and a comparable percentage of people support protections for transgender people.[151] Apart from morally-charged questions related to marriage, most people feel as if LGBT individuals ought to have the right to work free of discrimination. These data strongly suggest that opposition to LGBT workplace discrimination protection is *not* religiously based, but instead based upon ethically informed political beliefs.

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[144] *See, e.g.,* Martha Minow, *supra* note 135; Chai Feldblum, *supra* note 135; Koppelman, *infra* note 161.

[145] *See supra* notes 105-107.

[146] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531 (1993); Employment Div., 494 U.S. at 879 (if a law is neutral and generally applicable, but incidentally affects religion, it need not satisfy a compelling state interest to survive constitutional scrutiny).

[147] *See* THE PEW FORUM ON RELIGION AND PUBLIC LIFE & THE PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, MOST STILL OPPOSE SAME SEX MARRIAGE, MAJORITY CONTINUE TO SUPPORT CIVIL UNIONS 8 (2009) (64%) *available at* http://pewforum.org/uploadedfiles/Topics/Issues/Gay_ Marriage_and_Homosexuality/samesexmarriage09.pdf.

[148] *Id.*

[149] *Id.*

[150] *See* NAT'L GAY & LESBIAN TASK FORCE ACTION FUND, PASSING THE EMPLOYMENT NON-DISCRIMINATION ACT: A TOOLKIT 5 (2009) *available at* http://www.thetaskforce.org/enda07/ENDAtoolkit_c4.pdf.

[151] *Id.* at 7 (reporting that 61% of Americans support transgender employment non-discrimination laws).

ENDA seeks to provide such protection against widespread anti-LGBT discrimination. Its purpose is to "address the history and widespread pattern of irrational discrimination on the basis of sexual orientation or gender identity by private sector employers and local, State, and Federal government employers."[152] Similarly, Title VII of the Civil Rights Act was enacted to make illegal employment practices that "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin . . . ."[153] The goal to eliminate employment discrimination does not in itself offend religious views. It may offend privacy interests of those who are uncomfortable with LGBT people, yet privacy interests are not synonymous to religiosity, particularly within a constitutional context.

It is, after all, neither possible nor desirable to accommodate ethical beliefs — rational or not — that LGBT people simply should not exist. Some ENDA opponents may characterize their objection to LGBT romantic orientation toward members of the same gender or orientation toward a particular gender identity or expression. In other words, it is the romantic act or gender presentation that is believed to be sinful.[154] Be that as it may, an ethical commitment to opposite sex love or gender conformity is not necessarily a religious belief. In most religious freedom cases, courts shy away from dissecting the veracity of a religious claim,[155] but in some cases where the civil rights interests are especially strong, it is reasonable to further inquire to the nature of the belief.

Some scholars take purported religious beliefs against employment protection for granted. Andrew Koppelman, in his well-known article, *You Can't Hurry: Love Why Anti-Discrimination Protections for Gay People Should Have Religious Exemptions,* argues for religious exemptions of LGBT civil rights laws based on the rationale that "forced association with gay people" will amount to a tangible harm and prevent those who oppose homosexuality from living honestly with their values.[156]

This line of reasoning borders on absurdity for two primary reasons: First, it entirely ignores historical discrimination against other

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[152] H.R. 2981, 111th Cong. § 2(1) (1st Sess. 2009) *available at* http://www.govtrack.us/congress/billtext.xpd?bill=h111-2981.

[153] 42 U.S.C. § 2000e-2(1)

[154] *See, e.g.*, Americans for Truth About Homosexuality, Tell Congress You Oppose ENDA — The 'ENDA' Our Freedom' Bill, *available at* http://americansfortruth.com/news/tell-congress-you-oppose-enda-the-enda-our-freedom-bill.html (eliciting opposition to ENDA on the basis that the gay agenda is attempting to pass an oppressive law that threaten to silence religious freedom to voice the self-evident truth that homosexuality is sinful).

[155] *See* Lemon v. Kurtzman, 403 U.S. 602 (1971).

[156] Andrew Koppelman, *You Can't Hurry Love: Why Antidiscrimination Protections For Gay People Should Have Religious Exemptions*, 72 Brook. L. Rev. 125, 135 (2007).

groups currently protected under employment non-discrimination laws. Indeed, "forced association" with blacks likely posed discomfort to some Whites who held racial animus towards blacks. Some whites, in fact, had to learn to coexist with Blacks as equals, which required a level of uneasy "dishonesty" for a time. Yet forced association alone does not sanction mistreatment as precluded by non-discrimination laws. Uncomfortable co-existence is sometimes a fact of life that privileged groups must endure for the sake of progress, for which conservative Christians and other religious people are no exception.

Second, Koppelman treats employment discrimination and discomfort arising from forced association as comparable when these experiences are clearly not similar. Such a position is hard to take seriously as joblessness leads to endemic poverty among lesbians and gays, particularly transgender people.[157] Further, persistent discrimination experienced by LGBT routinely leads to mental health illness and suicide.[158] Merely disliking your co-workers based on divergent ethical views is hardly a basis to justify broad religious organization exemptions. Koppelman's foundational argument reveals a libertarian preference for not working with LGBT people that is a far cry from religious orthodoxy.

An overbroad religious exemption in ENDA potentially undermines the law's goal to eradicate discrimination. The absence of a bona fide occupational qualification — a narrow Title VII defense that allows employers to justify its discrimination under statute — invites employers to discriminate for any religious reason.[159] The broad religious exemption in earlier versions of ENDA sends a mixed message to the courts by asking "if Congress really intended to stamp out sexual orientation discrimination, why are religious groups above it?"[160] The most recent ENDA version does not appear to contain a BFOQ defense under Title VII's 703(e)(1).[161] Therefore, ENDA's previously broad religious exemption was equivalent to a generous BFOQ defense[162] that buffered the employment sector most likely to justify discrimination

[157] *See supra* note 130.

[158] *See* Kristen K. Clements-Nolle, Rani Marx & Mitchell Katz, *Attempted Suicide Among Transgender Persons: The Influence of Gender-Based Discrimination and Victimization, gender-based discrimination and victimization*, *J. HOMOSEXUALITY 53, 53-69* (2006) (presenting research to illustrate increases in mental illness due to discrimination and victimization).

[159] *See* J. Banning Jasiunas, *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 (2000); Jack M. Battaglia, *supra* note 53, at 227-28.

[160] *Id*.

[161] 42 U.S.C. § 2000e-2(a)(e)(1).

[162] *See* Kate B. Rhodes, *Defending ENDA: The Ramifications of Omitting the BFOQ Defense in the Employment in the Employment Non-Discrimination Act*, 19 LAW & SEXUALITY 1, 29 (2010) ("The most puzzling aspect of ENDA's lack of a BFOQ defense is the absence of any real debate or concerns about its inclusion or exclusion. The BFOQ defense has been a vital part of Title VII, and is often, but unsuccessfully, asserted as an affirmative defense. Including a BFOQ defense would enable ENDA to mirror more closely Title VII, which floor debates have indicated to be the intent of

against LGBT people against the law's application, and validated the untenable view that all religious organizations maintain a legitimate interest in LGBT discrimination.

ENDA opponents have been unable to articulate a reasonable nexus between religious belief and LGBT workplace discrimination. Upon deconstructing moral claims that merely working with LGBT people will offend deeply held religious beliefs, it becomes clear that such claims are libertarian, not religious claims. These proto-religious claims do not rise to the level of substantial burden that may occur when the government makes it religiously *impossible* to exercise a belief or practice.[163] Impossibility is not the Free Exercise Clause standard but instead provides a comparative lens from which to assess ethical discomfort claims. Religious organizations that view homosexual acts as immoral or gender non-conformity as unnatural do not suffer a substantial burden in merely having openly gay or transgender within their professional environments.

D. The Risk of Religious Organization Exemption Over-Accommodation

ENDA's religious exemptions prior to 2009 were broad not only in a statutory sense but also in more general legal sense. These exemptions lacked a narrowing principle, such as Title VII's restriction on religious discrimination, or a BFOQ. Moreover, the legislative history failed to demonstrate a reasonable nexus between religiosity and employment discrimination.[164] The exemption's overreach and lack of nexus alone suggest that such an exemption would not survive strict scrutiny review.

However, the previous exemptions also may have violated the religious clauses. The operative presumption embedded into the exemption's construction was that all religious organizations may object to LGBT moral choices to lead open and honest lives. This presumption is false, as discussed earlier, because some religious institutions and organizations support LGBT equality.[165] It then follows that the religious exemptions sought to accommodate a particular religious sub-group

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Congress. However, excluding a BFOQ defense would better effectuate the purpose of ENDA, to eliminate sexual orientation discrimination in employment.").

[163] *See* Eugene Volokh, *Intermediate Questions of Religious Exemptions — A Research Agenda with Test Suites*, 21 Cardozo L. Rev. 595, 654–55 (2000) (stating that in some religious freedom cases that objectors find themselves in a quandary in which a particular act to be legally permissible but religiously impermissible; this impermissibly however is closely related to a sincerely-held religious belief, such as a prisoner maintaining a kosher diet when the prison does not offer any kosher-options).

[164] This is my conclusion after primarily reviewing the three legislative hearings on ENDA during its fourteen-year history. *See supra* note 31, 39, & 79.

[165] *See supra* notes 115–117.

— conservative Christians — who aggressively opposed the bill.[166] The natural extension of this argument is that the sweeping scope of prior ENDA versions' religious exemptions aimed to over-accommodate a particular religious sub-group — an accommodation that in is violation of the Establishment Clause.

Recent Establishment Clause jurisprudence supports the view that government endorsement may take the form of statutory exceptionalism. Justice O'Connor's refining of the *Lemon* test is instructive. If a regulation's purpose conveys a message that a particular religious belief is favored or preferred, it then violates the Establishment Clause.[167] ENDA's previous religious exemption was premised on a particular religious belief, maintained by some conservative Christians, that L.G.B. sexual acts are immoral. Its purpose was to shield this religious segment's organizations from ENDA compliance. Such an accommodation tips the delicate Establishment Clause and Free Exercise balance toward State religious endorsement.

This perspective is supported by the fact that other statutory schemes strike a better balance between accommodation and civil rights. A broad ministerial exception is a reasonable approach, similar to the one within the 2009 version of ENDA or the District of Columbia's same-sex marriage law. Congress' policy choice against a narrower exemption is an affirmative entanglement with a particular religious belief. Whether such a belief is deeply held is irrelevant in this context. A favorable expression of a religious belief satisfies O'Connor's *Lemon* "endorsement" test.

The inquiry then turns to whether the religious exemption advances a secular purpose and whether its endorsement is merely incidental to achieving its secular purpose.[168] The religious exemption, by definition, does not serve a secular purpose. Courts have explained that lawmakers must exercise great caution in carving religious exemptions in neutral statutes because "such exemptions could become first steps toward advancing religion or could entangle Government in repeated religious inquiries, results proscribed by establishment clause."[169] In ENDA's case, it is the breadth and context of the religious exemption that advances a particular religious view, though the 2007 version sought

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[166] A well-known conservative Christian advocacy group, Focus on the Family, is one among many evangelical organizations that have publicly expressed its virulent opposition to ENDA. *See* Focus on the Family, Letter to Congress, Sept. 2, 2009, *available at* http://fota.cdnetworks.net/pdfs/2009-09-02-enda-letter.pdf (arguing that the religious liberty threat posed by ENDA is a "litigation minefield").

[167] *See supra* note 76.

[168] *See* American Civil Liberties Union of Kentucky v. Grayson County, Ky., 591 F.3d 837, 845 (6th Cir. 2010); Newdow v. Rio Linda Union School Dist., 597 F.3d 1007, 1076 (9th Cir. 2010); Freedom From Religion Found. Inc. v. Obama, WL 1499451 at 13 (W.D. Wis. 2010).

[169] *See* Abdool-Rashaad v. Seiter, 690 F.Supp. 598, 601 (S.D. Ohio 1987).

to guard against religious inquiries prohibited by the Establishment Clause with its judicial review provision.[170]

ENDA's over accommodation of an arguable religious viewpoint violates the Establishment Clause. Critics may make two points. First, critics may raise the point that the exemption cannot endorse any religious viewpoint because it is a virtual blanket exemption. This fact is accurate at first-blush. However, based on the legislative history and public advocacy positions of extreme Christian conservatives, an *informed* observer can easily read the exemption's purpose. Second, critics may argue that an exemption logically cannot advance a viewpoint because it is a negative action. On the contrary, a policy choice to grant an exemption within a generally applicable neutral law is an affirmative act that benefited a small but growing Christian organizational community, at the very least. It is further argued that ENDA's religious immunization expressed a preference among the many religiously informed, ethical views that exist on homosexuality and association that amounts to a government endorsement. Regardless of Congress's attempt to make the previous exemptions seem as though they were neutral, it is unlikely that such treatment of certain religious organizations would survive strict scrutiny because it is a thinly veiled accommodation to religious organizations that would simply prefer to pretend that LGBT people do not exist.

Other scholars have suggested alternatives to statutory religious exemptions. One suggestion centers on the power of meditation to cure employment conflicts. Jennifer Brown argues that meditation holds "great promise" for resolving gay rights and religious liberty disputes because it allows parties to extract the fundamentality of the tension.[171] Plus, she observes that mediation can dovetail differences rather than emphasizing them because "[m]ediation, much more than litigation, can deploy core values within Christian or LGBT experience to create empathy and shared understanding between the parties."[172] Another approach suggests that some religious organizations' needs can be met with relational privacy exemptions. Similar exemptions currently exist for small businesses with fifteen or fewer employees under Title VII.[173] Ultimately, ENDA's religious organizations exemptions — especially the bill's older versions — are political accommodations more so than legal ones mandated under the First Amendment.

The primary objective behind examining ENDA's previous religious exemptions is to explain how over accommodation can turn into

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[170] *See supra* note 59.

[171] *See* Jennifer Gerarda Brown, *Peacemaking in the Culture War Between Gay Rights and Religious Liberty,* 95 Iowa L. Rev. 747 (2010) (arguing that the culture war between gay rights and religious liberty does not need to be a zero-sum game).

[172] *Id.* at 800.

[173] 42 U.S.C. § 2000e(b).

religious exceptionalism. It is deeply troubling that a powerful religious community and political machine can influence public policy in a way to insulate it entirely from civil rights laws. Undoubtedly, religious freedom ought to be vigorously protected, but such protections should not exceed reasonability to accommodate a particular group's relational preference at the expense of LGBT individuals' livelihoods. Exceptional treatment of this kind violates vital First Amendment principles, and it is, candidly, a poor policy. Whether LGBT advocates expressly targeted ENDA's religious organization exemption or lawmakers tracking the political winds narrowed its scope, it is a victory for LGBT individuals and other marginalized individuals seeking civil rights protection.

IV. CHALLENGING CONSERVATIVES' ENTITLEMENT TO RELIGIOUS EXCEPTIONALISM

It is imperative that a balance is maintained between the religion clauses because equilibrium ensures governmental fairness within a pluralistic religious and otherwise diverse democracy. The over accommodation of particular religious communities undermines the fragile balance between religious fairness and freedom. In terms of striking this balance and achieving civil rights progress, religious favoritism, in the form of religious exceptionalism, is an iniquitous setback that equally threatens religious freedom, religious fairness, and civil rights advancement.

It is unclear how broadly courts will read the religious exemption in the 2009 version of ENDA or its potential impact on LGBT people who wish to work in religious organizations. It can be argued that the narrowing of the exemption indicates intent for the law to be consistent with Title VII's limited scope, or alternatively, that the bill's long history with a broad exemption more clearly reflects congressional intent to treat LGBT differently in some way. One writer convincingly argues that ENDA's stand-alone statutory scheme in itself invites courts to treat LGBT protections differently from other Title VII protections.[174] At the same time, as religious organizations are becoming significant economic players and an increasing number of persons come out of the closet, the number of affected persons from an exemption is likely higher than previous estimates. Overlooking this community is detrimental to ENDA potency, and one that deserves more attention from LGBT advocates.

ENDA's legislative history suggests that its religious exemption scope is closely aligned to the politics of the day. Though politics inevi-

[174] *See* J. Banning Jasiunas, *supra* note 159.

tably affect all civil rights proposals,[175] the way in which conservative Christian political forces dictated ENDA's religious exemption is disquieting. Two observations from this history reinforce this point: (1) religious organizations enjoyed a wholesale exemption for much of ENDA's legislative life, and (2) discussion surrounding the exemption was often touted as a positive aspect of the bill, even by LGBT advocates. Such a willing concession by lawmakers and lesbian and gay advocates demonstrates the political climate in which ENDA operated until recently.

Conservative Christians have long dominated the political and cultural landscape over LGBT rights. Coined as "special rights," conservative Christian rhetoric was adopted by mainstream America, where the right from discrimination and harm was seen as inappropriately interest driven.[176] Similarly, conservative Christian political forces framed gay advocacy as an "agenda" that sought to impose a certain set of values on others.[177] The Religious Right's success in dominating the landscape forced LGBT advocates to apologetically defend and qualify its proposals, as evidenced through enthusiastic claims that ENDA does not affect religious organizations. As LGBT political capital increases, however, LGBT advocates have re-fashioned their rhetoric to argue that LGBT persons deserve workplace protection as a constitutional right.[178]

The politics of accommodation are familiar to both the Religious Right and LGBT advocates. While the Religious Right has maintained an exceptionalism entitlement under the guise of religious freedom, the LGBT movement has wagered significant sacrifices to achieve legislative success.[179] The narrowing of ENDA's religious exemption, therefore, represents a legislative victory for LGBT civil rights, in which

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[175] *See generally* Charles and Barbara Whalen, The Longest Debate: A Legislative History of the 1964 Civil Rights Act (1985) (documenting the complex political maneuvering involved in passing the Civil Rights Act of 1964).

[176] *See* Samuel A. Marcosson, The "Special Rights" Canard in the Debate over Lesbian and Gay Rights, 9 Notre Dame J.L. Ethics & Pub. Pol'y 137 (1995).

[177] *See* Aimee D. Dayhoff, Sodomy Laws: The Government's Vehicle to Impose the Majority's Social Values, 27 Wm. Mitchell L. Rev. 1863 (2001). *See also* President Obama and Washington D.C. radicals plan to impose homosexuality and silence Christianity in workplaces. Will you help me warn Congress, Family Research Council (Nov. 2009), *available at* http://thinkprogress.org/wp-content/uploads/2009/12/FRC-ENDA-letter.pdf. More recently L.G.B.T advocates have reversed the rhetoric to claim that the Religious Right threatens to impose their "religious values" on others; Many Americans Uneasy with the Mix of Religion and Politics, Pew Research Center for the People & The Press Aug. 24, (2006), *available at* http://pewforum.org/uploadedfiles/Topics/Issues/Politics_and_Elections/religion-politics-06.pdf (reporting that 49% of survey participants believe that conservatives are "too assertive" about their values and political positions).

[178] *See, e.g.*, Employment Non-Discrimination Act, American Civil Liberties Union (Nov. 5, 2009), *available at* http://www.aclu.org/hiv-aids_lgbt-rights/employment-non-discrimination-act ("When Congress has found such discrimination, it passed laws to restore civil rights by ensuring arbitrary considerations do not determine access to employment. We believe such legislation continues to be an essential part of equal protection under the law.").

[179] *See supra* note 50.

conservative Christian entitlement no longer goes unquestioned and unchallenged. This victory signals to other civil rights advocates that, although religion continues to play an important role in shaping the cultural and political landscapes in which policymaking is one part, a particular religious political force does not necessarily have the power to single-handedly dictate political outcomes.

ENDA was anticipated to pass during the 111th Congress but as other pressing political issues, including the ban on open military service,[180] rise on the legislative priority list, ENDA's once near-clear path to passage was blocked. Regardless of whether ENDA is passed this year or in future years, its narrow religious exemption must remain intact. Lawmakers or LGBT advocates must believe in their political strength to challenge conservative Christian opposition and avoid easy concessions around the exemption like in years past. A narrow religious exemption strikes the proper balance between religious freedom and civil rights progress and manifests fair governmental treatment of legitimate rivaling interests within a diverse democracy.

V. CONCLUSION

This essay traced ENDA's long religious exemption history to explain how its previous iterations threatened to undermine the bill by creating a wholesale exemption for religious organizations. It explained how the exemption's broadness mirrored changing attitudes about LGBT people and speculated that broader versions were most likely political compromises designed to placate the conservative Christian bloc. This placation, however, overreached to tip the delicate balance between religious freedom and religious over accommodation; thus, it most likely violated the Establishment Clause. ENDA's current religious exemption is integrated within a narrow Title VII version, signifying a major victory for LGBT advocates. The LGBT movement and other civil rights advocates have successfully challenged the conservative movement's entitlement to accommodation and averted religious exceptionalism that put future civil rights struggles at risk. Civil rights advocates must continue to challenge the Religious Right political paradigm if they truly wish to achieve justice and equality.

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[180] *See* Bronwen Pardes, *House repeals "don't ask, don't tell,"* WASH. EXAMINER, May 29, 2010 *available at* http://www.examiner.com/x-49838-NY-Sexual-Health-Examiner~y2010m5d29-House-repeals-dont-ask-dont-tell.