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Cover Page Footnote

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REDRESSING LGBT EMPLOYMENT DISCRIMINATION VIA EXECUTIVE ORDER

ALEX REED*

INTRODUCTION

“[I]n the United States of America, who you are and who you love should never be a fireable offense.”¹

The United States workforce includes an estimated 5.4 million lesbian, gay, bisexual, and transgender (“LGBT”) persons.² Because no federal statute explicitly prohibits employment discrimination on the basis of sexual orientation or gender identity,³ employers may discriminate against LGBT workers with impunity,⁴ and numerous studies have confirmed that LGBT-related employment discrimination is rampant.⁵ Lesbian, gay, and bisexual (“LGB”) individuals experience sexual orientation-based employment discrimination at staggering rates: 8% to 17% have been fired or denied employment, 7% to 41% have been verbally or physically harassed by coworkers, and 10% to 19% have been unfairly compensated in terms of pay or benefits.⁶ Transgender persons experience gender identity-based employment discrimination at even greater rates: 47% have been fired or denied employment, 78%

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1. Barack Obama, *Congress Needs to Pass the Employment Non-Discrimination Act*, HUFFINGTON POST (Nov. 3, 2013), http://www.huffingtonpost.com/barack-obama/enda-congress_b_4209115.html.

2. MOVEMENT ADVANCEMENT PROJECT, HUMAN RIGHTS CAMPAIGN, & CTR. FOR AM. PROGRESS, *A BROKEN BARGAIN: DISCRIMINATION, FEWER BENEFITS AND MORE TAXES FOR LGBT WORKERS 2* (2013), available at <http://www.americanprogress.org/issues/lgbt/report/2013/06/04/65133/a-broken-bargain/>.

3. See Alex Reed, *Abandoning ENDA*, 51 HARV. J. ON LEGIS. 277 (2014) (noting that a handful of courts perceive LGBT-related employment discrimination as actionable sex discrimination under Title VII of the Civil Rights Act of 1964).

4. Although seventeen states and the District of Columbia have passed laws prohibiting employment discrimination on the basis of sexual orientation or gender identity and another four states have passed laws prohibiting employment discrimination on the basis of sexual orientation without a similar prohibition on gender identity discrimination, legal commentators have observed that state and local laws are often ineffective in combating employment discrimination. See Chad A. Readler, *Local Government Anti-Discrimination Laws: Do They Make a Difference?*, 31 U. MICH. J.L. REFORM 777, 778 (1998) (noting that local nondiscrimination ordinances are often poorly publicized and weakly enforced).

5. See S. REP. NO. 113-105, at 14–18 (2013) (referencing various studies conducted between 2008 and 2013 documenting instances of sexual orientation or gender identity discrimination).

6. Brad Sears & Christy Mallory, *Documented Evidence of Employment Discrimination & Its Effects on LGBT People*, WILLIAMS INST., July 2011, at 6, available at <http://williamsinstitute.law.ucla.edu/research/workplace/documented-evidence-of-employment-discrimination-its-effects-on-lgbt-people/>.

have been verbally or physically harassed by coworkers, and 7% have been physically assaulted at work.⁷ Federal action to prohibit employment discrimination on the basis of sexual orientation and gender identity, therefore, is not only warranted, but urgently needed to redress widespread bias against LGBT individuals.

Since 1974, numerous bills have been introduced in both the House and the Senate seeking to prohibit employment discrimination on the basis of sexual orientation and, more recently, gender identity.⁸ The earliest bills would have amended the Civil Rights Act of 1964 to include sexual orientation as a protected class along with race, color, religion, sex, and national origin.⁹ Had these bills become law, LGBT persons would have secured protections against discrimination not only in employment but also in public accommodations, public facilities, and federally-assisted programs.¹⁰ Although support for amending the Civil Rights Act increased steadily between 1974 and 1991,¹¹ each of these bills ultimately died in committee.¹²

More recent bills have sought to enact a freestanding statute that would prohibit LGBT-related discrimination solely in the area of employment.¹³ Known as the Employment Non-Discrimination Act (“ENDA”), this bill has received a floor vote in either chamber of Congress on only three occasions in the last twenty years. The first instance was in 1996 when the Senate failed to pass ENDA by a single vote.¹⁴ The second instance was in 2007 when the House passed ENDA by a vote of 235 to 184,¹⁵ notwithstanding President George W. Bush’s veto

7. JAIME M. GRANT ET AL., *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY* 53, 56–58 (2011).

8. Alex Reed, *A Pro-Trans Argument for a Transsexclusive Employment Non-Discrimination Act*, 50 AM. BUS. L.J. 835, 837–849 (2013).

9. 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, 1545–46 (2000).

10. See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 243–66 (codified as amended in scattered sections of 42 U.S.C.).

11. William C. Sung, *Taking the Fight Back to Title VII: A Case for Redefining “Because of Sex” to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 496–98 (2011).

12. Mary Kristen Kelly, *(Trans)forming Traditional Interpretations of Title VII: “Because of Sex” and the Transgender Dilemma*, 17 DUKE J. GENDER L. & POL’Y 219, 234 (2010).

13. Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 149, 178 (John D’Emilio, William B. Turner, & Urvashi Vaid eds., 2000). But see Chad Griffin, *Why HRC Supports a Comprehensive LGBT Civil Rights Bill*, HUMAN RIGHTS CAMPAIGN BLOG (July 9, 2014), <http://www.hrc.org/blog/entry/why-hrc-supports-a-comprehensive-lgbt-civil-rights-bill> (asserting “it is time for the LGBT movement to throw its weight behind a fully comprehensive LGBT civil rights bill” that would “bar discrimination on the basis of sexual orientation and gender identity in all core civil rights categories—including housing, public accommodations, credit, education and, if ENDA fails to pass, in employment”).

14. 142 CONG. REC. S10, 129–39 (daily ed. Sept. 10, 1996); see also Reed, *supra* note 8, at 840–41 (noting that ENDA’s proponents calculated they had 50 votes in support of the bill with Vice President Al Gore set to cast the tie-breaking vote in favor of passage, but one of ENDA’s supporters had to miss the vote due to a medical emergency).

15. 153 CONG. REC. H13228 (daily ed. Nov. 7, 2007).

pledge.¹⁶ The third and most recent instance was on November 7, 2013 when the Senate passed ENDA by a vote of 64 to 32.¹⁷

Although President Obama has promised to sign ENDA should the bill reach his desk,¹⁸ he will almost certainly be denied that opportunity. House Speaker John Boehner is a longtime opponent of ENDA¹⁹ and has indicated that he will not allow the bill to come up for a vote.²⁰ House Majority Leader Eric Cantor, moreover, has confirmed that ENDA is not scheduled for consideration anytime in the foreseeable future,²¹ and not one of the four House committees having jurisdiction over ENDA has taken any action on the bill.²² ENDA, therefore, appears destined to die with the adjournment of the 113th Congress and is unlikely to become law as long as Republicans control one or more houses of Congress or the presidency.²³

This article rejects the notion that ENDA's opponents can be persuaded to support the bill with additional substantive concessions and concludes that executive action is necessary to protect LGBT persons against employment discrimination. Part I examines the two most common rationales for opposing ENDA and concludes that they are pretext for discrimination. For many of the legislators opposing ENDA, no amount of revisions to the bill's substantive provisions would be sufficient to win their support because they fundamentally disagree with the bill's basic premise that LGBT persons are deserving of workplace pro-

16. Kate B. Rhodes, *Defending ENDA: The Ramifications of Omitting the BFOQ Defense in the Employment Non-Discrimination Act*, 19 LAW & SEXUALITY 1, 3–4 (2010).

17. 159 CONG. REC. S7894 (daily ed. Nov. 7, 2013).

18. Press Release, Office of the White House Press Secretary, Statement by the President on Senate Passage of the Employment Non-Discrimination Act of 2013 (Nov. 7, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/11/07/statement-president-senate-passage-employment-non-discrimination-act-2013>.

19. Sam Stein, *John Boehner Opposes ENDA, Dealing Blow to Bill's Chances*, HUFFINGTON POST (Nov. 4, 2013, 9:25 AM), http://www.huffingtonpost.com/2013/11/04/john-boehner-enda_n_4212250.html; see also Chris Johnson, *Boehner on ENDA: 'I Haven't Thought Much About It'*, WASH. BLADE (Apr. 18, 2012), <http://www.washingtonblade.com/2012/04/18/boehner-on-enda-i-havent-thought-much-about-it/> (noting Speaker Boehner has previously suggested that “[t]here are ample laws already in place to deal with” LGBT-related employment discrimination such that ENDA is unnecessary).

20. Igor Bobic, *Boehner Calls ENDA 'Unnecessary'*, TALKING POINTS MEMO (Nov. 14, 2013, 12:02 PM), <http://talkingpointsmemo.com/livewire/boehner-calls-enda-unnecessary>.

21. Kristina Peterson, *Senate Approves Ban on Gay Bias at Work*, WALL ST. J., Nov. 8, 2013, at A4.

22. Library of Congress, Bill Summary & Status, 113th Congress, H.R. 1755, Employment Non-Discrimination Act of 2013, THOMAS, <https://www.congress.gov/bill/113th-congress/house-bill/1755>.

23. See Chris Geidner, *Barney Talks About ENDA's Future, Saying Dems are the "Only Way"*, METRO WEEKLY (Nov. 29, 2011), <http://metroweekly.com/poliglot/2011/11/barney-talks-about-endas-future.html>; see also Chris Johnson, *Pelosi Hints at 'Plan' for ENDA as Supporters Stand by Bill*, WASH. BLADE (July 10, 2014), <http://www.washingtonblade.com/2014/07/10/enda-supporters-strike-back/> (responding to observations that several prominent LGBT advocacy groups had withdrawn their support for ENDA because of the bill's broad religious exemption, House Minority Leader Nancy Pelosi stated “[o]ur Democratic votes are solid with or without the clause, so I just want to get Republican votes right now”).

tections. Part II demonstrates that President Obama may unilaterally extend explicit status-based protections to a significant number of LGBT workers in both the public and private sectors, while at the same time signaling his support for a burgeoning movement within the federal judiciary whereby LGBT-related employment discrimination is regarded as actionable sex discrimination under Title VII of the Civil Rights Act of 1964.

I. THE PROFFERED RATIONALES FOR OPPOSING ENDA

Representative Barney Frank, the lead sponsor of ENDA in the 110th, 111th, and 112th Congresses, believes that the two most commonly asserted rationales for opposing ENDA are pretext.²⁴ According to Representative Frank, the real reason many lawmakers oppose ENDA is because they view LGBT-oriented employment discrimination as a “good thing” that should be encouraged rather than prohibited.²⁵ A closer examination of the proffered rationales confirms that they are as likely to be motivated by anti-LGBT animus as they are sincerely-held concerns regarding free enterprise or religious liberty.

A. *The Supposed Threat to the Business Community*

ENDA has always contained provisions designed to make the bill more palatable to industry, but the number of concessions has increased markedly over time.

The earliest concessions were designed to assuage the business community’s concerns that ENDA would prove to be as robust an antidiscrimination statute as Title VII. Title VII, for instance, allows plaintiffs to contest intentional discrimination on a disparate treatment theory whereas inadvertent discrimination is actionable on a disparate impact theory.²⁶ ENDA, in contrast, would permit only disparate treatment claims such that facially neutral employment practices having a disproportionately adverse effect on LGBT persons would not be actionable.²⁷ Title VII, moreover, permits affirmative action for racial minorities and women in certain circumstances.²⁸ ENDA, on the other hand, would prohibit affirmative action on the basis of sexual orientation or gender identity even if LGBT persons were significantly under-

24. See *Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Educ. and Labor*, 110th Cong. 12 (2007) (statement of Rep. Barney Frank) (responding to criticism that ENDA’s exemption for religious organizations was insufficient, Representative Frank replied, “[f]ine, let us work together to [make] it better”); *Employment Non-Discrimination Act of 2009: Hearing on H.R. 3017 Before the H. Comm. on Educ. and Labor*, 111th Cong. 7 (2009) (statement of Rep. Barney Frank) (asserting that “[t]here is no record of this being disruptive” to businesses).

25. Justin Snow, *Frank Talk*, METRO WEEKLY (Jan. 17, 2013), <http://metroweekly.com/feature/?ak=8062>.

26. *Ricci v. DeStefano*, 557 U.S. 557, 577–78 (2009).

27. S. 815, 113th Cong. § 4(g) (2013); H.R. 1755, 113th Cong. § 4(g) (2013).

28. *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208–09 (1979).

represented in a particular workforce.²⁹ Title VII, furthermore, authorizes the Equal Employment Opportunity Commission (“EEOC”) to impose reporting requirements on private sector employers,³⁰ including a mandate that employers furnish data regarding the race, ethnicity, and gender composition of their workforce.³¹ ENDA, conversely, would forbid the EEOC from collecting data regarding workers’ sexual orientation and gender identity and guarantee that employers are not forced to compile such data on the Commission’s behalf.³²

More recent concessions have no analog in Title VII and are instead designed to address the business community’s specific concerns vis-à-vis ENDA. To preserve ERISA³³ preemption in the area of employee benefits, ENDA’s proponents agreed to abandon a provision that would have allowed public employers to provide health insurance to their employees’ domestic partners.³⁴ To ensure that no employer would be forced to provide spousal benefits to legally married same-sex couples, ENDA’s proponents agreed to adopt the Defense of Marriage Act’s definition of “marriage”³⁵ which, prior to its invalidation by the U.S. Supreme Court,³⁶ was limited to the legal union of one man and one woman as husband and wife.³⁷ To guarantee that cisgender³⁸ “employees who refuse to conform to [gender-based dress or grooming standards] or who [seek to] change their gender presentation from [one day to the next]” would be precluded from stating viable discrimi-

29. S. 815, 113th Cong. § 4(f) (2013); H.R. 1755, 113th Cong. § 4(f) (2013).

30. 42 U.S.C. § 2000e-8(c) (2012).

31. 29 C.F.R. § 1602.7 (2009); EEOC, Standard Form 100, Rev. Jan. 2006, Employer Information Report EEO-1: Instruction Booklet (2006), *available at* <http://www.eeoc.gov/employers/eeo1survey/index.cfm> (follow PDF version of “EEO-1 Instruction Booklet, with Sample Form” hyperlink).

32. S. 815, 113th Cong. § 9 (2013); H.R. 1755, 113th Cong. § 9 (2013).

33. Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (1974) (codified as amended in scattered sections of 26 and 29 U.S.C.).

34. *Compare* H.R. 2015, 110th Cong. § 8(b) (2007) (including provision stating “[n]otwithstanding this Act or any other provision of law, a State or political subdivision of a State may establish rights, remedies, or procedures for the provision of employee benefits to an individual for the benefit of the domestic partner of such individual”), *with* H.R. 3685, 110th Cong. § 8(b) (2007) (omitting such provision). *See also Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Educ. and Labor*, 110th Cong. 38 (2007) (statement of Lawrence Z. Lorber, Partner, Proskauer Rose LLP) (noting that section 8(b) of H.R. 2015 “will overturn, in the circumstances of this Act only, the long standing concept of ERISA preemption,” thereby “engender[ing] significant opposition to the legislation”); *Employment Non-Discrimination Act of 2009: Hearing on H.R. 3017 Before the H. Comm. on Educ. and Labor*, 111th Cong. 38-39 (2009) (statement of Camille A. Olson, Partner, Seyfarth Shaw LLP) (asserting that by striking the provision contained in section 8(b) of H.R. 2015, “ENDA of 2009 preserves the [ERISA] preemption of the field of regulation of employee benefit plans—an issue that was a source of significant concern in 2007”).

35. S. 1584, 111th Cong. § 8(c) (2009); H.R. 3017, 111th Cong. § 8(c) (2009); S. 811, 112th Cong. § 8(c) (2011); H.R. 1397, 112th Cong. § 8(c) (2011).

36. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

37. 1 U.S.C. § 7 (2013) (held unconstitutional in 2013).

38. A cisgender person “is someone who identifies as the gender/sex they were assigned at birth.” Naomi Mezey, *Response: The Death of the Bisexual Saboteur*, 100 GEO. L.J. 1093, 1100 n.35 (2012).

nation claims,³⁹ ENDA's proponents agreed to add language acknowledging that employers may require employees to adhere to reasonable dress and grooming standards provided they permit employees who have undergone or are undergoing gender transition to adhere to the same dress and grooming standards as the gender to which they have transitioned or are transitioning.⁴⁰ To address employers' concerns that they will be forced to build new bathrooms, locker rooms, and changing areas to accommodate transgender persons,⁴¹ ENDA's proponents agreed to include a provision specifying that the bill does not require the construction of new or additional facilities.⁴² Finally, to protect employers against the possibility of redundant damages awards,⁴³ ENDA's proponents agreed to add language acknowledging that while an employment practice may be unlawful under both ENDA and Title VII, plaintiffs may not receive a double recovery.⁴⁴

Although the U.S. Chamber of Commerce (the "Chamber") once categorically opposed ENDA,⁴⁵ two decades' worth of industry-oriented

39. *Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Educ. and Labor*, 110th Cong. 51 (2007) (statement of Helen Norton, Associate Professor, University of Colorado School of Law); see also *Employment Non-Discrimination Act of 2009: Hearing on H.R. 3017 Before the H. Comm. on Educ. and Labor*, 111th Cong. 93 (2009) (report of the Traditional Values Coalition, Educational & Legal Institute) ("Will ENDA cover cross-dressers (heterosexuals who dress in opposite sex clothing); drag queens (gays); transsexuals (those who have undergone a sex change); and she-males (those who undergo a partial sex change but keep their male sex organs)?").

40. H.R. 2015, 110th Cong. § 8(a)(4) (2007); S. 1584, 111th Cong. § 8(a)(5) (2009); H.R. 3017, 111th Cong. § 8(a)(5) (2009); S. 811, 112th Cong. § 8(a)(5) (2011); H.R. 1397, 112th Cong. § 8(a)(5) (2011); S. 815, 113th Cong. § 8(a) (2013); H.R. 1755, 113th Cong. § 8(a) (2013).

41. *Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Before the Subcomm. on Health, Employment, Labor and Pensions of the H. Comm. on Educ. and Labor*, 110th Cong. 38 (2007) (statement of Lawrence Z. Lorber, Partner, Proskauer Rose LLP) (noting ENDA requires employers to provide adequate shower and dressing facilities to employees undergoing gender transition but does not specify whether employers must construct additional facilities or whether the "use of certain [existing] facilities [may] be timed to insure employee comfort for all employees").

42. S. 1584, 111th Cong. § 8(a)(4) (2009); H.R. 3017, 111th Cong. § 8(a)(4) (2009); S. 811, 112th Cong. § 8(a)(4) (2011); H.R. 1397, 112th Cong. § 8(a)(4) (2011); S. 815, 113th Cong. § 8(b) (2013); H.R. 1755, 113th Cong. § 8(b) (2013).

43. *Employment Non-Discrimination Act of 2009: Hearing on H.R. 3017 Before the H. Comm. on Educ. and Labor*, 111th Cong. 38–39 (2009) (statement of Camille A. Olson, Partner, Seyfarth Shaw LLP) (asserting that "ENDA, as currently drafted, serves only to add protections on the basis of sexual orientation and gender identity and that it does not replace any claims that would otherwise be actionable under Title VII," thereby "lead[ing] to the unintended consequence of a potential dual recovery by a successful plaintiff"); S. REP. NO. 113-105, at 9–10 (2013) ("Section 10(d) also clarifies that double-recovery of damages is not permitted.").

44. S. 815, 113th Cong. § 10(d) (2013). See also S. REP. NO. 113-105, at 10 (2013) (noting "[t]he law is clear . . . that double recovery for claims based on the same facts is not permitted, and this provision restates that well established principle").

45. Archive of U.S. Chamber of Commerce Website from June 29, 2001, http://web.archive.org/web/20010629192134/http://www.uschamber.com/_Political+Advocacy/Issues+Index/Labor+and+Workplace/Civil+Rights/default.htm (last visited Jan. 13, 2014).

concessions have persuaded the world's largest business federation⁴⁶ to remain neutral on recent iterations of the bill.⁴⁷ The Chamber first indicated that it may change its position vis-à-vis ENDA in September 2007 when the organization's vice president acknowledged, "[w]e're cautiously optimistic that we can be neutral on [ENDA] when it goes to the House floor."⁴⁸ Shortly after the U.S. House voted to pass a revised, gender identity-exclusive ENDA in November 2007, the Chamber informed its membership that it was no longer opposing ENDA:

Congress is debating passage of legislation prohibiting employment discrimination based on sexual orientation and possibly gender identity. The Chamber had significant concerns with early drafts of the legislation (H.R. 2015), for example, the extent to which the bill would erode ERISA preemption or permit disparate impact claims to be brought. We have expressed these concerns to proponents of the legislation and it appears that the vast majority of these concerns were addressed when the House passed the Employment Non-Discrimination Act (H.R. 3685) on November 7, 2007. The Chamber continues to carefully monitor these bills as they move through the legislative process.⁴⁹

Significantly, the Chamber has remained neutral even as ENDA has been expanded to include gender identity protections. In a 2011 legislative update to its membership, the Chamber attributed its continued neutrality to the array of industry-oriented concessions contained in the bill:

In past years, the Chamber negotiated with supporters of the Employment Non-Discrimination Act to ensure that the bill accomplishes its goal without unintended consequences. As a result of these negotiations, the bill has been improved so that it does not erode ERISA preemption, impose a disparate impact cause of action, or require construction of new or additional facilities. The current bill respects all of the negotiations made by the Chamber in prior years.⁵⁰

46. *About the U.S. Chamber*, U.S. CHAMBER OF COMMERCE, <https://www.uschamber.com/about-us/about-us-chamber> (last visited Jan. 13, 2014).

47. Chris Johnson, *U.S. Chamber of Commerce Stays Neutral on ENDA*, WASH. BLADE (Sept. 18, 2013), <http://www.washingtonblade.com/2013/09/18/chamber-stays-neutral-enda/> ("Consistent with our prior positions on the bill, the Chamber remains neutral on ENDA.").

48. Kent Hoover, *Odds Good for Workplace Protections for Gays*, ATLANTA BUS. CHRON., Sept. 17, 2007, at 13, available at <http://www.bizjournals.com/atlanta/stories/2007/09/17/story13.html>.

49. Archive of U.S. Chamber of Commerce Website from Dec. 18, 2007, <http://web.archive.org/web/20071218082927/http://www.uschamber.com/issues/index/labor/eo.htm> (last visited Jan. 13, 2014).

50. Archive of U.S. Chamber of Commerce Website from Nov. 26, 2012, <https://www.uschamber.com/sites/default/files/Labor%20Issues%20Update%20for%20November%202012%20LRC.pdf> (last visited Jan. 13, 2014).

The Chamber recently reaffirmed its stance as to the current version of ENDA, stating, “[c]onsistent with our prior positions on the bill, the Chamber remains neutral on ENDA.”⁵¹

LGBT advocates regard the Chamber’s neutrality as “a huge victory,” and suggest that the lack of organized opposition from the business community has been “incredibly helpful” in persuading additional legislators to support the bill.⁵² In the words of one advocate, “[t]he fact that the U.S. Chamber of Commerce, the National Federation of Independent Business, [and] the National Association of Independent Manufacturers, all staunch defenders of free enterprise, are not actively opposed to ENDA is a critical part of our pitch” to lawmakers who have expressed concerns about the bill’s potential business implications.⁵³

Nevertheless, some legislators continue to assert that ENDA poses a significant threat to the business community. The six senators who opposed ENDA in the Health, Education, Labor, and Pensions Committee (“HELP Committee”), for example, warned that private employers would be subjected to a torrent of baseless lawsuits should ENDA be enacted.⁵⁴ These senators noted that the bill “makes no provisions for, nor seems to in any way acknowledge the potential for, nefarious abuse of employment protections” and asserted that “[t]his oversight creates a gaping hole which could leave employers powerless and confused about how to prevent abuse.”⁵⁵ Similarly, House Speaker John Boehner has indicated that he will not allow ENDA to receive a vote in the U.S. House of Representatives because he believes the bill “will increase frivolous litigation and cost American jobs, especially small business jobs.”⁵⁶ Yet, an examination of the available data indicates that these contentions are dubious at best and dishonest at worst.

51. Johnson, *supra* note 47. The Chamber’s ostensible indifference toward ENDA is increasingly at odds with the views of its individual members. Of the 500 largest corporations in the United States, more than 120 belong to the Business Coalition for Workplace Fairness, a group lobbying for ENDA’s passage. A number of these corporations are represented on the Chamber’s board of directors, including Accenture, Alcoa, Deloitte, Dow Chemical, IBM, Pfizer, U.S. Airways, and Verizon Communications, among others. Compare Business Coalition for Workplace Fairness Members, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/resources/entry/business-coalition-for-workplace-fairness-members> (last visited Feb. 26, 2014), with Board of Directors, U.S. CHAMBER OF COMMERCE, <https://www.uschamber.com/about-us/board-directors> (last visited Feb. 26, 2014).

52. Johnson, *supra* note 47.

53. Kevin Bogardus, *Gay Rights Activists Turn to Fortune 500*, THE HILL (Nov. 6, 2013, 6:00 AM), <http://thehill.com/business-a-lobbying/business-a-lobbying/189361-gay-rights-activists-tap-fortune-500-for-support>. The National Federation of Independent Business is the principal small business advocacy association in the nation. *About NFIB*, NAT’L FED’N OF INDEP. BUS., <http://www.nfib.com/about-nfib/> (last visited Jan. 13, 2014). The National Association of Independent Manufacturers is the largest manufacturing association in the United States. *About the NAM—Manufacturing in America*, NAT’L ASSOC. OF MFRS., <http://www.nam.org/About-Us/About-the-NAM/US-Manufacturers-Association.aspx> (last visited Jan. 13, 2014).

54. S. REP. NO. 113-105, at 24 (2013).

55. *Id.* at 25.

56. Jeremy W. Peters, *Bill Advances to Outlaw Discrimination Against Gays*, N.Y. TIMES, Nov. 5, 2013, at A10.

Speaker Boehner cites an estimate prepared by the Congressional Budget Office (“CBO”) to support his assertion that ENDA will unleash a flood of frivolous litigation on the business community.⁵⁷ Although the CBO estimates “that implementing [ENDA] would cost \$47 million over the 2014-2018 period mostly for the [EEOC] to handle additional discrimination cases,” and goes on to note that the EEOC “expects that implementing [ENDA] would increase its annual caseload (currently about 100,000 cases) by 5 percent,” the CBO, significantly, does not estimate what percentage of these cases are likely to be frivolous.⁵⁸

Responding to requests for clarification, Speaker Boehner’s spokesperson stated, “[w]e are concerned the bill creates a new right of action based on vague, undefined language that does not exist elsewhere in federal non-discrimination law” and concluded his remarks by asserting that ENDA “will undoubtedly lead to an increase in lawsuits, as indicated by the CBO report.”⁵⁹ Assuming for the sake of argument that ENDA will indeed lead to an increase in lawsuits, the simple fact that more lawsuits are filed post-ENDA does not necessarily support the contention that ENDA “will increase frivolous litigation.” Rather, the filing of a large number of lawsuits could be interpreted as confirmation that discrimination on the basis of sexual orientation and gender identity is pervasive within the American workplace such that ENDA provides a critical means of redressing legitimate instances of employment bias.

Ostensibly anticipating the “frivolous litigation” argument, ENDA’s proponents asked the Government Accountability Office (“GAO”) to prepare a report analyzing the administrative complaint data from states that prohibit employment discrimination on the basis of sexual orientation or gender identity.⁶⁰ The GAO examined the number of claims filed in the 21 states that prohibit all forms of LGBT-related employment discrimination, as well as in the 4 states that prohibit only sexual orientation-based employment discrimination and found “relatively few . . . complaints based on sexual orientation and gender identity.”⁶¹ Specifically, the GAO determined that LGBT-related claims represented approximately 3–4% of the administrative complaints filed between 2007 and 2012.⁶²

57. Robert Farley, *Spinning ENDA*, FACTCHECK.ORG (Nov. 6, 2013), <http://www.factcheck.org/2013/11/spinning-enda/>.

58. S. REP. NO. 113-105, at 11–13 (2013).

59. Farley, *supra* note 57.

60. 159 CONG. REC. S7804 and 810 (2013) (statement of Sen. Merkley).

61. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-13-700R, UPDATE ON STATE STATUTES AND ADMINISTRATIVE COMPLAINT DATA ON EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY I (2013), *available at* <http://www.gao.gov/products/GAO-13-700R>.

62. *Id.* See also *Employment Non-Discrimination Act: Frequently Asked Questions*, HUMAN RIGHTS CAMPAIGN, <http://www.hrc.org/campaigns/employment-non-discrimination-act> (last visited Feb. 26, 2014).

This finding is significant because studies estimate that 3.8% of adults in the United States identify as LGBT.⁶³ Consequently, absent any data, one would expect claims filed by LGBT persons to account for 3–4% of all discrimination claims. Had the GAO report found that sexual orientation and gender identity discrimination claims represented 5% or more of the complaints filed in these states, ENDA's opponents might have a stronger argument that the bill stands to increase frivolous litigation. Because the percentage of claims filed is almost perfectly correlated with the percentage of LGBT persons, however, fears that ENDA would unleash a torrent of baseless litigation are unwarranted.

Concerns that ENDA will have a particularly deleterious effect on small businesses are equally unjustified. Like all federal antidiscrimination statutes, ENDA contains an exemption for small businesses.⁶⁴ Employers with 14 or fewer employees will not be subject to ENDA and may continue to discriminate against LGBT persons without fear of violating federal law.⁶⁵

When asked to specify how ENDA will “cost American jobs, especially small business jobs,” Speaker Boehner's spokesperson stated, “[o]bviously, many private employers will face additional costs [under ENDA] . . . and those costs will lead to job losses. (Especially for small businesses that cannot afford the legal fees).”⁶⁶ As noted earlier, however, ENDA is unlikely to elicit a significant amount of frivolous litigation, meaning small businesses stand to incur substantial legal fees only if they intentionally discriminate on the basis of sexual orientation or gender identity.

Moreover, the same CBO estimate cited by Speaker Boehner in support of his contention that ENDA will increase frivolous litigation notes that private employers' expenses in implementing ENDA will be limited to “the costs of modifying employment procedures and posting notices to avoid discriminatory practices.”⁶⁷ The CBO acknowledges “that changes to employment procedures would likely build on ongoing training and updates to personnel manuals” and concedes that the “costs of notices would probably be relatively minor and would be made in the course of other routine updates.”⁶⁸ ENDA's implementation

63. Gary J. Gates, *How Many People are Lesbian, Gay, Bisexual, and Transgender?*, WILLIAMS INST., Apr. 2011, at 1, available at <http://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/how-many-people-are-lesbian-gay-bisexual-and-trans-gender/>.

64. S. 815, 113th Cong. § 3(a)(5)(A) (2013); H.R. 1755, 113th Cong. § 3(a)(4)(A) (2013).

65. S. REP. NO. 113-105, at 20 (2013).

66. Farley, *supra* note 57. Senate Minority Leader Mitch McConnell made similar statements in the 112th Congress when he indicated that ENDA “would impose significant regulatory burdens and costs on small businesses.” Crosby Burns & Jeff Krehely, *Ensuring Workplace Fairness is Not Expensive: America's Small Businesses Say ENDA-Like Policies Have Minuscule or No Costs*, CTR. FOR AM. PROGRESS (Oct. 12, 2011), <http://www.american-progress.org/issues/lgbt/news/2011/10/12/10465/ensuring-workplace-fairness-is-not-expensive/>.

67. S. REP. NO. 113-105, at 13 (2013).

68. *Id.*

costs, therefore, are likely to be insignificant irrespective of an employer's size.⁶⁹

Although Speaker Boehner and his colleagues on the Senate HELP Committee claim to represent the interests of the small business community, most small businesses favor employment protections for LGBT persons.⁷⁰ An October 2011 study found that 63% of small business owners support ENDA⁷¹ and confirmed that many of these businesses already include sexual orientation and gender identity in their nondiscrimination policies.

Indeed, 69% of small businesses prohibit sexual orientation-based employment discrimination, and 67% of these firms report that there were no costs associated with the implementation of such policies.⁷² Of the 25% of small businesses that indicated there were costs associated with the adoption of such policies, 65% confirmed that those expenses represented less than one percent of their annual operating costs.⁷³ Finally, 80% of small businesses report that there are no costs associated with maintaining a sexual orientation-inclusive nondiscrimination policy, and the remaining businesses indicate that maintenance expenses represent less than one percent of their annual operating costs.⁷⁴

Separately, 62% of small businesses prohibit gender identity-based employment discrimination, and 68% of these firms report that there were no costs associated with the implementation of such policies.⁷⁵ Of the 22% of small businesses that indicated there were costs associated with the adoption of such policies, 76% confirmed that those expenses represented less than one percent of their annual operating costs.⁷⁶ Finally, 76% of small businesses report that there are no costs associated with maintaining a gender identity-inclusive nondiscrimination policy, and the remaining businesses indicate that maintenance expenses represent less than 1% of their annual operating costs.⁷⁷

69. *But see* Michael Abramowicz et al., *Randomizing Law*, 159 U. PA. L. REV. 929, 1002 (2011) (noting that while an "analysis of historic [state-level] data suggests that employer costs are low" in terms of litigation fees and compliance costs, "these estimates might not fully represent the costs that a federal law [such as ENDA] would produce").

70. Burns & Krehely, *supra* note 66.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* Conversely, 88% of Fortune 500 companies include sexual orientation in their corporate nondiscrimination policies while 57% have revised their nondiscrimination policies to include gender identity. HUMAN RIGHTS CAMPAIGN FOUNDATION, CORPORATE EQUALITY INDEX 2013: RATING AMERICAN WORKPLACES ON LESBIAN, GAY, BISEXUAL, AND TRANSGENDER EQUALITY, 6 (2012). Apple CEO Tim Cook recently encouraged Congress to follow Apple's lead and prohibit employment discrimination on the basis of sexual orientation and gender identity, declaring: "We've found that when people feel valued for who they are, they have the comfort and confidence to do the best work of their lives." Tim Cook, *Workplace Equality is Good for Business: One Reason Why Congress Should Support the Employment Nondiscrimination Act*, WALL ST. J., Nov. 3, 2013, at B6.

Small businesses lacking fully-inclusive nondiscrimination policies, moreover, do not cite costs as the primary impediment to their adoption of LGBT-related employment protections. Of those small businesses that do not prohibit discrimination on the basis of sexual orientation, only 2% report that cost concerns deterred them from providing employment protections to LGB persons.⁷⁸ Of those small businesses that do not prohibit discrimination on the basis of gender identity, only 4% report that cost concerns deterred them from providing employment protections to transgender individuals.⁷⁹ Instead, most of these businesses conceded that they simply never thought to adopt such policies or did not believe they had any LGBT employees who stood to benefit from the adoption of such policies.⁸⁰

While Speaker Boehner and his colleagues would have the public believe that their opposition to ENDA stems from sincerely-held concerns regarding the bill's potential to engender frivolous litigation and impose burdensome regulations on small businesses, these legislators' prior statements suggest that their opposition is motivated, at least in part, by animus toward lesbian, gay, and bisexual persons. Shortly after the U.S. House voted to pass a gender identity-exclusive version of ENDA in 2007, House Minority Leader John Boehner issued the following statement:

There is no doubt that this legislation will lead to endless, excessive litigation that will further bog down our courts at a high cost to employers, workers, and taxpayers. For example, the bill purports to protect workers based on their 'perceived' sexual orientation – a highly subjective concept that is bound to tie the legal system in knots. Congress would be well-served to focus on ways to reduce the amount of frivolous lawsuits, not compound the problem by adding new, obscure ways for trial lawyers to game the system.

This legislation also drastically weakens religious freedom in the workplace and puts activist judges in the position of imposing same-sex marriage and civil union laws on states. Simply by using ENDA as the basis of their decisions – just as state Supreme Courts have done with state-level ENDA laws in the past – liberal judges will be empowered under this legislation to single-handedly undermine state and federal marriage laws across the country. I'm disappointed that the Majority turned back a straightforward proposal offered by House Republicans to protect state and federal marriage laws from being overturned, modified, or restricted by activist judges as a result of this deeply flawed legislation.⁸¹

78. Burns & Krehely, *supra* note 66.

79. *Id.*

80. *Id.* When asked about ENDA, the spokesperson for the National Small Business Association stated, "[w]e have talked about it, but it's not one of the things at the top of our list that we're really concerned about." Farley, *supra* note 57.

81. Press Release, Rep. John Boehner, Majority's ENDA Bill Will Be Boon to Trial Lawyers, Weaken State and Federal Marriage Laws (Nov. 6, 2007), *available at* <http://www>

The “straightforward proposal” referenced by Minority Leader Boehner was a motion to recommit ENDA to the Committee on Education and Labor with instructions to report the bill back to the House once the “construction” section of the bill had been revised to state, “[n]othing in this Act may be construed to modify, limit, restrict, or in any way overturn any State or Federal definition of marriage as between one man and one woman, including the use of this Act as a legal predicate in litigation on the issue of marriage.”⁸² Representative Randy Forbes offered the motion on the House floor, and he explained his rationale as follows:

Mr. Speaker, one of the big concerns that many of us have with legislation of this type is that courts across the country have used it to establish public policy, and then certain judges have taken that and determined from that public policy that they are going to redefine the institution of marriage.

In considering this bill, I am deeply troubled by not only what is in the bill, but where I believe this bill is leading us. And you don’t have to take my word for it. A memo from the Marriage Law Project at Catholic University’s Columbus School of Law noted this:

“ENDA is about more than jobs. It is also about marriage. ENDA is based on the idea that State laws restricting marriage to the union of one man and one woman are a ‘subterfuge’ for discrimination against homosexuals and bisexuals. If the courts accept the proposition that marriage is a ‘subterfuge’ for discrimination on the basis of sexual orientation, the Defense of Marriage Act will be struck down as unconstitutional.”

And that is the goal, Mr. Speaker. This legislation will ultimately allow activist judges across the country to redefine the institution of marriage. The majority might say that is not their intent, but I guarantee that is exactly what will happen if ENDA passes as it is. If we don’t vote to stop it, then we are tacitly allowing one of our most sacred institutions to be torn down.

This legislation will provide certain activist judges with the legal justification to strike down State and Federal marriage laws that define marriage as between one man and one woman. State ENDA laws are being used by activist judges to impose same-sex marriage and civil unions on States. State courts are using ENDA and other similar laws to justify the argument that the government has no rational basis to continue discriminating in the area of marriage. And this is not something that might happen down the road. It has already happened in three States: Massachusetts, Vermont and New Jersey. . . .

.speaker.gov/press-release/boehner-majority%E2%80%99s-enda-bill-will-be-boon-trial-lawyers-weaken-state-and-federal [hereinafter *Boehner Press Release*].

82. 153 CONG. REC. H13228-02, H13250 (2007) (statement of Rep. Forbes).

Mr. Speaker, I rise today to ensure that this bill does not become the building block that some may use to destroy the institution of marriage. . . .

On the wall in my office, I have a framed copy of the Declaration of Independence and the pictures of our Founding Fathers. This wall serves as a reminder to me of the ideals and institutions our country was founded on. Yet every day we see people trying to rewrite our history and tear down those ideals and institutions. . . .

Marriage between a man and woman has been the cornerstone of strength in our country, and while it may be under attack from all sides, I believe it is an institution worth protecting. This motion allows us to take a stand for marriage, for our country, and, at least for today, puts a stop to those that are trying or may try to use this legislation as a predicate to change those laws.⁸³

Representative Forbes' warnings that ENDA will "tear down" and "destroy" the institution of marriage, together with his suggestion that marriage is "under attack" such that lawmakers must "take a stand for marriage [and] for our country," are reminiscent of the statements made in support of the Defense of Marriage Act ("DOMA").⁸⁴ In striking down section 3 of DOMA on the grounds that it was motivated, at least in part, by animus toward LGB persons, the United States Supreme Court noted that the House report accompanying DOMA asserted that "it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage," as "[t]he effort to redefine 'marriage' to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage."⁸⁵ Given this legislative history, the Supreme Court determined that the principal purpose of DOMA was to impose inequality on LGB persons in violation of the Due Process Clause of the Fifth Amendment.⁸⁶

The Supreme Court's decision in *United States v. Windsor* presumably explains why Speaker Boehner and his colleagues no longer cite

83. 153 CONG. REC. H13228-02, H13250–H13251 (2007) (statement of Rep. Forbes). See also Thomas M. Messner, *ENDA and the Path to Same-Sex Marriage*, HERITAGE FOUNDATION (Sept. 18, 2009), <http://www.heritage.org/research/reports/2009/09/enda-and-the-path-to-same-sex-marriage> ("Whatever other concerns might exist, however, the growing body of evidence demonstrating a connection between nondiscrimination laws and marriage redefinition provides solid grounds for lawmakers who support marriage as the union of husband and wife to be seriously concerned about local, state, and federal measures like ENDA."); *The Employment Non-Discrimination Act (ENDA): A Threat to Free Markets and Freedom of Conscience and Religion*, FAMILY RESEARCH COUNCIL (2013), <http://www.frc.org/enda> ("State courts which have redefined 'marriage' to include homosexual couples . . . cited the existence of 'non-discrimination' laws like ENDA at the state level as establishing a principle regarding the legal irrelevance of 'sexual orientation,' which they have then applied to the institution of marriage. Passage of ENDA at the national level could give fuel for a similar decision by the U.S. Supreme Court, forcing the redefinition of marriage in every state in the union . . .").

84. Pub. L. No. 104-199, 110 Stat. 2419 (1996).

85. *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

86. *Id.* at 2695–96.

same-sex marriage as one of their rationales for opposing ENDA. Instead, these legislators now seek to emphasize the bill's supposed potential to increase frivolous litigation and harm small businesses as their justification for opposing ENDA. The fact that neither of these rationales has any factual basis suggests that the proffered justifications are pretext and that opposition to same-sex unions continues to be a motivating factor in these lawmakers' decision to oppose ENDA. Although fears that ENDA's passage would lead to the invalidation of DOMA are now largely moot, Speaker Boehner and his colleagues ostensibly remain concerned that ENDA will empower "activist judges" to "impos[e] same-sex marriage" on the individual states.⁸⁷ Therefore, unless the United States Supreme Court one day recognizes a constitutional right to same-sex marriage, Speaker Boehner and his colleagues will likely continue to oppose ENDA even if additional industry-oriented concessions are included in the bill.

B. *The Supposed Threat to Religious Organizations*

Although ENDA has always contained an exemption for religious organizations, the scope of the exemption has broadened significantly over time. The first four iterations of the bill sought to distinguish between religious organizations' non-profit and for-profit activities, with only the former warranting exemption from ENDA's coverage.⁸⁸ This distinction was subsequently abandoned in the 107th and 108th Congresses in favor of a categorical exemption providing, "[t]his Act shall not apply to a religious organization."⁸⁹

When ENDA's proponents in the 110th Congress sought to limit the exemption to organizations having "religious ritual or worship or the teaching or spreading of religious doctrine or belief" as their primary purpose,⁹⁰ opponents in the House balked and demanded that the exemption be revised to track the analogous provisions of Title VII,⁹¹ which permit religious organizations to discriminate on the basis of religion but not race, color, sex, or national origin.⁹² Thereafter, proponents in the House introduced an amendment providing that organizations exempt from the religious discrimination provisions of Title VII would be exempt from the sexual orientation and gender identity provisions of ENDA.⁹³ The House adopted the amendment by a vote of 402 to 25, with House Minority Leader John Boehner and Chief Deputy Republican Whip Eric Cantor both supporting the revised

87. Boehner Press Release, *supra* note 81.

88. S. 2238, 103d Cong. § 7 (1994); S. 932, 104th Cong. § 8 (1995); S. 869, 105th Cong. § 9 (1997); S. 1276, 106th Cong. § 9 (1999).

89. S. 1284, 107th Cong. § 9 (2001); S. 1705, 108th Cong. § 9 (2003).

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

91. Ann C. McGinley, *Erasing Boundaries: Masculinities, Sexual Minorities, and Employment Discrimination*, 43 U. MICH. J.L. REFORM 713, 729-30 (2010).

92. Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241, 255 (codified as amended at 42 U.S.C. § 2000e-1(a) (2006)).

93. 153 CONG. REC. H13228-02, H13243 (2007).

religious exemption.⁹⁴ Hoping to capitalize on this broad-based support, ENDA's proponents have included the exemption, verbatim, in the three most recent iterations of the bill.⁹⁵

Whereas a number of religious organizations have endorsed the exemption as "respect[ing] the protections for religious institutions afforded by the First Amendment and Title VII,"⁹⁶ several LGBT groups advocating for ENDA's passage have become concerned that the exemption is overbroad.⁹⁷ On April 25, 2013, four of these groups issued a joint press release stating:

While we applaud the progress that has been made, we stand united in expressing very grave concerns with the religious exemption in ENDA. It could provide religiously affiliated organizations—far beyond houses of worship—with a blank check to engage in employment discrimination against LGBT people. Some courts have said that even hospitals and universities may be able to claim the exemption; thus, it is possible that a religiously affiliated hospital could fire a transgender doctor or a religiously affiliated university could terminate a gay groundskeeper. It gives a stamp of legitimacy to LGBT discrimination that our civil rights laws have never given to discrimination based on an individual's race, sex, national origin, age, or disability. This sweeping, unprecedented exemption undermines the core goal of ENDA by leaving too many jobs, and LGBT workers, outside the scope of its protections.⁹⁸

94. *Id.*

95. S. 1584, 111th Cong. § 6 (2009); S. 811, 112th Cong. § 6 (2011); S. 815, 113th Cong. § 6 (2013).

96. *Employment Non-Discrimination Act: Ensuring Opportunity for All Americans: Hearing on S. 1584 Before the S. Comm. on Health, Education, Labor, and Pensions*, 111th Cong. 189-90 (2009) (letter signed by various religious organizations). See also S. REP. NO. 113-105, at 21 (2013) (noting that approximately fifty religious organizations signed a letter addressed to the Senate HELP Committee which stated, "any claims that ENDA harms religious liberty are misplaced" and declared that "this exemption . . . should ensure that religious freedom concerns don't hinder the passage of this critical legislation"). Moreover, polls show that 67% of American Catholics and 70% of evangelical Christians are in favor of extending employment protections to LGBT persons. 159 CONG. REC. S7783-02, S7785 (2013).

97. Conversely, the Senate HELP Committee touted the breadth of ENDA's religious exemption as a strength, noting that the "religious exemption . . . is broader than that contained in other civil rights laws. For example, under [T]itle VII, religious organizations are not permitted to discriminate based on race, sex and national origin." S. REP. NO. 113-105, at 9 n.16 (2013).

98. Press Release, American Civil Liberties Union et al., Employment Non-Discrimination Act Statement (Apr. 25, 2013), available at <http://www.aclu.org/lgbt-rights/employment-non-discrimination-act-statement>; see also Chris Geidner, *ACLU, LGBT Groups Raise "Grave Concerns" About Job Bill Religious Exemption*, BUZZFEED (Apr. 25, 2013), <http://www.buzzfeed.com/chrisgeidner/aclu-lgbt-groups-raise-grave-concerns-about-job-bill-religio> (quoting an LGBT advocate as saying that the current religious exemption "would be setting up a two-tiered system saying that race, color, sex, and national origin discrimination cannot be engaged in by [religious organizations], but sexual orientation and gender identity discrimination can"); Press Release, American Civil Liberties Union et al., Weakened ENDA Means Less Protection for Everyone (Oct. 4, 2007), available at https://www.aclu.org/lgbt-rights_hiv-aids/weakened-enda-means-less-protection-everyone (assert-

These concerns have been echoed by a number of legal scholars who argue that the religious exemption contained in ENDA is far broader than the analogous provision of Title VII,⁹⁹ notwithstanding the fact that the exemption's author "literally copied and pasted" the relevant text directly from Title VII.¹⁰⁰

Nevertheless, two floor amendments seeking to expand the exemption even further were recently introduced in the Senate. The first amendment was sponsored by Senator Rob Portman and sought to ensure that government agencies would not be permitted to penalize an employer qualifying for ENDA's religious exemption by withholding "licenses, permits, certifications, accreditation, contracts, grants, guarantees, tax-exempt status, or any benefits or exemptions from that employer."¹⁰¹ The amendment also sought to insert a sentence in the bill's "purposes" section acknowledging that equal employment opportunity for LGBT persons must be balanced against and made consistent with notions of religious liberty.¹⁰² By including the latter provision, Senator Portman sought to guard against the possibility that federal courts would interpret ENDA as creating a compelling governmental interest in eradicating LGBT-oriented employment discrimination that would trump religious organizations' statutorily-conferred right to discriminate.¹⁰³

ing that the current version of the religious exemption "is not a broad exemption; it is a total exemption"); Editorial, *Toward Ending Workplace Discrimination*, N.Y. TIMES, Nov. 5, 2013, at A26 (arguing ENDA "has a significant flaw—a terribly broad religious exemption" such that "[a]ny attempt to further enlarge the exemption should be rejected").

Citing the bill's broad religious exemption, several prominent LGBT organizations officially withdrew their support for ENDA in July 2014. Chris Johnson, *Support for ENDA Crumbles*, WASH. BLADE, July 9, 2014, <http://www.washingtonblade.com/2014/07/09/endas-fate-dismal-religious-exemption-splits-lgbt-advocates/>.

99. See Reed, *supra* note 8, at 865 (noting that courts "may interpret ENDA's broad exemption for religious organizations as reflecting a congressional determination that" LGBT-related discrimination is somehow less pernicious than discrimination on the basis of race, color, religion, sex, or national origin); Sung, *supra* note 11, at 508 ("Compared to ENDA, Title VII provides very limited exemptions under which religious groups may discriminate.").

100. Chris Johnson, *Religious Exemption Inspires Heated Debate at ENDA Panel*, WASH. BLADE (Sept. 12, 2013), <http://www.washingtonblade.com/2013/09/12/enda-situation-room/>.

101. 159 CONG. REC. S7880-02, S7881 (2013).

102. *Id.* at S7880.

103. See Steven H. Aden & Stanley W. Carlson-Thies, *Catch or Release? The Employment Non-Discrimination Act's Exemption for Religious Organizations*, 11 ENGAGE 4, 6 (2010) (proposing that a statement be added to the "purposes" section of ENDA "that announces the congressional intention not to inadvertently undermine religious freedom in the course of enhancing employment nondiscrimination protections," thereby ensuring that courts do not interpret ENDA to create a compelling governmental interest in ending LGBT-related employment discrimination that trumps ENDA's religious exemption).

Although Senator Portman sponsored the amendment, he was not responsible for its content. Rather, the amendment's substantive provisions were first proposed in a September 2010 paper co-authored by the senior legal counsel for Alliance Defending Freedom ("ADF"). *Id.* at 4.

ADF also co-authored Arizona's Senate Bill 1062, a bill that purports to protect religious liberty but has come to be associated with LGBT-related discrimination. Michael Paulson & Fernanda Santos, *Religious Right Cheers a Bill Allowing Refusal to Serve Gays*, N.Y.

The second amendment sought to create a uniform standard for determining whether an employer qualifies as a religious organization so as to be exempt from ENDA's coverage.¹⁰⁴ The amendment's sponsor, Senator Patrick Toomey, noted that while ENDA incorporates the religious exemptions contained in Title VII, federal courts have developed wildly different tests for determining whether an employer is exempt from Title VII as a religious organization.¹⁰⁵ Senator Toomey described the amendment as an attempt to "clarify that ENDA's religious exemption [would] appl[y] to religious hospitals, schools, charities, and other organizations that are owned by, controlled by, or officially affiliated with a church or religious group covered by ENDA's [religious] exemption."¹⁰⁶

Whereas many of ENDA's proponents did not take a position on the Portman Amendment,¹⁰⁷ these individuals actively sought to defeat the Toomey Amendment.¹⁰⁸ Senator Tom Harkin, chairman of the HELP Committee and one of ENDA's most ardent supporters in the Senate, criticized the amendment at length:

In determining what organizations should qualify for [Title VII's] religious exemption, most courts have . . . said that where the primary activity of the organization is commerce or profit . . . the organization may not discriminate in hiring [notwithstanding the strongly held religious beliefs of the organization's owners]. That is what this amendment, I believe, seeks to change. This amendment would allow entities that are "officially affiliated" with a religious society to discriminate on the basis of sexual orientation and gender identity. This is a new term that is undefined in the text of the amendment and could lead to thousands of for-profit businesses being allowed to discriminate.

TIMES, Feb. 22, 2014, at A1, A3. ADF, moreover, filed an amicus brief in support of the Texas statute criminalizing same-sex sodomy in *Lawrence v. Texas*, defended California's same-sex marriage ban in *Hollingsworth v. Perry*, opposed LGBT-inclusive anti-bullying initiatives in the nation's public school systems, and lobbied against the Boy Scouts of America's decision to permit openly gay scouts. Luke Brinkner, *Meet Alliance Defending Freedom, Fox's Favorite Anti-LGBT Legal Organization*, EQUAL MATTERS (Dec. 4, 2013), <http://equalitymatters.org/blog/201312040001>.

Thus, an argument can be made that the Portman Amendment was motivated, at least in part, by animus toward LGB persons given that its substance was authored by a "virulently anti-gay" group according to the Southern Poverty Law Center. Leah Nelson, *The Last Word*, INTELLIGENCE REPORT, 2013, available at <http://www.splcenter.org/home/2012/spring/the-last-word>.

104. 159 CONG. REC. S7894-01, S7900 (2013) (statement of Sen. Toomey).

105. *Id.*

106. *Id.* at S7901.

107. See Chris Geidner, *LGBT Advocates Won't Oppose Amendment on Impact of Job Bias Bill's Religious Exemption*, BUZZFEED (Nov. 5, 2013), <http://www.buzzfeed.com/chrisgeidner/religious-exemption-to-lgbt-rights-bill-is-key-to#394wvai> ("Officials with the Human Rights Campaign, American Civil Liberties Union and Freedom to Work all said they believed it was an unnecessary provision, but none said they were actively opposing it . . .").

108. See *id.* (noting the ACLU warned that the amendment would "broaden an already broad religious exemption and could create a dangerous precedent that could allow for-profit corporations to be eligible" for the religious exemption).

Some examples that have been suggested could qualify for the [amended] exemption could be a private employer whose only “affiliation” with a religious society is receiving a regular newsletter from that society or a private employer who sponsors a fundraiser for a religiously affiliated nonprofit or a private employer who provides goods and services to a religious organization.

Our Nation’s civil rights laws require those who participate in commercial activity [to] adhere to the broad principles of fairness and equal treatment. In potentially allowing secular commercial businesses to discriminate in hiring and other employment practices on the basis of sexual orientation or gender identity, this amendment threatens to gut the fundamental premise of ENDA that all workers should be treated equally and fairly.¹⁰⁹

Senator Harkin concluded his remarks by speculating that the amendment would engender significant litigation as to when and under what circumstances an employer would be deemed “officially affiliated” with a particular religion so as to be exempt from ENDA’s coverage, thereby denying employers the very predictability and certainty the amendment was designed to achieve.¹¹⁰ Senator Tammy Baldwin echoed her colleague’s concerns and noted that the existing exemption “is the product of a long and significant bipartisan negotiation and compromise[,]” such that it should be afforded deference.¹¹¹

Ultimately, the Portman Amendment was agreed to on a voice vote whereas the Toomey Amendment was defeated by a vote of 43 to 55.¹¹²

Senators John McCain and Orrin Hatch, both of whom voted against ENDA in 1996,¹¹³ cited the bill’s robust religious exemption as the reason they were now supporting the bill. Shortly before the vote on final passage, Senator McCain issued a press release stating, “[w]ith the addition of [the Portman Amendment] strengthening protections for religious institutions, I am pleased to support [ENDA].”¹¹⁴ Senator Hatch, meanwhile, made his support known several months earlier when he voted to advance ENDA out of the HELP Committee.¹¹⁵ Prior to the committee vote, Senator Hatch had his staffers conduct “a lengthy . . . review of every employment nondiscrimination bill that had ever been introduced” to determine whether ENDA could be improved

109. 159 CONG. REC. S7894-01, S7901 (2013) (statement of Sen. Harkin).

110. *Id.*

111. *Id.* at S7902 (statement of Sen. Baldwin).

112. Chris Johnson, *Historic: Senate Passes ENDA*, WASH. BLADE (Nov. 7, 2013), <http://www.washingtonblade.com/2013/11/07/senate-passes-trans-inclusive-enda/>.

113. 142 CONG. REC. S10129-02, S10139 (1996).

114. Press Release, Statement by Senator John McCain on ENDA (Nov. 7, 2013), available at <http://www.mccain.senate.gov/public/index.cfm/press-releases?ID=22ba5a3d-75df-4dea-950e-e681b23b6224>.

115. Matt Canham, *Hatch Backs Anti-Discrimination Bill for Gay Employees*, SALT LAKE TRIB. (July 10, 2013, 6:18 PM), <http://www.sltrib.com/sltrib/politics/56577174-90/hatch-bill-discrimination-gay.html.csp>.

upon in terms of its religious protections.¹¹⁶ The analysis confirmed that ENDA 2013 stands to provide the most expansive religious exemption of any nondiscrimination statute to date.¹¹⁷ Following the committee vote, Senator Hatch issued a statement praising the bill's broad religious exemption: "I appreciate that the authors of [ENDA] were willing to include a robust religious exemption in this bill. . . . I voted for it because it prohibits discrimination that should not occur in the workplace, it protects the rights of religious entities, and minimizes legal burdens on employers."¹¹⁸

Yet, some legislators continue to insist that the exemption is too narrow. Of the 32 senators who opposed ENDA on final passage, only one took to the floor to speak against the bill, and his criticisms focused exclusively on the religious exemption.¹¹⁹ Senator Dan Coats began his remarks by declaring, "the legislation before us raises very serious concerns regarding religious freedom" and went on to assert that "the so-called protections for religious liberty in this bill are vaguely defined and do not extend to all organizations that wish to adhere to their moral or religious beliefs in their hiring practices."¹²⁰ In regard to the Portman and Toomey Amendments, Senator Coats conceded, "some [m]embers believe that these amendments go too far. I frankly believe they don't go far enough."¹²¹ The Senator concluded by stating, "I hope my colleagues would stand with me in protecting our religious freedom and oppose this legislation."¹²²

While Senator Coats would have his colleagues believe that he is primarily concerned with the preservation of religious liberty, his prior statements regarding ENDA indicate that his opposition is motivated, at least in part, by animus toward lesbian, gay, and bisexual persons. Senator Coats' remarks in the 104th Congress emphasize his belief that homosexuality is immoral and seek to alienate the LGB community from the broader civil rights movement by portraying ENDA as an attempt to extend legal protections on the basis of behavior rather than immutable characteristics:

Mr. President, today's debate concerns an issue of extreme import and controversy—extending civil rights protection to sexual orientation.

This is an issue of great importance because, for the first time in our history, Federal legislation would protect an individual's behavior, rather than an individual's status, as traditional civil

116. Fawn Johnson, *Transgender Witness Was Tipping Point for Gay-Rights Bill*, NAT'L J. DAILY (Nov. 7, 2013), <http://www.nationaljournal.com/daily/transgender-witness-was-tipping-point-for-gay-rights-bill-20131107>.

117. *Id.*

118. Chris Johnson, *Historic: Senate Panel Advances Trans-Inclusive ENDA*, WASH. BLADE (July 10, 2013), <http://www.washingtonblade.com/2013/07/10/historic-senate-panel-advances-trans-inclusive-enda/>.

119. Peterson, *supra* note 21, at A4.

120. 159 CONG. REC. S7894-01, S7895 (2013) (statement of Sen. Coats).

121. *Id.*

122. *Id.*

rights laws have done. The practical impact of this bill is that employers will no longer be able to consider or hold an employee accountable for any acts related to their sexual orientation.

The fact that this issue—the extension of civil rights to an individual's behavior—is controversial goes without saying. This is an issue about gay rights in the workplace, which the American people have not reached a moral consensus [on]. Many Americans, including business people, those who support strong traditional families, and persons with religious or moral objections, have serious concerns about promoting homosexuality as a lifestyle. This is important, because if this bill becomes law, it will give the Federal stamp of approval to activities that are still considered illegal in many States. It is significant also because individual employers, employees, forprofit [sic] religious organizations and enterprises will no longer be able to conduct their business without the fear of Federal intrusion and potentially costly litigation.

Mr. President, we are not speaking of extending rights that every citizen of the United States is guaranteed—rather we are considering special rights for persons based on their lifestyle choice, as evidenced by their behavior. I share the concern of many that no person be subjected to violence and hatred simply because they do not meet with societal approval. But I am just as concerned about individuals who, because of sincerely and deeply held religious or moral convictions, find certain lifestyles to be morally unacceptable and yet are told by the Government that those beliefs must be kept private and may not be applied to their business decisions. These individuals are told that the [F]irst [A]mendment's protections do not apply to the way they run their businesses, their family bookstore, or their day care center. This should not be the case.

I ask my colleagues to join with me in voting to preserve one of our Nation's most cherished rights: The freedom to freely exercise our religious beliefs and to not be coerced by the Government into accepting into our employ those whose behavior violates our deeply held religious convictions.¹²³

Later that same day, Senator Coats characterized same-sex marriage as “trendy moral relativism” and “a sign . . . of a deep moral confusion” while expressing his support for the bill that would ultimately become DOMA.¹²⁴

For legislators like Senator Coats, the religious exemption will always be inadequate unless it is expanded to include secular commercial employers.¹²⁵ Such an exemption, however, would effectively nullify the statute by allowing virtually any employer to claim they are

123. 142 CONG. REC. S10129-02, S10131-32 (1996) (statement of Sen. Coats).

124. 142 CONG. REC. S10100-02, S10114 (1996) (statement of Sen. Coats).

125. 159 CONG. REC. S7894-01, S7895 (2013) (statement of Sen. Coats) (complaining that “[t]he so-called protections [for] religious liberty . . . do not extend to all

exempt from ENDA's coverage as a religious organization, and that is arguably the intent. While Senator Coats and his colleagues may harbor sincere concerns regarding ENDA's implications for religious liberty, they are at least equally likely to be motivated by anti-LGBT animus, as evidenced by Senator Coats' prior statements regarding ENDA and DOMA. Thus, Senator Coats and his colleagues will likely continue to oppose ENDA even if the exemption for nonprofit religious organizations is further expanded.

II. REDRESSING LGBT EMPLOYMENT DISCRIMINATION VIA EXECUTIVE ORDER

Given that the two most commonly asserted rationales for opposing ENDA are pretext, further substantive concessions in these areas are unlikely to garner additional support for the bill. Many lawmakers reject ENDA's basic premise that LGBT persons are deserving of workplace protections and instead view LGBT-related employment discrimination as "a good thing" that should be encouraged rather than prohibited. Because ENDA is unlikely to become law as long as its opponents are motivated by LGBT animus, President Obama should act unilaterally and issue two executive orders providing meaningful employment protections to LGBT workers.

The first order would amend Executive Order 11478, which protects federal civilian employees against discrimination on the basis of race, color, religion, sex, national origin, handicap, age, sexual orientation, or status as a parent¹²⁶ to include gender identity and sexual orientation as subcategories of the existing "sex" classification.¹²⁷ This

organizations that wish to adhere to their moral or religious beliefs in their hiring practices"). The Senate HELP Committee noted:

[S]ome have expressed concern that the religious beliefs of employers and employees are not sufficiently protected [under ENDA]. They argue that those whose religion dictates that homosexuality is wrong will be forced to hire or work with gay men and lesbians. [Such] arguments are not new to the civil rights debate, but our Nation's laws rightly require non-religious organizations and entities, particularly those who participate in commercial activity, to adhere to broad principles of fairness and equality.

S. REP. NO. 113-105, at 9 (2013).

126. Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (Aug. 8, 1969), *as amended by* Exec. Order No. 12,106, 44 Fed. Reg. 1053 (Dec. 28, 1978), Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (May 28, 1998), and Exec. Order No. 13,152, 65 Fed. Reg. 26,115 (May 2, 2000).

127. As amended, Executive Order 11478 would protect federal civilian employees against discrimination on the basis of race, color, religion, sex (including gender identity and sexual orientation), national origin, handicap, age, or status as a parent.

This would mimic one of two approaches taken by federal agencies in adding gender identity to their equal employment opportunity policies. Eleven agencies include gender identity within a parenthetical of the "sex" classification, e.g., race, color, religion, sex (including gender identity), national origin, etc., whereas twelve agencies list gender identity as a stand-alone classification, e.g., race, color, religion, sex, gender identity, national origin, etc. Mathew S. Nosanchuk, *The Endurance Test: Executive Power and the Civil Rights of LGBT Americans*, 5 ALB. GOV'T L. REV. 440, 461-62 (2012). Amending Executive Order 11478 in the manner advocated would ensure that the executive branch is consistent insofar as discrimination on the basis of gender identity is concerned. Moreover,

would ensure that federal civilian employees are able to contest instances of gender identity or sexual orientation discrimination in the same manner as instances of race, color, religion, national origin, handicap, or age discrimination. Amending Executive Order 11478 in this manner, moreover, would serve to affirm the EEOC's 2012 decision in *Macy v. Holder*, which found that discrimination on the basis of an individual's transgender status is per se actionable under Title VII as a form of sex discrimination,¹²⁸ while proactively advancing the related proposition that sexual orientation discrimination is itself a form of sex discrimination predicated on LGB individuals' failure to conform to gender stereotypes.¹²⁹

Historically, federal courts have been inclined to dismiss sex discrimination claims brought by LGBT workers for fear these individuals are attempting to bootstrap sexual orientation and gender identity protections into Title VII.¹³⁰ Within the last few years, however, a small but significant number of courts have allowed openly LGBT persons to contest employment discrimination on a gender-stereotyping theory of sex discrimination.¹³¹ The inclusion of gender identity and sexual orientation within Executive Order 11478's existing "sex" classification would signal President Obama's support for this more expansive understanding of sex discrimination, providing an impetus for additional courts to adopt an LGBT-inclusive interpretation of Title VII that permits private sector LGBT workers to state cognizable sex discrimination claims.

The second order would amend Executive Order 11246, which prohibits federal contractors from discriminating on the basis of race, color, religion, sex, or national origin,¹³² to include gender identity and sexual orientation as subcategories of the existing "sex" classifica-

whereas every federal agency lists sexual orientation as a stand-alone classification pursuant to Executive Order 13087, the proposed amendment would require that all agencies delete these provisions and include sexual orientation, together with gender identity, in a parenthetical following the "sex" classification.

On June 30, 2014, President Obama announced that he would issue an executive order protecting federal civilian employees against discrimination on the basis of gender identity but did not discuss the format or timing of the proposed order. Sunnive Brydum, *Obama Announces New Executive Order*, THE ADVOCATE (June 30, 2014, 7:28 PM), <http://www.advocate.com/politics/2014/06/30/breaking-obama-announces-new-exec-order>.

128. EEOC Appeal No. 0120120821, Agency No. ATF-2011-00751 (Apr. 20, 2012).

129. The gender-stereotyping theory of sex discrimination "permits an individual to bring a [sex discrimination] claim under Title VII if an employer has based an employment decision on the individual's failure to conform to stereotypical expectations of how men and women should look and behave." Jason Lee, Note, *Lost in Transition: The Challenges of Remedying Transgender Employment Discrimination Under Title VII*, 35 HARV. J.L. & GENDER 423, 432 (2012).

130. See Mark E. Berghausen, Note, *Intersex Employment Discrimination: Title VII and Anatomical Sex Nonconformity*, 105 NW. U. L. REV. 1281, 1295-1306 (2011) (collecting cases in the gender identity context); Zachary A. Kramer, Note, *Heterosexuality and Title VII*, 103 NW. U. L. REV. 205, 207 n.17 (2009) (collecting cases in the sexual orientation context).

131. Reed, *supra* note 3.

132. Exec. Order No. 11,246, 30 Fed. Reg. 12,935 (Sept. 24, 1965), as amended by Exec. Order No. 11,375, 32 Fed. Reg. 14,303 (Oct. 13, 1967).

tion.¹³³ Amending Executive Order 11246 in this manner would provide explicit employment protections to the 500,000 LGBT individuals working for federal contractors¹³⁴ while at the same time encouraging federal courts to adopt an LGBT-inclusive interpretation of Title VII's "sex" classification that would extend employment protections to all private sector LGBT workers, not just those working for federal contractors. Although President Obama is ostensibly concerned that such an order would lead to accusations of executive overreach¹³⁵ while at the same time inciting further congressional opposition to ENDA,¹³⁶ House Republicans have already indicated that they have no intention of allowing a floor vote on ENDA and President Obama need not be overly concerned by the prospect of conservative criticism now that he is in his second term.

A. *An Executive Order Explicitly Protecting Federal Transgender Workers and Strengthening Existing Protections for Federal LGB Workers*

As originally promulgated by President Nixon, Executive Order 11478 prohibited all executive departments and federal agencies from discriminating on the basis of race, color, religion, sex, or national origin.¹³⁷ The order acknowledges that while "[i]t has long been the pol-

133. As amended, Executive Order 11246 would prohibit federal contractors from discriminating on the basis of race, color, religion, sex (including gender identity and sexual orientation), or national origin.

This would mimic one of two approaches taken by federal agencies in adding gender identity to their equal employment opportunity policies. See *supra* note 127.

On June 16, 2014, President Obama announced that he would issue an executive order prohibiting federal contractors from discriminating on the basis of sexual orientation or gender identity but did not discuss the format or timing of the proposed order. Carol E. Lee, *Obama to Bar Gay Discrimination By Federal Contractors*, WALL ST. J. (June 16, 2014, 12:04 PM), <http://online.wsj.com/articles/obama-to-bar-gay-discrimination-by-federal-contractors-1402934436>.

134. M.V. Lee Badgett, *The Impact of Extending Sexual Orientation and Gender Identity Non-Discrimination Requirements to Federal Contractors*, WILLIAMS INST., Feb. 2012, at 2, available at <http://williamsinstitute.law.ucla.edu/research/workplace/impact-of-extending-sexual-orientation-and-gender-identity-nondiscrimination-requirements-to-federal-contractors/>.

135. See Janet Hook, *Republicans Criticize Obama's Push to Use Executive Power*, WALL ST. J. (Jan. 28, 2014, 11:39 PM), <http://online.wsj.com/articles/SB10001424052702303553204579349203326044972> (acknowledging that President Obama's "declaration . . . that he will resort to using executive power to advance his policy goals drew fire from Republicans who believe he is overreaching his authority"); Snow, *supra* note 25 (noting that Barney Frank believes the absence of an LGBT-inclusive executive order for federal contractors reflects President Obama's "reluctance to do too many things by executive order and feed into [Republicans'] argument that there's an executive overreach").

136. See Steven T. Dennis, *Is the White House ENDA Strategy Working?*, ROLL CALL (Nov. 4, 2013, 3:29 PM), http://www.rollcall.com/news/is_the_white_house_venda_strategy_working-228851-1.html (stating that the White House sought "to avoid poisoning the well for ENDA by skipping the administrative route" of issuing an ENDA-style executive order for federal contractors).

137. Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (Aug. 8, 1969). This order was preceded by a 1965 order that prohibited federal agencies from discriminating on the basis of race, creed, color, or national origin, Exec. Order No. 11,246, 30 Fed. Reg. 12,935 (Sept. 24, 1965), and that order was preceded by a 1961 order prohibiting employment discrimination on the basis of race, color, religion, or national origin. Exec. Order No.

icy of the United States Government to provide equal opportunity in Federal employment . . . [a]dditional steps . . . are called for in order to strengthen and assure fully equal employment opportunity in the Federal Government.”¹³⁸ The order requires each executive department and federal agency to maintain an affirmative program of equal employment opportunity for all civilian employees and designates the Civil Service Commission as the entity responsible for enforcement.¹³⁹ The order was designed to ensure that federal civilian workers received employment protections comparable to those available under the Civil Rights Act of 1964¹⁴⁰ and to make such protections the official policy of the U.S. government.¹⁴¹

In 1978, the order was amended to include age and handicap among the federal government’s prohibited bases for employment discrimination.¹⁴² The amended order stripped the Civil Service Commission of its administrative responsibilities and transferred all enforcement functions to the EEOC.¹⁴³ The order was designed to ensure that federal civilian workers received employment protections comparable to those available under the Age Discrimination in Employment Act of 1967¹⁴⁴ and the Rehabilitation Act of 1973¹⁴⁵ and to make such protections the official policy of the U.S. government.¹⁴⁶

Executive Order 11478 was amended again in 1998 to include sexual orientation among the federal government’s prohibited bases for employment discrimination.¹⁴⁷ Unlike the first two iterations, the amended order was designed to provide federal civilian workers with superior, not merely comparable, employment protections relative to their private sector counterparts. Indeed, President Clinton chose to issue the order notwithstanding the fact that legislation seeking to prohibit sexual orientation-based employment discrimination had been introduced and rejected in every session of Congress going back to 1974. President Clinton, nevertheless, was aware of the amended order’s shortcomings in the absence of analogous statutory protections. In his signing statement accompanying the order, President Clinton acknowledged:

10,925, 26 Fed. Reg. 1977 (Mar. 6, 1961). The 1961 order, however, merely reaffirmed the nondiscrimination provisions set forth in a 1955 order, Exec. Order No. 10,590, 20 Fed. Reg. 409 (Jan. 18, 1955), which itself simply reaffirmed the nondiscrimination provisions set forth in a 1948 order, Exec. Order No. 9980, 13 Fed. Reg. 4311 (July 26, 1948).

138. Exec. Order No. 11,478, 34 Fed. Reg. 12,985 (Aug. 8, 1969).

139. *Id.* at §§ 2–3.

140. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 42 U.S.C.).

141. Exec. Order No. 11,478, 34 Fed. Reg. 12,985, at § 1 (Aug. 8, 1969).

142. Exec. Order No. 12,106, 44 Fed. Reg. 1053 (Dec. 28, 1978).

143. *Id.*

144. Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–34 (2006).

145. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended in scattered sections of 29 U.S.C.).

146. Exec. Order No. 12,106, 44 Fed. Reg. 1053 (Dec. 28, 1978).

147. Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (May 28, 1998).

This Executive Order states Administration policy but does not and cannot create any new enforcement rights (such as the ability to proceed before the Equal Employment Opportunity Commission). Those rights can be granted only by legislation passed by the Congress, such as the Employment Non-Discrimination Act. I again call upon Congress to pass this important piece of civil rights legislation which would extend these basic employment discrimination protections to all gay and lesbian Americans.¹⁴⁸

In noting that the order “does not and cannot create any new enforcement rights,” President Clinton was acknowledging the EEOC’s then-longstanding position that discrimination on the basis of sexual orientation does not constitute actionable sex discrimination under Title VII.¹⁴⁹ Federal employees seeking to contest sexual orientation-based employment discrimination, therefore, were assumed to be limited to whatever Equal Employment Opportunity (“EEO”) processes existed within their respective departments and agencies, with no possibility of invoking the “1614 process” to obtain a hearing before an EEOC administrative judge, appeal an adverse agency determination to the EEOC, or bring a lawsuit in federal court.¹⁵⁰

148. Press Release, Office of the White House Press Secretary, Statement by the President (May 28, 1998), available at <http://clinton6.nara.gov/1998/05/1998-05-28-statement-on-amendment-to-eeo-executive-order.html>.

149. See *Morrison v. Dalton*, EEOC Appeal No. 01930778, Agency No. DON92-00102-024 (June 16, 1994) (“While the Commission is not unsympathetic to appellant’s plight, the allegations complained of [i.e., sexual orientation discrimination,] are beyond our jurisdiction.”).

150. Federal civilian employees may utilize the complaint process set forth in 29 C.F.R. 1614 (the “1614 process”) to contest employment discrimination arising under any of the statutes the EEOC is responsible for enforcing, i.e., the Equal Pay Act of 1963, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, Sections 501 and 505 of the Rehabilitation Act of 1973, Titles I and V of the Americans with Disabilities Act of 1990, the Civil Rights Act of 1991, and Title II of the Genetic Information Non-Discrimination Act. *Facts About Discrimination in Federal Government Employment Based on Marital Status, Political Affiliation, Status as a Parent, Sexual Orientation, or Transgender (Gender Identity) Status*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION <http://www.eeoc.gov/federal/otherprotections.cfm> (last visited Feb. 26, 2014).

Under the 1614 process, federal employees have two options once an agency has completed its initial investigation of their complaint: the employee may either request a hearing before an EEOC administrative judge or ask the relevant agency to issue a final decision. If an employee declines to request a hearing before an EEOC administrative judge and the agency finds that there was no discrimination, the employee has the right to appeal the agency’s decision to the EEOC Office of Federal Operations or file a lawsuit in federal court. Conversely, if an employee requests a hearing before an EEOC administrative judge, the judge will render a decision, and the agency will then issue a final order indicating whether the agency agrees with the judge’s decision. If the agency disagrees with any part of the administrative judge’s decision, the agency must appeal the decision to the EEOC Office of Federal Operations. If, however, the agency agrees with the administrative judge’s decision and issues a final order consistent therewith, the employee has the right to appeal the order to the EEOC Office of Federal Operations or file a lawsuit in federal court. *Overview of Federal Sector EEO Complaint Process*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION http://www.eeoc.gov/federal/fed_employees/complaint_overview.cfm (last visited Feb. 26, 2014).

As noted by the EEOC, “[t]here are also federal laws and regulations and Executive Orders (which are not enforced by the EEOC) that prohibit discrimination on other

Presumably, had President Clinton amended Executive Order 11478 to prohibit employment discrimination on the basis of gender identity, he would have made a similar caveat as to the limited enforcement options that stood to be available to federal transgender workers. President Clinton ostensibly then would have called on Congress to pass legislation prohibiting gender identity discrimination so that federal transgender workers' employment discrimination claims would be eligible for adjudication under the 1614 process rather than be relegated to the internal EEO procedures of the various federal agencies. As it turns out, such caveats would have been unnecessary as the EEOC has since concluded that discrimination on the basis of an individual's transgender status is per se actionable under Title VII as a form of sex discrimination. The EEOC made this determination in the 2012 case of *Macy v. Holder*.¹⁵¹

In *Macy*, the EEOC reversed the Department of Justice's ("DOJ") determination that claims of gender identity discrimination are ineligible for adjudication under the 1614 process and instead held "that claims of discrimination based on transgender status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII's sex discrimination prohibition, and may therefore be processed under Part 1614. . . ." ¹⁵² Although the DOJ had agreed to investigate Mia Macy's sex discrimination claim under Title VII consistent with the 1614 process, the DOJ informed Macy that her gender identity claim would have to be investigated under the DOJ's internal EEO procedures as such claims were ostensibly outside the scope of Title VII.¹⁵³ Macy opposed the "de facto dismissal" of her gender identity claim because the DOJ's internal EEO procedures do not provide as many rights and remedies as are available under Title VII and the 1614 process.¹⁵⁴ On appeal, the EEOC held that "each of the formulations of [Macy's] claims are simply different ways of stating the same claim of discrimination 'based [] on sex,' a claim cognizable under Title VII" and therefore eligible for adjudication under the 1614 process.¹⁵⁵

Significantly, because *Macy* was decided by the full Commission rather than the EEOC's Office of Federal Operations, the decision is binding on all executive departments and federal agencies notwith-

bases, such as sexual orientation" *Id.* Federal employees seeking to contest sexual orientation-based employment discrimination, therefore, cannot avail themselves of the 1614 process but must instead rely on whatever grievance procedures have been established by their respective agencies. *Processing Complaints of Discrimination by Lesbian, Gay, Bisexual, and Transgender (LGBT) Federal Employees*, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION http://www.eeoc.gov/federal/directives/lgbt_complaint_processing.cfm (last visited Feb. 26, 2014).

If enacted, ENDA would allow federal employees to contest instances of sexual orientation or gender identity discrimination under the 1614 process, as the EEOC would be responsible for enforcement. S. 815, 113th Cong. § 10 (2013); H.R. 1755, 113th Cong. § 10 (2013).

151. EEOC Appeal No. 0120120821, Agency No. ATF-2011-00751 (Apr. 20, 2012).

152. *Id.* at 5-6.

153. *Id.* at 5.

154. *Id.* at 4.

155. *Id.* at 6.

standing the fact that Executive Order 11478 does not explicitly include gender identity among its protected classes.¹⁵⁶ Consequently, federal employees who suffer an adverse employment action because of their gender identity now have the same enforcement rights under the 1614 process as their colleagues who are discriminated against on the basis of race, color, religion, sex, national origin, handicap, or age.¹⁵⁷

Although the EEOC has not issued a *Macy*-style ruling in regard to sexual orientation, the EEOC has issued guidance within the last few years indicating that discrimination on the basis of sexual orientation constitutes actionable sex discrimination under Title VII. In reaching this conclusion, the EEOC relies on a gender-stereotyping theory of sex discrimination whereby notions that men should be physically, emotionally, and romantically attracted only to women, and that women should be physically, emotionally, and romantically attracted only to men, are deemed discriminatory.¹⁵⁸

The guidance takes the form of an EEOC management directive issued shortly after the *Macy* decision.¹⁵⁹ After listing various federal court rulings and agency determinations permitting LGB persons to contest employment discrimination on a gender-stereotyping theory of sex discrimination, the management directive states that “lesbian, gay and bisexual employees [of the federal government] who believe they have been discriminated against because of their sexual orientation should be counseled that they have a right to file a complaint under the 1614 process, because they may have experienced sex discrimination.”¹⁶⁰ The directive goes on to assert that “if a lesbian, gay, or bisexual employee [of the federal government] files a complaint under the 1614 process and the agency rejects the complaint as failing to state a claim of sex discrimination, the agency should ensure that it provides the employee with the appropriate notice of right to appeal” the thresh-

156. Advocate Contributors, Op-Ed., *Why We Still Need a Fully Inclusive ENDA*, THE ADVOCATE (Apr. 27, 2012), <http://www.advocate.com/politics/commentary/2012/04/27/oped-why-we-still-need-fully-inclusive-enda>; Chris Geidner, *Transgender Breakthrough*, METRO WEEKLY (Apr. 23, 2012), <http://www.metroweekly.com/news/?ak=7288>.

157. *Processing Complaints of Discrimination by Lesbian, Gay, Bisexual, and Transgender (LGBT) Federal Employees*, *supra* note 150.

158. See *Castello v. Donahoe*, EEOC Appeal No. 0120111795, Agency No. 1G-701-0071-10, at 3 (Dec. 20, 2011) (remanding complaint for processing under Title VII and the 1614 process after finding that “complainant has essentially argued that [her supervisor] was motivated by the sexual stereotype that having relationships with men is an essential part of being a woman, and made a negative comment based on complainant’s failure to adhere to this stereotype”); *Veretto v. Donahoe*, EEOC Appeal No. 0120110873, Agency No. 4B-060-0130-10, at 3–4 (July 1, 2011) (remanding complaint for processing under Title VII and the 1614 process after finding that complainant’s supervisor “was motivated by the sexual stereotype that marrying a woman is an essential part of being a man, and became enraged when complainant did not adhere to this stereotype by announcing his marriage to a man in the society pages of the local newspaper”).

159. *Processing Complaints of Discrimination by Lesbian, Gay, Bisexual, and Transgender (LGBT) Federal Employees*, *supra* note 150. See also *Castello*, EEOC Appeal No. 0120111795 (permitting homosexual worker to contest employment discrimination on a gender-stereotyping theory of sex discrimination); *Veretto*, EEOC Appeal No. 0120110873 (same).

160. *Processing Complaints of Discrimination by Lesbian, Gay, Bisexual, and Transgender (LGBT) Federal Employees*, *supra* note 150.

old jurisdictional question to the EEOC.¹⁶¹ Finally, in regard to Executive Order 11478, the directive states, “where a lesbian, gay, or bisexual employee [of the federal government] files a complaint under the 1614 process for sex discrimination, the complaint may be dual filed under both the 1614 and EO processes. Of course, if a complainant wants to file his or her complaint solely under the Executive Order or solely under the 1614 process, the individual is free to do so.”¹⁶²

The EEOC’s management directive is not binding on all executive departments and federal agencies in the same way as *Macy*, however. Indeed, until the full Commission has cause to decide a case in which an LGB federal employee has attempted to state a claim for sex discrimination under the 1614 process on the theory that LGB-oriented discrimination is a form of impermissible gender-stereotyping, the extent of Executive Order 11478’s protections for LGB federal employees will remain uncertain.¹⁶³

If President Obama were to amend Executive Order 11478 to include gender identity and sexual orientation as subcategories of the existing “sex” classification,¹⁶⁴ this would not only serve to affirm the EEOC’s decision in *Macy v. Holder* and bring doctrinal consistency to the order’s text, but would also proactively advance the notion that discrimination on the basis of sexual orientation is itself a form of sex discrimination actionable under Title VII.¹⁶⁵ Once the President is on record as supporting an expansive interpretation of Title VII’s “sex” provision to include instances of sexual orientation discrimination, LGB federal employees presumably would be inclined to forego their agencies’ internal grievance procedures in favor of attempting to obtain relief under the more robust 1614 process, and the EEOC likely would feel emboldened to issue a *Macy*-style ruling in regards to sexual orientation, thereby rendering all forms of LGBT-related employment discrimination eligible for adjudication under the 1614 process.

Amending Executive Order 11478 in this manner, moreover, would signal President Obama’s support for a burgeoning movement within the federal judiciary whereby LGBT-oriented employment dis-

161. *Id.*

162. *Id.*

163. See Reed, *supra* note 3, at 294 (noting that although the EEOC has issued two decisions permitting openly LGB persons to contest employment bias on a gender-stereotyping theory of sex discrimination, both opinions were issued by the EEOC Office of Federal Operations rather than the full Commission, such that unlike *Macy v. Holder* they do not establish a national precedent).

164. As amended, Executive Order 11478 would protect federal civilian employees against discrimination on the basis of race, color, religion, sex (including gender identity and sexual orientation), national origin, handicap, age, or status as a parent. This would mimic one of two approaches taken by federal agencies in adding gender identity to their equal employment opportunity policies. See *supra* note 127.

165. Although the EEOC may continue to dismiss sexual orientation claims filed under the 1614 process even after President Obama’s issuance of an LGB-inclusive amendment to Executive Order 11478, federal employees would still be able to contest instances of sexual orientation discrimination under their respective agencies’ internal grievance procedures. Consequently, federal LGB workers in no way stand to be harmed by the elimination of sexual orientation as a stand-alone category.

crimination is regarded as actionable sex discrimination under Title VII. Whereas, at present, only a handful of federal courts permit LGBT workers to state cognizable sex discrimination claims, President Obama's issuance of an LGBT-inclusive amendment to Executive Order 11478 would likely prove influential in persuading additional courts to extend employment protections to LGBT workers via the "sex" classification of Title VII.

B. *An Executive Order Protecting Private Sector LGBT Workers Employed by Federal Contractors*

As originally promulgated by President Johnson, Executive Order 11246 prohibited federal contractors from discriminating on the basis of race, creed, color, or national origin.¹⁶⁶ The order provides that "all Government contracting agencies shall include in every Government contract hereafter entered into the following provisions: 'During the performance of this contract, the contractor agrees as follows: (1) The contractor will not discriminate against any employee or applicant for employment because of race, creed, color, or national origin.'¹⁶⁷ The order stipulates that "the contractor will include the [relevant nondiscrimination] provisions . . . in every subcontract or purchase order . . . so that such provisions will be binding upon each subcontractor or vendor [with whom the federal contractor does business]."¹⁶⁸ The Secretary of Labor is given responsibility for enforcing the order, and the penalties for noncompliance range from public censure, to a recommendation to the EEOC that appropriate civil proceedings be instituted under Title VII, to a recommendation to the Department of Justice that appropriate criminal proceedings be instituted for the furnishing of false information, to suspension or cancellation of the underlying contract, to being declared ineligible for any future federal contracts.¹⁶⁹

The order was amended in 1967 to include sex and religion among federal contractors' prohibited bases for employment discrimination.¹⁷⁰ President Johnson noted that "Congress, by enacting Title VII of the Civil Rights Act of 1964, enunciated a national policy of equal employment opportunity in private employment, without discrimination because of race, color, religion, sex or national origin" such that "[i]t is desirable that the equal employment opportunity programs provided for in Executive Order 11246 expressly embrace discrimination on account of sex" or religion.¹⁷¹

166. Exec. Order No. 11,246, *supra* note 132. This order was preceded by a 1961 order that prohibited federal contractors from discriminating on the same four bases. Exec. Order No. 10,925, *supra* note 137. The 1961 order, moreover, simply reaffirmed the nondiscrimination provisions set forth in a 1943 order. Exec. Order No. 9346, 8 Fed. Reg. 7183 (May 27, 1943).

167. Exec. Order No. 11,246, *supra* note 132.

168. *Id.*

169. *Id.*

170. Exec. Order No. 11,375, *supra* note 132.

171. *Id.*

If President Obama were to amend Executive Order 11246 to include gender identity and sexual orientation as subcategories of the existing “sex” classification,¹⁷² approximately 500,000 private sector LGBT workers would gain explicit status-based protections against employment discrimination,¹⁷³ and the President would fulfill a six year-old campaign promise to the LGBT community.

In 2008, then Senator Obama pledged that, if elected president, he would issue an executive order barring federal contractors from discriminating on the basis of sexual orientation or gender identity.¹⁷⁴ Many LGBT advocates believed that President Obama was prepared to issue such an order in the fall of 2011 when he unveiled his “we can’t wait” campaign, a series of executive orders designed to highlight congressional inaction on the President’s domestic agenda.¹⁷⁵ Those hopes were dashed on April 12, 2012 when White House Press Secretary Jay Carney revealed that President Obama did not intend to issue such an order during the 112th Congress, ostensibly because the President was focused on securing congressional passage of ENDA.¹⁷⁶

When John Boehner subsequently announced that ENDA would not receive a vote during the 113th Congress, advocates hoped that ENDA’s demise would prompt President Obama to issue the long-sought executive order for federal contractors.¹⁷⁷ These expectations were only heightened by the re-launch of the President’s “we can’t wait” campaign in January 2014.¹⁷⁸ During a January 17 cabinet meeting, President Obama notified reporters that he “was not just going to be waiting for legislation [from Congress]” and stated, “I’ve got a pen and . . . I can use that pen to sign executive orders.”¹⁷⁹ A few days later, White House aides revealed that President Obama intended to address

172. As amended, Executive Order 11246 would prohibit federal contractors from discriminating on the basis of race, color, religion, sex (including gender identity and sexual orientation), or national origin.

This would mimic one of two approaches taken by federal agencies in adding gender identity to their equal employment opportunity policies. See *supra* note 127.

173. Badgett, *supra* note 134, at 2.

174. Chris Geidner, *Then and Now: White House Won’t Comment On a Federal Contractor Nondiscrimination Policy, But Obama Pledged His Support for Such a Policy in 2008*, METRO WEEKLY (Mar. 8, 2012), <http://www.metroweekly.com/news/?ak=7139>.

175. Jackie Calmes, *Jobs Plan Stalled, Obama to Try New Economic Drive*, N.Y. TIMES, Oct. 24, 2011, at A16; Tom Cohen, *Obama Uses Executive Orders As a Political Tool*, CNN (Nov. 2, 2011), <http://edition.cnn.com/2011/11/01/politics/obama-executive-orders/>.

176. Chris Johnson, *Reporters Grill Carney Over ENDA Exec Order*, WASH. BLADE (Apr. 12, 2012), <http://www.washingtonblade.com/2012/04/12/reporters-grill-carney-over-enda-exec-order/>.

177. Julie Pace, *Gay Groups Shift Focus to Obama After Senate Win on ENDA*, HUFFINGTON POST (Nov. 8, 2013, 11:30 AM), http://www.huffingtonpost.com/2013/11/08/obama-gay-rights_n_4240729.html; Chris Johnson, *Carney Fires Back at Boehner over ENDA*, WASH. BLADE (Nov. 15, 2013), <http://www.washingtonblade.com/2013/11/15/carney-fires-back-boehner-enda/>.

178. Chris Johnson, *Will Obama “Use the Pen” to Protect LGBT Workers?*, WASH. BLADE (Jan. 17, 2014), <http://www.washingtonblade.com/2014/01/17/will-obama-use-pen-pro-tect-lgbt-workers/>.

179. Jared A. Favole, *Obama: “I’ve Got a Pen and I’ve Got a Phone,”* WALL ST. J., Jan. 14, 2014, at A4.

income inequality in his January 28 state of the union address, and many advocates were convinced that the issuance of an LGBT-inclusive executive order was imminent.¹⁸⁰

The President's failure to announce such an order left many advocates frustrated, including the head of the Human Rights Campaign, who lamented, "the [P]resident's message tonight failed to address the needs of LGBT workers looking for a fair shake in this economy. Not only was there no call for the House to [pass ENDA], President Obama also side-stepped his commitment to take action where Congress has left off, leaving out an order prohibiting discrimination by federal contractors."¹⁸¹ Thereafter, when White House Press Secretary Jay Carney was asked whether President Obama views the issuance of an LGBT-inclusive executive order as an unfulfilled campaign promise, Mr. Carney demurred, stating, "I don't have any updates for you on the issue of a hypothetical executive order for LGBT non-discrimination for federal contractors. We're focused right now on [ENDA], which . . . has made progress in Congress, and we're going to keep pushing on it."¹⁸²

Even if ENDA were somehow able to pass the House and be signed into law, an LGBT-inclusive amendment to Executive Order 11246 would still be necessary to protect LGBT workers at certain small businesses. Whereas ENDA would apply to employers with 15 or more employees,¹⁸³ Executive Order 11246 applies to all employers receiving government contracts in excess of \$10,000.¹⁸⁴ Consequently, amending Executive Order 11246 to include gender identity and sexual orientation as subcategories of the existing "sex" classification would provide employment protections to LGBT persons who would not otherwise receive coverage under ENDA.¹⁸⁵

Similarly, an LGBT-inclusive amendment to Executive Order 11246 stands to provide the federal government with enforcement powers that would not be available under ENDA. LGBT persons seeking to contest systemic employment discrimination under ENDA would have

180. Chris Johnson, *Carney Won't Say if ENDA Will Come Up in State of the Union*, WASH. BLADE (Jan. 27, 2014), <http://www.washingtonblade.com/2014/01/27/carney-wont-say-enda-will-come-state-union/>.

181. Chris Johnson, *Obama's State of the Union Light on LGBT Issues*, WASH. BLADE (Jan. 29, 2014), <https://www.washingtonblade.com/2014/01/29/obamas-state-of-the-union-light-on-lgbt-issues/>.

182. Chris Johnson, *Carney Riled by Questions on ENDA Executive Order*, WASH. BLADE (Jan. 31, 2014), <http://www.washingtonblade.com/2014/01/31/carney-riled-by-questions-on-enda-executive-order/>.

183. S. 815, 113th Cong. § 3(a)(5)(A) (2013); H.R. 1755, 113th Cong. § 3(a)(4)(A) (2013).

184. LEE BADGETT ET AL., CTR. FOR AM. PROGRESS & WILLIAMS INST., AN EXECUTIVE ORDER TO PREVENT DISCRIMINATION AGAINST LGBT WORKERS 5–6 (2013), *available at* <http://williamsinstitute.law.ucla.edu/research/workplace/executive-order-19-feb-2013/>.

185. Like ENDA, Title VII does not apply to employers with fourteen or fewer employees such that an LGBT-inclusive amendment to Executive Order 11246 would still be necessary to protect LGBT workers at certain federal contractors even if the EEOC and federal courts were to one day reach a consensus that discrimination on the basis of sexual orientation or gender identity is inherently a form of sex discrimination actionable under Title VII.

only one option—filing a complaint with the EEOC.¹⁸⁶ If Executive Order 11246 was amended to prohibit federal contractors from discriminating on the basis of gender identity or sexual orientation, however, LGBT persons would be able to contest instances of systemic discrimination by filing a second, wholly separate complaint with the Department of Labor's Office of Federal Contract Compliance Programs ("OFCCP").¹⁸⁷

Upon receiving a complaint of systemic LGBT-related discrimination, OFCCP would conduct an investigation and, if a violation were found, attempt to enter into a conciliation agreement with the offending contractor.¹⁸⁸ Should conciliation efforts prove unsuccessful, the OFCCP would then refer the complaint to the Office of the Solicitor for the initiation of enforcement proceedings before an administrative law judge.¹⁸⁹

LGBT persons also stand to benefit from OFCCP's practice of routinely auditing federal contractors to ensure that they are in compliance with Executive Order 11246.¹⁹⁰ These compliance audits are not prompted by worker complaints, but instead reflect OFCCP's proactive efforts to promote equal employment opportunity.¹⁹¹ Collectively, these additional enforcement powers are likely to prove effective in combating LGBT-oriented discrimination in ways that ENDA would not, just as Executive Order 11246 has proven effective in combating race and sex discrimination notwithstanding the existence of Title VII.¹⁹²

Although ENDA appears destined to die with the adjournment of the 113th Congress, President Obama may extend meaningful employment protections to approximately 500,000 private sector LGBT workers by amending Executive Order 11246 to include gender identity and sexual orientation as subcategories of the existing "sex" classification. This would ensure that OFCCP interprets the order's "sex" provision in

186. JEFF KREHELY & CROSBY BURNS, CTR. FOR AM. PROGRESS, A ONE-TWO PUNCH FOR WORKER PROTECTION (Apr. 4, 2012), available at <http://www.americanprogress.org/issues/lgbt/news/2012/04/04/11393/a-one-two-punch-for-worker-protection/>.

187. U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, MEMORANDUM OF UNDERSTANDING BETWEEN U.S. DEPARTMENT OF LABOR AND EQUAL EMPLOYMENT OPPORTUNITY COMMISSION 6 (Nov. 7, 2011), available at <http://www.dol.gov/ofccp/OFCCPNews/november11.htm>.

188. Office of Fed. Contract Compliance Programs, U.S. Dep't of Labor, Executive Order 11246, <http://www.dol.gov/ofccp/regs/compliance/fs11246.htm> (last visited Feb. 26, 2014).

189. *Id.*

190. KREHELY & BURNS, *supra* note 186.

191. Office of Fed. Contract Compliance Programs, *supra* note 188.

192. KREHELY & BURNS, *supra* note 186. Like ENDA, Title VII provides workers with a single means of contesting systemic employment discrimination, i.e., filing a complaint with the EEOC. Thus, an LGBT-inclusive amendment to Executive Order 11246 would provide the federal government with an additional means of combating LGBT-related employment discrimination even if the EEOC and federal courts were to one day reach a consensus that discrimination on the basis of sexual orientation or gender identity is inherently a form of sex discrimination actionable under Title VII.

a manner consistent with *Macy v. Holder*¹⁹³ while proactively advancing the related proposition that sexual orientation discrimination is itself a form of sex discrimination predicated on LGB individuals' failure to conform to gender stereotypes.

Amending Executive Order 11246 in this manner would signal President Obama's support for a burgeoning movement within the federal judiciary whereby LGBT-oriented employment discrimination is regarded as actionable sex discrimination under Title VII. Whereas, at present, only a handful of federal courts permit openly LGBT workers to state cognizable sex discrimination claims, President Obama's issuance of an LGBT-inclusive amendment to Executive Order 11246 would likely prove influential in persuading additional courts to extend employment protections to LGBT workers via the "sex" classification of Title VII. In this way, President Obama would provide explicit status-based protections to private sector LGBT workers employed by federal contractors, while at the same time providing an impetus for federal courts to permit all private sector workers, regardless of whether they happen to be employed by a federal contractor, to contest LGBT-related employment discrimination as actionable sex discrimination under Title VII.

CONCLUSION

John Boehner recently declared there is "no way" ENDA will pass the House during the 113th Congress.¹⁹⁴ While Speaker Boehner and his colleagues would have the public believe their opposition is predicated on ENDA's potential to elicit frivolous lawsuits, increase regulatory burdens, and undermine religious freedoms, a closer examination of the proffered rationales confirms that they are as likely to be motivated by anti-LGBT animus as they are sincerely-held concerns regarding free enterprise and religious liberty. For these legislators, no amount of revisions to ENDA's substantive provisions would be sufficient to win their support because they fundamentally disagree with the bill's basic premise that LGBT persons are deserving of workplace protections.

President Obama, therefore, should act unilaterally and issue two executive orders providing meaningful employment protections to LGBT workers. Amending Executive Order 11478 to include gender

193. See Nan D. Hunter et al., *The Relationship Between the EEOC's Decision that Title VII Prohibits Discrimination Based on Gender Identity and the Enforcement of Executive Order 11246*, WILLIAMS INST., May 2012, available at <http://williamsinstitute.law.ucla.edu/research/workplace/eec-title-vii-decision-eo-11246/> (noting that "it is the OFCCP's policy and practice to interpret EO 11246's non-discrimination requirements to be the same as Title VII's requirements" and "this policy and practice indicates that the OFCCP will likely treat complaints of gender identity discrimination filed under EO 11246 as actionable complaints of sex discrimination, consistent with the EEOC's recent" decision in *Macy*).

194. Chris Johnson, *Boehner Tells LGBT Caucus 'No Way' ENDA Will Pass*, WASH. BLADE (Jan. 29, 2014), <http://www.washingtonblade.com/2014/01/29/boehner-tells-lgbt-caucus-way-enda-will-pass/>.

identity and sexual orientation as subcategories of the existing “sex” classification would ensure that federal civilian employees are able to contest instances of gender identity or sexual orientation discrimination in the same manner as instances of race, color, religion, national origin, handicap, or age discrimination. Moreover, amending the order in this manner would serve to affirm the EEOC’s 2012 decision in *Macy v. Holder*, which found that discrimination on the basis of an individual’s transgender status is *per se* actionable under Title VII as a form of sex discrimination, while proactively advancing the related proposition that sexual orientation discrimination is itself a form of sex discrimination predicated on LGB individuals’ failure to conform to gender stereotypes.

Historically, federal courts have been inclined to dismiss sex discrimination claims brought by openly LGBT workers for fear these individuals were attempting to bootstrap sexual orientation and gender identity protections into Title VII. Within the last few years, however, a small but significant number of courts have allowed openly LGBT persons to contest employment discrimination on a gender-stereotyping theory of sex discrimination. The inclusion of gender identity and sexual orientation within Executive Order 11478’s existing “sex” classification would signal President Obama’s support for this more expansive understanding of sex discrimination.

Separately, amending Executive Order 11246 to include gender identity and sexual orientation as subcategories of the existing “sex” classification would provide explicit employment protections to the 500,000 LGBT individuals working for federal contractors while at the same time encouraging federal courts to adopt an LGBT-inclusive interpretation of Title VII’s “sex” classification that would extend employment protections to all private sector LGBT workers, not just those employed by federal contractors. Although President Obama is ostensibly concerned that such an order would lead to accusations of executive overreach while at the same time inciting additional congressional opposition to ENDA, House Republicans have already indicated that they have no intention of allowing a floor vote on ENDA and President Obama need not be overly concerned by the prospect of conservative criticism now that he is in his second term.

