

CHAPTER 19

THE EMPLOYMENT NON-DISCRIMINATION ACT:
ITS SCOPE, HISTORY, AND PROSPECTS

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I. INTRODUCTION

The Employment Non-Discrimination Act (ENDA) is a proposed federal bill that would prohibit discrimination in hiring and employment based on an individual’s actual or perceived sexual orientation or gender identity by civilian, nonreligious employers who employ at least 15 employees.¹

¹See generally Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (2013), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:hr1755;> Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:s815>. Inasmuch as H.R. 1755 and S. 815 appear to be identical, except as

Advocates for lesbian, gay, bisexual, and transgender (LGBT) people and their congressional allies have fought for the passage of some form of ENDA for more than four decades, including the 113th Congress, which commenced in January 2013.

In June 2012, attorney and transgender rights advocate Kylar Broadus testified before the Senate Health, Education, Labor, and Pensions Committee (Senate HELP Committee). He described how his gender affirmation elicited open abuse from his coworkers and contributed to his eventual termination:

After I announced my gender transition, it only took six months before I was “constructively discharged” from my employer. While my supervisors could tolerate a somewhat masculine-appearing black woman, they were not prepared to deal with my transition to being a black man. With growing despair, I watched my professional connections, support and goodwill evaporate, along with my prospects of remaining employed. I was harassed until I was forced to leave. I received harassing telephone calls hourly from my supervisor some days. I received assignments after hours that were due by 9 a.m. the next morning. The stress was overwhelming. I ended up taking a stress leave for several weeks. I thought upon my return perhaps things would settle down. I was back less than a week from stress leave and knew that it wasn’t going to settle down. I was forbidden from talking to certain people and my activities were heavily monitored. I was forced out and unemployed for about a year before finally obtaining full-time employment.²

Broadus warned that his experience was not unique: “It’s devastating, it’s demoralizing and dehumanizing to be put in that position. I sit here as

otherwise noted in the discussion in this chapter, citations in the chapter will be to S. 815, as introduced on April 25, 2013. As explained in greater detail in Section III.D. *infra*, on July 10, 2013, the Senate Committee on Health, Education, Labor, and Pensions (Senate HELP Committee) approved, subject to any technical and conforming changes to be made by Committee staff, a substitute version of S. 815 that contains a few amendments that added text to the bill. On September 12, 2013, the amended version of the Senate bill was reported to the Senate. On November 7, 2013, the full Senate approved a further amendment relating to religious freedom and passed ENDA. On November 12, 2013, the Senate forwarded S. 815 to the House of Representatives for action. Please note that this history of ENDA is current as of April 30, 2014.

In response to requests from the Senate HELP Committee, the Government Accounting Office (GAO) has provided the Committee with six reports on the status of state laws prohibiting discrimination based on sexual orientation and gender identity. These reports, issued on October 23, 1997 (GAO/OGC-98-7R), April 28, 2000 (GAO/OGC-00-27R), April 19, 2002 (GAO-02-665R), July 9, 2002 (GAO-02-878R), October 1, 2009 (GAO-10-135R), and July 31, 2013 (GAO-13-700R), are available on the GAO’s website at www.gao.gov. Links to GAO reports are set forth in the overview in Chapter 20 (Survey of State Laws Regarding Gender Identity and Sexual Orientation Discrimination in the Workplace).

²*Employment Non-Discrimination Act of 2011: Equality at Work, Hearing on S. 811 Before the U.S. Senate Committee on Health, Education, Labor, and Pensions* (June 12, 2012) [hereinafter *2012 Senate Hearing*] (testimony of Kylar W. Broadus, Founder, Trans People of Color Coalition). The video recording of the hearing and the prepared statements submitted by the witnesses who testified live are available at www.help.senate.gov/hearings/hearing/?id=bc503bd3-5056-9502-5da9-beea5048efc9. The quote in the text above is drawn from Broadus’ written statement, which is available at www.help.senate.gov/imo/media/doc/Broadus.pdf. See also Erin Mershon, *ENDA Senate Hearing Draws Testimony from First Publicly Open Transgender Person*, HUFFINGTON POST (June 12, 2012), available at www.huffingtonpost.com/2012/06/12/enda-senate-hearing-transgender_n_1590902.html.

a 50-year-old man wondering what I am going to do, and other people are in much worse situations than I.”³

Although ENDA’s passage is still far from certain, this chapter will discuss in greater detail the impact ENDA would have on both employers and their employees if—and perhaps when—it becomes law.

- The chapter begins by analyzing the specific terms of the bill, with a particular focus on the employers ENDA covers, what exactly is prohibited, and what exemptions exist.
- The chapter next provides a brief legislative history of ENDA, including a summary of congressional hearings, to give the reader a sense of how the legislation has evolved and been shaped by the political process. As of April 30, 2014, Congress had held 11 hearings and issued three reports regarding ENDA.⁴ The full Senate had voted twice on ENDA, and the full House of Representatives had voted once on the legislation.
- Finally, the chapter examines the past and present controversies and challenges facing ENDA, as a means of providing insight into ENDA’s prospects for passage and potential changes in future drafts of the bill.

Given that ENDA’s history has roots going back 40 years, this chapter can provide only a broad overview of its history, but through this history, it also aims to offer enough details to provide insight into its future.⁵

II. WHAT DOES THE EMPLOYMENT NON-DISCRIMINATION ACT SAY?

ENDA is modeled on existing federal legislation providing employment protections to individuals based on race, color, religion, sex, national origin, age, and disability. ENDA draws on the language of and concepts from Title VII of the Civil Rights Act of 1964⁶ to ban discrimination in employment based on actual or perceived sexual orientation or gender identity. However, ENDA also differs from Title VII in important ways that this section will explore.

³Julie Bolcer, *With Senate Hearing, Hope for a Jumpstart on ENDA*, ADVOCATE (June 12, 2012), available at www.advocate.com/politics/2012/06/12/senate-hearing-hope-jumpstart-enda.

⁴Two of those hearings were on predecessor legislation that also reached other areas, such as housing and public accommodations.

⁵Readers who want to delve more deeply into the legislative history should review the law review articles and legislative reports and hearings cited in this chapter. Several timelines of ENDA legislation are available on the following websites: Human Rights Campaign (www.hrc.org/resources/entry/employment-non-discrimination-act-legislative-timeline); National Gay and Lesbian Task Force (www.thetaskforce.org/issues/nondiscrimination/timeline); and Wikipedia (http://en.wikipedia.org/wiki/Employment_Non-Discrimination_Act). The Wikipedia article links each House and Senate version of the ENDA bills (1994–present) to the Library of Congress’s THOMAS database.

⁶42 U.S.C. §2000e *et seq.*

A. To Whom Does the Employment Non-Discrimination Act Apply?

ENDA defines “sexual orientation” as “homosexuality, heterosexuality, or bisexuality.”⁷ “Gender identity” is defined as “gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.”⁸ Thus, for example, a heterosexual employee who is discriminated against because the individual does not conform to the sex or gender stereotypes associated with that individual’s sex would have a cause of action under ENDA, just as an LGBT person would.⁹

ENDA incorporates the definition of “employee” from Title VII: “an individual employed by an employer.”¹⁰ ENDA also extends employment protections specifically to state and federal government employees; it does this

⁷S. 815, 113th Cong. §3(a)(9). In the September and November 2013 versions of the Senate bill, the subsection is §3(a)(10).

⁸S. 815, 113th Cong. §3(a)(6). In the September and November 2013 versions of the Senate bill, the subsection is §3(a)(7). The September 2013 Senate Report accompanying S. 815 further explains the following:

With respect to gender identity, the committee notes that gender transition is the process of a transgender individual publicly changing his or her gender presentation to be consistent with his or her gender identity. This process usually involves changes to name, personal appearance, voice and mannerisms. In some cases, it could mean medical procedures, including hormone therapy, sex-reassignment surgeries, and other procedures that are generally conducted under medical supervision. The committee emphasizes that an individual’s gender transition is unique and personal to each transgender employee. State laws that prohibit discrimination based on sexual orientation or gender identity do not include language defining gender transition; nor do they otherwise prescribe what steps a transgender employee must take in order to be treated in a nondiscriminatory manner that is consistent with his or her gender identity. The committee notes that every gender transition is unique. Therefore, it is the committee’s intent that nothing in this Act be read as establishing what an individual’s gender transition must entail. If an employee has undergone a gender transition prior to the time of employment, the duty of nondiscrimination applies on the basis of the employee’s gender as established at the time of employment. The employer need not inquire, and the employee need not disclose, information regarding the employee’s transition. The employer’s obligation is simply not to discriminate in the event that the past transition comes to the employer’s attention.

However, the term “notified” in section 8(a)[, which pertains to dress or grooming standards,] indicates that an employee who undergoes gender transition on the job must take some affirmative step to communicate the matter to the employer. Notification may be written or oral, and need not be in any specified form or use any “magic words,” so long as it is sufficient for the employer to understand.

S. REP. NO. 113-105, at 6–7 (Sept. 12, 2013) (Committee on Health, Education, Labor, and Pensions), available at www.gpo.gov/fdsys/pkg/CRPT-113srpt105/pdf/CRPT-113srpt105.pdf [hereinafter *2013 Senate Report*] (footnotes omitted).

⁹As discussed in Chapter 14 (Title VII of the Civil Rights Act of 1964), discrimination based on gender stereotypes is barred by Title VII’s prohibition against sex discrimination. Enactment of ENDA would effectively eliminate the defense that some courts have permitted employers to raise that the discrimination confronted by LGBT employees is not due to the employees’ gender nonconformity but is because of their sexual orientation or gender identity.

¹⁰S. 815, 113th Cong. §3(a)(3)(A)(i), incorporating by reference 42 U.S.C. §2000e(f). In the September and November 2013 versions of the Senate bill, the subsection is §3(a)(4)(A)(i). Title VII excludes from the definition of “employee” publicly elected officials, their personal staff, appointees with policy-making powers, and immediate advisors. *Id.* However, these individuals may have some protections afforded by civil service laws and the Government Employee Rights Act of 1991. *See id.*; 42 U.S.C. §2000e-16c(a). *See generally* BARBARA T. LINDEMANN,

by incorporating those employees' eligibility for recourse from employment discrimination under the Equal Employment Opportunity Act of 1972, the Government Employee Rights Act of 1991, the Congressional Accountability Act of 1995, and the Presidential and Executive Office Accountability Act of 1996.¹¹ ENDA expressly excludes unpaid volunteers from the definition of "employee."¹²

ENDA's determination of what constitutes an "employer" is more nuanced, as is true for the Title VII definition of "employer" as well. An "employer" is "a person engaged in an industry affecting commerce . . . who has 15 or more employees . . . for each working day in each of 20 or more calendar weeks in the current or preceding calendar year."¹³ "Employer" also includes an "employing authority" and an "employing office" as those terms are defined in the Government Employee Rights Act of 1991, the Congressional Accountability Act of 1995, and the Presidential and Executive Office Accountability Act of 1996, as well as an entity to which the Equal Employment Opportunity Act of 1972 applies, thereby establishing state and federal governments and agencies as employers for the purposes of ENDA compliance.¹⁴

However, there are three categories of employers who are exempted from ENDA compliance:

- The first category is bona fide private membership clubs that have Internal Revenue Code Section 501(c) tax-exempt status, with the sole exception of labor unions.¹⁵
- The second category includes the five branches of the Armed Forces: Army, Navy, Air Force, Marine Corps, and Coast Guard.¹⁶ A corollary to the military exemption is ENDA's inapplicability to any federal, state, or local laws that bestow special rights and preferences concerning employment for veterans.¹⁷

PAUL GROSSMAN, & C. GEOFFREY WEIRICH, EMPLOYMENT DISCRIMINATION LAW ch. 22 (Employers), §1.B.3. (5th ed. 2012) [hereinafter EMPLOYMENT DISCRIMINATION LAW].

¹¹S. 815, 113th Cong. §3(a)(3)(A)(ii–iv), incorporating by reference those individuals covered by 42 U.S.C. §2000e-16b(a)(1) (part of the Government Employee Rights Act of 1991); 2 U.S.C. §1301(3) (part of the Congressional Accountability Act of 1995); 3 U.S.C. §411(c)(1) (part of the Presidential and Executive Office Accountability Act of 1996); and 42 U.S.C. §2000e-16(a) (part of the Equal Employment Opportunity Act of 1972). In the September and November 2013 versions of the Senate bill, the subsection is §3(a)(4)(A)(ii–iv).

¹²S. 815, 113th Cong. §3(a)(3)(B). In the September and November 2013 versions of the Senate bill, the subsection is §3(a)(4)(B).

¹³S. 815, 113th Cong. §3(a)(4)(A). In the September and November 2013 versions of the Senate bill, the subsection is §3(a)(5)(A).

¹⁴S. 815, 113th Cong. §3(a)(4)(B)–(D) (incorporating by reference 42 U.S.C. §2000e-16b(a)(1) (part of the Government Employee Rights Act of 1991); 2 U.S.C. §1301(9) (part of the Congressional Accountability Act of 1995); 3 U.S.C. §411(c)(2) (part of the Presidential and Executive Office Accountability Act of 1996); and 42 U.S.C. §2000e-16(a) (part of the Equal Employment Opportunity Act of 1972)). In the September and November 2013 versions of the Senate bill, the subsection is §3(a)(5)(B)–(D).

¹⁵S. 815, 113th Cong. §3(a)(4)(A). In the September and November 2013 versions of the Senate bill, the subsection is §3(a)(5)(A).

¹⁶S. 815, 113th Cong. §7(a).

¹⁷*Id.* §7(b).

- The third and most extensive category includes religious organizations. ENDA expressly references Title VII’s religious exemptions,¹⁸ which permit religious associations, corporations, educational institutions, and societies to discriminate based on religion in a range of ways that other entities may not. Title VII also permits religious and nonreligious entities to discriminate based on religion, sex, or national origin if that discrimination relates to a bona fide occupational qualification that is reasonably necessary to the normal operation of their businesses.¹⁹ By contrast, ENDA’s religious exemption goes further and completely frees religious entities, which include schools, colleges, universities, and other educational institutions that are either substantially controlled by a religious organization or have a curriculum directed toward the propagation of a particular religion, from any obligation to comply with ENDA’s prohibitions.²⁰

¹⁸*Id.* §6, which exempts from ENDA’s coverage those associations, corporations, educational institutions or institutions of learning, and societies that are exempt from the religious discrimination provisions of Title VII pursuant to 42 U.S.C. §§2000e-1(a) and 2000e-2(e)(2). In the November 2013 version of the Senate bill, the full text of what was §6 in the initial version of the 2013 Senate bill was recast as new subsection 6(a), with the new subsection referring to the exempted religious organizations as “religious employers.” *Id.* §6(a) (as passed by the full Senate on Nov. 7, 2013).

42 U.S.C. §2000e-1(a) provides in relevant part:

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

42 U.S.C. §2000e-2(e)(2) provides in relevant part:

Notwithstanding any other provision of [Title VII], . . . it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

Discussion of Title VII’s prohibition against discrimination based on religion and the exemptions that religious institutions have to the applicability of Title VII is beyond the scope of this treatise. *See generally* EMPLOYMENT DISCRIMINATION LAW chs. 9 (Religion) and 20 (Sexual and Other Forms of Harassment), §III.C.; BARBARA T. LINDEMANN & DAVID D. KADUE, WORKPLACE HARASSMENT LAW ch. 11 (Harassment Because of Religion), §III.D., and ch. 17 (Harassment Not Because of a Protected Basis), §IV. (2012).

¹⁹42 U.S.C. §2000e-2(e)(1).

²⁰S. 815, 113th Cong. §6; *see also* H.R. REP. NO. 110-406 pt. 1, at 32 (Oct. 22, 2007) (Committee on Education and Labor), *available at* www.gpo.gov/fdsys/pkg/CRPT-110hrpt406/pdf/CRPT-110hrpt406-pt1.pdf [hereinafter *2007 House Report*] (“insofar as a religious organization is exempt from Title VII religious discrimination claims, it is exempt from sexual orientation discrimination claims under ENDA”); Crosby Burns and Jeff Krehely, *The Freedom to Work, the Freedom to Worship: The Employment Non-Discrimination Act Advances Workplace Equality and Protects Religious Liberty*, CENTER FOR AMERICAN PROGRESS 3–4 (June 2012), *available at* www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/enda_final.pdf (“In other words ENDA gives religious organizations a legal right to discriminate on the basis of sexual orientation and gender identity. . . . In this way ENDA does not threaten but instead advances the freedom of religion in the United States. This is why dozens of religious organizations and

Indeed, according to a 2013 report prepared for members and committees of the U.S. Congress by the nonpartisan Congressional Research Service, ENDA's religious exemption

does not appear to limit the permissibility of religious organizations' discrimination based on sexual orientation or gender identity to instances in which those factors may conflict with religious beliefs. For example, under the legislation, even religious organizations whose religious teachings do not oppose homosexuality could be permitted to refuse to hire a gay applicant. Thus, the proposed legislation likely would not interfere with religious organizations' employment practices involving considerations of sexual orientation or gender identity of employees and applicants. To the contrary, it may actually broaden these organizations' ability to discriminate in hiring. In this sense, the ENDA exception goes farther than the Title VII [exemption], which allows religious employers to discriminate on the basis of religion but not on the basis of race, color, national origin, or sex.²¹

So long as a religious employer objects to a particular individual's sexual orientation or gender identity, ENDA's religious exemption would permit that employer to not hire or retain that individual.²²

As discussed in Section III.D.5. *infra*, in November 2013 the full Senate approved a further amendment relating to religious freedom.

Finally, ENDA would also apply to employment agencies and labor organizations.²³

B. What Is Prohibited?

ENDA would prohibit employers from intentionally discriminating against employees based on their sexual orientation or gender identity, actual or perceived. ENDA's protections cover discrimination relating to hiring; compensation; promotion; and the terms, conditions, or privileges associated with employment.²⁴ Further, by incorporating the phrase "terms, conditions, or privileges of employment" from Title VII, ENDA incorporates the Title VII jurisprudence that creates a cause of action for any individual who works in a discriminatorily hostile or abusive environment.²⁵ The 2007 House of Representatives Committee on Education and Labor Report on ENDA described hostile environment coverage in this

faith-based communities have come out in strong support of ENDA, often citing the importance of ENDA's religious protections as a reason to support the bill.").

²¹JODY FEDER & CYNTHIA BROUGH, SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION IN EMPLOYMENT: A LEGAL ANALYSIS OF THE EMPLOYMENT NON-DISCRIMINATION ACT (ENDA) 7 (July 15, 2013), Congressional Research Service, R40934, available at www.fas.org/sgp/crs/misc/R40934.pdf.

²²ENDA's religious exemption is discussed further in Section III.D.4. *infra*.

²³S. 815, 113th Cong. §3(a)(5) and (7), incorporating by reference the definitions of "employment agency" and "labor organization" set forth in 42 U.S.C. §2000e(c)-(d). In the September and November 2013 versions of the Senate bill, the subsections are §3(a)(6) and (8).

²⁴S. 815, 113th Cong. §4(a).

²⁵*See, e.g., Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63-65, 40 FEP 1822 (1986). Hostile work environment claims under Title VII are discussed in Chapter 14 (Title VII of the Civil Rights Act of 1964).

way: “ENDA creates an actionable discrimination claim based on hostile work environment when, for example, the workplace is permeated with discriminatory intimidation, ridicule, or insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment.”²⁶

Employment agencies would be prohibited from denying service to individuals based on actual or perceived sexual orientation or gender identity.²⁷ Similarly, labor organizations would be barred from denying membership to, depriving employment opportunities from, or otherwise discriminating against individuals because of their actual or perceived sexual orientation or gender identity.²⁸

Three additional provisions address association discrimination, retaliation, and quotas. In particular, employers, employment agencies, and labor organizations may not

- engage in otherwise prohibited conduct against an individual based on the actual or perceived sexual orientation or gender identity of a person with whom the individual associates or has been associated;²⁹
- retaliate against an individual who has opposed any practice that would be prohibited under ENDA, alleged a violation of ENDA, or participated in an investigation or other proceeding related to an ENDA violation;³⁰ or
- grant preferential treatment to ameliorate a workplace imbalance based on sexual orientation or gender identity or adopt or implement a quota based on sexual orientation or gender identity.³¹

C. What Is Not Prohibited?

Employers retain the ability to enforce reasonable dress and grooming standards for employees during work hours.³² However, employers must permit employees who have undergone or are undergoing a gender transition to adhere to the standards that apply to the gender to which the employees

²⁶2007 House Report, at 31 & n.132, available at www.gpo.gov/fdsys/pkg/CRPT-110hrpt406/pdf/CRPT-110hrpt406-pt1.pdf (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21, 63 FEP 225 (1993)).

²⁷S. 815, 113th Cong., §4(b).

²⁸*Id.* §4(c).

²⁹*Id.* §4(e). Discrimination based on association is also discussed in Chapters 14 (Title VII of the Civil Rights Act of 1964) and 16 (The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973).

³⁰S. 815, 113th Cong., §5.

³¹*Id.* §4(f). In addition, the EEOC may not compel the collection of, or require the production of, statistics on sexual orientation or gender identity from employers, employment agencies, or labor organizations. *Id.* §9. As explained in Section III.D.2. *infra*, on July 10, 2013, the Senate HELP Committee approved, subject to any technical and conforming changes to be made by Committee staff, a substitute version of S. 815 that contains a handful of amendments. One of these amended §9 of the bill to extend the bar on the collection or production of statistics to the U.S. Department of Labor.

³²S. 815, 113th Cong. §8(a).

have transitioned or are transitioning.³³ The grooming and dress standards selected by the employer also cannot violate any federal, state, or local laws.³⁴

ENDA also specifies that employers need not construct new or additional facilities, such as bathrooms.³⁵

D. How Would the Employment Non-Discrimination Act Be Enforced?

ENDA creates a cause of action for any individual who is discriminated against in employment because of his or her actual or perceived sexual orientation or gender identity. In general, individuals would file claims in the same manner as they would file discrimination claims under Title VII and other laws such as the Government Employee Rights Act of 1991, the Congressional Accountability Act of 1995, and the Presidential and Executive Office Accountability Act of 1996.³⁶

For example, in the case of a private-sector employee who has experienced discrimination, the employee first must file a complaint with the U.S. Equal Employment Opportunity Commission (EEOC).³⁷ After investigation, the EEOC can pursue legal action against the employer if it believes the employer has violated ENDA; if the EEOC declines to do so, the employee may independently file a lawsuit.³⁸ If an individual plaintiff or the EEOC prevails in litigation, the employee may receive injunctive relief (including reinstatement) as well as back pay, other equitable relief, and compensatory and punitive damages to the same extent as available under Title VII.³⁹ The prevailing party may be awarded attorneys' fees and costs, although the EEOC is not entitled to attorneys' fees.⁴⁰

ENDA imposes one important restriction on the cause of action available to those who have been discriminated based on their sexual orientation or gender identity: Potential claimants can only assert disparate treatment theories.⁴¹ ENDA forbids the use of a disparate impact theory—in which

³³*Id.* Appearance, dress, and grooming codes are discussed extensively in Chapter 35 (Appearance, Dress, and Grooming Codes).

³⁴S. 815, 113th Cong. §8(a).

³⁵*Id.* §8(b). Gender-segregated facilities are discussed extensively in Chapters 36 (Gender-Segregated Facilities) and 42 (The “Bathroom Bill” Security Concerns Debunked).

³⁶S. 815, 113th Cong. §10(a)(1)–(5). *See generally* EMPLOYMENT DISCRIMINATION LAW pts. V (Procedural Issues) and VII (Remedies).

³⁷ENDA grants the EEOC the “same powers as [it] has to administer and enforce” Title VII. S. 815, 113th Cong. §10(a)(1)(A), incorporating by reference 42 U.S.C. §2000e-5. With respect to discrimination claims brought by federal employees, *see generally* EMPLOYMENT DISCRIMINATION LAW ch. 32 (Federal Employee Litigation).

³⁸S. 815, 113th Cong. §10(a)(1)(A), 6(A). *See* Chapters 22 (Transgender Discrimination Claims: A Plaintiff Perspective on Proofs and Trial Strategies) and 23 (Transgender Discrimination Claims: A Defense Perspective on Proofs and Trial Strategies) for employment litigation tactics and strategies; *see generally* EMPLOYMENT DISCRIMINATION LAW chs. 29 (Title VII Litigation Procedure) and 30 (EEOC Litigation).

³⁹S. 815, 113th Cong. §10(b)(1); 42 U.S.C. §§1981a(1) and 2000e-5(g). Remedies in actions involving governmental employers are covered in S. 815 at §11(c)–(d).

⁴⁰S. 815, 113th Cong. §12. The July 10, 2013, Senate HELP Committee’s manager’s amendment made minor technical changes to the language of §12.

⁴¹S. 815, 113th Cong. §4(g).

a facially neutral regulation is alleged to be discriminatory in operation—to prove ENDA violations.⁴² To state a claim under ENDA, therefore, an individual must allege that he or she was singled out and treated less favorably than others similarly situated based on his or her sexual orientation or gender identity. As with disparate treatment cases under Title VII, this requires an allegation that the employer acted with discriminatory intent.⁴³

E. Why Is the Employment Non-Discrimination Act Necessary?

Many states and localities have taken steps to provide protections against discrimination based on sexual orientation or gender identity in the absence of federal legislation. Eighteen states, the District of Columbia, and Puerto Rico have enacted legislation prohibiting employment discrimination based on both sexual orientation and gender identity, and another three states have enacted legislation limited to employment discrimination based on sexual orientation.⁴⁴ At least 190 cities and counties have taken action at the local level to prohibit discrimination based on gender identity.⁴⁵ Many businesses have also voluntarily extended protections to employees for sexual orientation discrimination. In 2012, nearly 97 percent of the Fortune 500 companies voluntarily included sexual orientation in their employment nondiscrimination policies.⁴⁶ In 2013, 61 percent of these companies also included gender identity in their nondiscrimination policies.⁴⁷

In spite this progress, 49 percent of the American population lives in states with no protections.⁴⁸ In 29 states, discrimination based on sexual orientation is still permitted.⁴⁹ In 32 states, it is legal to fire someone solely for being transgender.⁵⁰

Further, discrimination based on sexual orientation and gender identity is widespread. According to M.V. Lee Badgett—the research director of the Williams Institute and an economics professor at the University of

⁴²*Id.* The July 10, 2013, Senate HELP Committee’s manager’s amendment reinforced this limitation by amending the introductory language of §10(b), which pertains to “procedures and remedies,” to expressly cross-reference §4(g), which prohibits disparate impact claims.

⁴³*See, e.g.,* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 5 FEP 965 (1973). See generally Chapter 14 (Title VII of the Civil Rights Act of 1964), Section II.

⁴⁴See Chapter 20 (Survey of State Laws Regarding Gender Identity and Sexual Orientation Discrimination in the Workplace).

⁴⁵*Id.*

⁴⁶Press Release, Equality Forum, Record 483 (96.6%) of Fortune 500 Provide Sexual Orientation Protection (Aug. 30, 2012), *available at* <http://equalityforum.com/romney-enda-and-fortune-500>.

⁴⁷HUMAN RIGHTS CAMPAIGN FOUNDATION, CORPORATE EQUALITY INDEX 2014: RATING AMERICAN WORKPLACES ON LESBIAN, GAY, BISEXUAL AND TRANSGENDER EQUALITY 3, 6 (2013), *available at* www.hrc.org/corporate-equality-index.

⁴⁸Jerome Hunt, *A State-by-State Examination of Nondiscrimination Laws and Policies* 5 (Center for American Progress Action Fund 2012), *available at* www.americanprogress.org/issues/2012/06/pdf/state_nondiscrimination.pdf. This analysis was prepared before Delaware and Maryland extended their fair employment practices laws to bar discrimination based on gender identity.

⁴⁹See Chapter 20 (Survey of State Laws Regarding Gender Identity and Sexual Orientation Discrimination in the Workplace).

⁵⁰*Id.*

Massachusetts Amherst—who testified at the June 12, 2012, Senate hearing on ENDA, nearly 42 percent of lesbian, gay, and bisexual (LGB) people had experienced employment discrimination at some point in their lives.⁵¹ A survey of transgender people revealed that 78 percent of respondents reported experiencing at least one form of harassment or mistreatment at work.⁵²

Reliance on private businesses to voluntarily adopt nondiscrimination policies in lieu of federal protection is equally problematic. Although those policies can help in bringing about a workplace culture shift, they are notoriously difficult to enforce; many corporate defendants have been successful in fighting claims by arguing that the policies are vague or do not create an enforceable contractual duty.⁵³ In addition, many companies may be unlikely to adopt any form of discrimination protections for LGBT employees. ExxonMobil, for example, rejected adding sexual orientation to the company nondiscrimination policy in May 2012 because 80 percent of the shareholders voted against such a change.⁵⁴

ENDA would therefore provide baseline protections for employees against discrimination based on their sexual orientation or gender identity, rather than leave the rights of these employees to the whims of local voters or corporate shareholders.

F. Is the Employment Non-Discrimination Act Constitutional?

According to the bill, Congress would rely on two sources of constitutional authority for enacting ENDA: the Commerce Clause of Article 1, Section 8, and Section 5 of the Fourteenth Amendment to the U.S. Constitution.⁵⁵

⁵¹2012 Senate Hearing, available at www.help.senate.gov/hearings/hearing/?id=bc503bd3-5056-9502-5da9-beea5048efc9 (testimony of M.V. Lee Badgett, Research Director, UCLA Law School Williams Institute, and Director, University of Massachusetts Center for Public Policy and Administration). The text of Badgett's supplementary written statement is available at www.help.senate.gov/imo/media/doc/Badgett.pdf or <http://williamsinstitute.law.ucla.edu/research/workplace/testimony-s811-061212>. For additional analysis from the Williams Institute of the existence and impact of employment discrimination against LGBT people, see Chapter 40 (Employment Discrimination Against LGBT People: Existence and Impact).

⁵²*Id.*

⁵³Richard F. Ober Jr. & Ian Ayres, *Sexual Orientation Nondiscrimination Policies: The Hollow Promise*, ACC DOCKET 48, 50 (Oct. 2006), available at <http://islandia.law.yale.edu/ayres/hollowpromise.pdf>.

⁵⁴John Wright, *ExxonMobil Shareholders Again Reject LGBT Employment Protections*, DALLAS VOICE (May 30, 2012), available at www.dallasvoice.com/exxon-voted-lgbt-protections-10116107.html. Before the merger between Exxon and Mobil in 1999, Mobil had been one of the first Fortune 500 companies to include sexual orientation in its nondiscrimination policy and offer domestic partner benefits for same-sex partners. After the merger, the company rescinded sexual orientation from the nondiscrimination policy and discontinued the policy of providing benefits for same-sex partners. David Taffet, *Is This the Year ExxonMobil Changes Its Anti-Gay Ways?*, DALLAS VOICE (Mar. 29, 2013), available at www.dallasvoice.com/year-exxonmobil-anti-gay-ways-10105709.html.

⁵⁵S. 815, 113th Cong. §2(3). These same constitutional justifications have been set forth in the various iterations of ENDA, including the 2001 and 2013 ENDA bills and the 2007 version of ENDA that did not include protection against discrimination based on gender identity, as is explained in the Senate and House reports accompanying those bills. See S. REP. NO. 107-341, at 18–25 (Nov. 15, 2002) (Committee on Health, Education, Labor, and Pensions), available at www.gpo.gov/fdsys/pkg/CRPT-107srpt341/pdf/CRPT-107srpt341.pdf [hereinafter 2002 Senate Report]; 2007 House Report, at 27–30, available at www.gpo.gov/fdsys/pkg/CRPT-110hrpt406/

1. *The Commerce Clause*

Congress has a long history of enacting civil rights legislation based on its Commerce Clause authority. Commerce Clause jurisprudence has firmly established the authority of Congress to regulate economic activity that, in the aggregate, has a substantial impact on interstate commerce.⁵⁶ This power has been recognized to extend to the regulation of employees.⁵⁷ Congress relied on this theory of aggregate harm to interstate commerce in enacting Title VII,⁵⁸ the Americans with Disabilities Act of 1990 (ADA),⁵⁹ and the Age Discrimination in Employment Act of 1967 (ADEA),⁶⁰ and the U.S. Supreme Court has rejected arguments that Congress exceeded its powers under the Commerce Clause in enacting these laws.⁶¹

ENDA relies on this same theory: Sexual orientation discrimination impedes employers' productivity and has significant psychological and economic costs for LGBT workers in the form of unfair terms and conditions of employment as well as lost and lower wages to sustain themselves and their families. These significant workplace costs have regional and national effects, thereby affecting interstate commerce. Although the Supreme Court's decision regarding the Patient Protection and Affordable Care Act, in *National Federation of Independent Business v. Sebelius*,⁶² may have limited the scope of the Commerce Clause, its limitation is unlikely to affect ENDA's viability. The Court in *Sebelius* held that Congress could not rely on the Commerce Clause to regulate economic inactivity (in this case, the failure to buy health insurance).⁶³ By contrast, the activity ENDA regulates—the hiring, firing, and management of employees based on their actual or perceived sexual orientation or gender identity—is certainly economic activity.

As will be discussed later in this chapter, opponents of ENDA assert that the legislation would impose a moral viewpoint about homosexuality on

pdf/CRPT-110hrpt406-pt1.pdf; 2013 Senate Report, at 22–24, available at www.gpo.gov/fdsys/pkg/CRPT-113srpt105/pdf/CRPT-113srpt105.pdf.

⁵⁶See *Wickard v. Filburn*, 317 U.S. 111, 118–29 (1942) (upholding federal limits on farm production as applied to a local farmer who grew wheat for family consumption).

⁵⁷See *United States v. Darby*, 312 U.S. 100, 111–25, 1 WH 17 (1941) (upholding the Fair Labor Standards Act as applied to a local employer).

⁵⁸*Nesbit v. Gears Unlimited, Inc.*, 347 F.3d 72, 81, 92 FEP 1249 (3d Cir. 2003), cert. denied, 541 U.S. 959 (2004) (“Title VII applies to ‘employers’ and defines an ‘employer’ (in relevant part) as ‘a person engaged in an industry affecting commerce who has fifteen or more employees.’”).

⁵⁹42 U.S.C. §12101(b)(4) (listing among the ADA’s purposes “to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities”).

⁶⁰29 U.S.C. §621(a)(4) (listing a Congressional finding that “the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce”).

⁶¹See, e.g., *EEOC v. Wyoming*, 460 U.S. 226, 235–43, 31 FEP 74, 4 EB 1033 (1983) (extension of the ADEA to the states was a valid exercise of Commerce Clause power); *Heart of Atlanta Motel Inc. v. United States*, 379 U.S. 241, 252–62 (1964) (upholding the Civil Rights Act of 1964 as a valid exercise of Commerce Clause power on the grounds that restrictions in accommodations for African Americans severely interfered with interstate travel).

⁶²567 U.S. ___, 132 S. Ct. 2566, 53 EB 1513 (2012).

⁶³132 S. Ct. at 2589–91.

an unwilling public. Such an argument will not support a Commerce Clause challenge to ENDA because, as the Court observed in *Heart of Atlanta Motel Inc. v. United States*,⁶⁴ in the context of the Civil Rights Act of 1964:

That Congress was legislating against moral wrongs . . . rendered its enactments no less valid. In framing . . . this Act Congress was also dealing with what it considered a moral problem. But that fact does not detract from the overwhelming evidence of the disruptive effect that racial discrimination has had on commercial intercourse. It was this burden which empowered Congress to enact appropriate legislation, and, given this basis for the exercise of its power, Congress was not restricted by the fact that the particular obstruction to interstate commerce with which it was dealing was also deemed a moral and social wrong.⁶⁵

2. *The Fourteenth Amendment*

The Fourteenth Amendment is the second source of constitutional authority for ENDA because of its mandate that states guarantee equal protection of the law to all persons. More specifically, Section 5 of the Fourteenth Amendment, known as the Enforcement Clause, grants Congress the authority to pass legislation “to remedy and to deter violations of rights guaranteed” by the Fourteenth Amendment.⁶⁶ Valid legislation passed under Section 5 of the Fourteenth Amendment also abrogates the sovereign immunity normally afforded to States through the Eleventh Amendment.⁶⁷

The Supreme Court originally granted Congress wide authority to enact legislation under Section 5, holding that Congress has the ability to deter and remedy conduct that is not by itself forbidden under the Fourteenth Amendment.⁶⁸ However, later Supreme Court decisions have placed two limitations on prophylactic legislation. First, Congress cannot expand the scope of a substantive right beyond the limits established by the Supreme Court for the right at issue. The remedy the legislation seeks to provide must be “congruent and proportional” with the substantive right being protected—the statutory means must fit the constitutional violations sought to be remedied.⁶⁹ Second, when prophylactic legislation abrogates sovereign immunity, Congress must provide sufficient evidence of past unconstitutional state discrimination.⁷⁰

⁶⁴379 U.S. 241 (1964).

⁶⁵*Id.* at 257.

⁶⁶*Board of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 365, 11 AD 737 (2001) (quoting *Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 81, 81 FEP 970 (2000) (internal quotation marks omitted)).

⁶⁷*Kimel*, 528 U.S. at 80.

⁶⁸*Katzenbach v. Morgan*, 384 U.S. 641, 648–50 (1966).

⁶⁹*Garrett*, 531 U.S. at 374; *accord City of Boerne v. Flores*, 521 U.S. 507, 530, 74 FEP 62 (1997).

⁷⁰*See, e.g., Nevada Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 8 WH.2d 1221 (2003) (Chief Justice Rehnquist, on behalf of the Court, found that the evidence of sex discrimination—which is subject to heightened scrutiny—in the congressional record was sufficient to warrant the abrogation of sovereign immunity of states from money damages under the Family

Both limitations are related to the tier of judicial scrutiny the alleged constitutional violation would have invoked. For violations receiving a higher level of scrutiny, such as those based on race or sex, Congress can select a remedy that is broader and can provide less evidence of actual violations. Conversely, for violations receiving a lower level of scrutiny, Congress must select a more narrowly tailored remedy so as not to penalize constitutional behavior and must provide more evidence of actual unconstitutional conduct.⁷¹

ENDA likely satisfies both of these requirements to qualify as prophylactic legislation under Section 5 of the Fourteenth Amendment. Although the question of what tier of scrutiny sexual orientation or gender identity discrimination should receive is an issue courts across the nation are still struggling with, discrimination based on sexual orientation or gender identity in the employment context almost certainly fails any level of scrutiny, including rational basis review.⁷² Discrimination in employment based on these characteristics is more likely than not to be based on animus or prejudice, because one's sexual orientation or gender identity generally will not affect one's ability to perform a given job. The Supreme Court has held animus or hostility toward a group to be insufficient to survive even rational basis review.⁷³ Indeed, in 2013, in *United States v. Windsor*,⁷⁴ while invalidating Section 3 of the Defense of Marriage Act (DOMA),⁷⁵ which barred the federal government from recognizing same-sex couples' marriages, the Court observed:

[DOMA] violates basic due process and equal protection principles applicable to the Federal Government. The Constitution's guarantee of equality "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment of that group. In determining whether a law is motivated by an improper animus or purpose, "[d]iscriminations of an unusual character" especially require careful consideration. DOMA cannot survive under these principles. . . . The avowed purpose and practical effect of [DOMA] are to impose a disadvantage, a separate status, and so a stigma upon all who enter into same-sex marriages made lawful by the unquestioned authority of the States.

....

DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. . . . The differentiation demeans the couple, whose moral and sexual choices the Constitution protects, and whose relationship the State has sought to dignify. And it humiliates tens of thousands of children now being raised by same-sex couples. The law in

and Medical Leave Act; 538 U.S. at 728–40. In contrast, Justice Kennedy's dissent almost exclusively focused on what he perceived to be a paucity of evidence; *id.* at 745–59).

⁷¹ See Chapter 15 (Federal Equal Protection).

⁷² See Chapter 15 (Federal Equal Protection), Section V., and Chapter 16 (The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973), Section III.G.3.

⁷³ See *Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (O'Connor, J., concurring); *Romer v. Evans*, 517 U.S. 620, 632–35, 70 FEP 1180 (1996); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534–36 & n.7 (1973).

⁷⁴ 570 U.S. ___, 133 S. Ct. 2675, 118 FEP 1417 (2013).

⁷⁵ Pub. L. No. 104-199, §3 (Sept. 21, 1996) (codified at 1 U.S.C. §7).

question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.⁷⁶

ENDA's limitation to disparate treatment claims is likewise tailored to ensure that the statute reaches only the prohibited hostility. Congress has also marshaled an array of first-hand testimony regarding discrimination based on sexual orientation or gender identity during its hearings, such as that of Kylar Broadus.⁷⁷ In addition, the congressional record contains extensive statistical evidence, such as the 2008 study indicating that 42 percent of a national random sample of LGB people had experienced employment discrimination at some point in their lives.⁷⁸ In the largest survey of transgender people to date, also noted earlier, 78 percent of respondents reported experiencing at least one form of harassment or mistreatment at work.⁷⁹ The congressional record also includes testimony and a detailed report that documented that "there is a widespread and persistent pattern of unconstitutional discrimination against LGBT state government employees, as well as against local government employees; [and that] there is no meaningful difference in the pattern and scope of employment discrimination against LGBT people by state governments compared to what is found in the private sector or in federal or local government."⁸⁰

III. HISTORY

As this section will show, ENDA's history tracks both the evolving views and continuing struggle in American society about the permissibility of sexual orientation and gender identity discrimination.⁸¹

⁷⁶*Windsor*, 133 S. Ct. at 2693–94, 118 FEP at 1425–26 (citations omitted). The pernicious effects of DOMA and the impact of the *Windsor* decision are discussed in Chapters 15 (Federal Equal Protection), 18 (Immigration and LGBT Employees), and 37 (Employee Benefit Issues).

⁷⁷See 2012 Senate Hearing, available at www.help.senate.gov/hearings/hearing/?id=bc503bd3-5056-9502-5da9-beea5048efc9.

⁷⁸M.V. Lee Badgett, *Testimony on S. 811, The Employment Non-Discrimination Act of 2011* (June 12, 2012), available at www.help.senate.gov/imo/media/doc/Badgett.pdf and <http://williamsinstitute.law.ucla.edu/research/workplace/testimony-s811-061212>.

⁷⁹*Id.*

⁸⁰*The Employment Non-Discrimination Act of 2009, Hearing on H.R. 3017 Before the U.S. House of Representatives Committee on Education and Labor*, No. 111-32, 111th Cong. 51 (Sept. 23, 2009) available at www.gpo.gov/fdsys/pkg/CHRG-111hhrg52242/pdf/CHRG-111hhrg52242.pdf and <http://democrats.edworkforce.house.gov/hearing/hr-3017-employment-non-discrimination-act-2009> [hereinafter 2009 House Hearing] (statement of Brad Sears, Executive Director, UCLA School of Law Williams Institute). The video recording of the hearing is available at <http://edwork.edgeboss.net/wmedia/edwork/fc/fc092309.wvx>. See Brad Sears et al., *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment* (Williams Institute 2009), available at <http://williamsinstitute.law.ucla.edu/research/workplace/documenting-discrimination-on-the-basis-of-sexual-orientation-and-gender-identity-in-state-employment>. Brad Sears and Christy Mallory also discuss this topic in Chapter 40 (Employment Discrimination Against LGBT People: Existence and Impact).

⁸¹For a comprehensive review of the history of ENDA from 1974 to 1999, see Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in *CREATING CHANGE: SEXUALITY,*

The first national legislative proposal to end discrimination against LGB individuals was introduced in 1974, although it would take another six years before there would be a congressional hearing on the legislation. In this early version, ENDA (then called the Equality Act) would have outlawed not only employment discrimination but also discrimination in other areas, including housing and public accommodations. At the 1980 hearing, spirits ran high. Indeed, the very first speaker, Art Agnos, a California-based public policy specialist who later served as mayor of San Francisco, indicated that this bill could be a significant, positive step in the direction of legalizing marriage for gay and lesbian couples.⁸² After Mr. Agnos' surprising candor, the remaining speakers continued the optimism. During this first hearing, there were few voices of dissent and the atmosphere remained lively throughout.

As ENDA transformed over the years, however, speakers in favor began to recognize that LGB-rights legislation would not pass easily through Congress. The bill continued to be introduced, but the focus and tone of advocates shifted. During later congressional sessions, hearings concentrated on ENDA's economic benefits and data related to discrimination rather than on more general discussions about the lives of LGB individuals.

In the early 2000s, criticism abounded that the focus of ENDA had become too narrow, and many LGBT organizations were split between their support for and disapproval of the bill. Tensions came to a head when in 2007 the Human Rights Campaign (HRC), the leading LGBT advocacy group on Capitol Hill, supported Representative Barney Frank's (D-Mass.) decision to remove gender identity from ENDA, just six months after gender identity had been added to the legislation for the first time. Those tensions resolved, at least to a degree, when ENDA was eventually reintroduced in 2009 with gender identity protections added back in.

At the beginning of 2014, ENDA was yet again before both houses of Congress. Although its fate was unclear, LGBT advocates were hopeful that the significant, positive shift in public opinion and the landmark *Windsor* DOMA decision would help convince Congress that the time had come for equal employment rights for LGBT people.

A. 1974–1992

1. Overview

On May 14, 1974, during the 93rd Congress, Representative Bella Abzug (D-N.Y.) introduced the first national legislative proposal to end

PUBLIC POLICY, AND CIVIL RIGHTS 149 (John D'Emilio et. al. eds. 2000) [hereinafter *From Bella to ENDA*].

⁸²*The Civil Rights Amendments Act of 1979: Hearing on H.R. 2074 Before the Subcommittee on Employment Opportunities of the U.S. House of Representatives Committee on Education and Labor*, 96th Cong. 16 (Oct. 10, 1980), available at <http://catalog.hathitrust.org/Record/002755080> [hereinafter *1980 House Hearing*] (statement of Art Agnos, California State Assembly) (“I don’t think [gay marriage] is wrong or illegal. If that troubles people, then they have to understand where gay people are coming from originally”).

discrimination against LGB individuals.⁸³ Known as the Equality Act of 1974, the legislation would have prohibited discrimination based on marital status, sex, or sexual orientation in federally assisted programs, public accommodations, housing, and public education, or under color of state law.⁸⁴

Proponents of the legislation were initially optimistic that it would pass for two reasons. First, recent developments in LGBT rights gave hope that public opinion toward LGBT people was changing. The Stonewall Riots of 1969 drew unprecedented media attention to LGBT rights, and the American Psychiatric Association declassified homosexuality as a mental illness in 1973.⁸⁵ Second, proponents believed that other political developments were indicative of a general movement toward equality for all minority groups.⁸⁶ As a result of the Civil Rights Act of 1964, access to public facilities and to private businesses serving the public could no longer be denied based on race, color, religion, or national origin,⁸⁷ and employment opportunities could no longer be denied based on race, color, religion, national origin, or sex.⁸⁸ Women were also on the verge of a similar constitutional victory, as in 1972 Congress passed the Equal Rights Amendment (ERA) and sent it to the states for ratification.⁸⁹ In the words of the National Gay and Lesbian Task Force (NGLTF), which is a major voice in the LGBT community, “The momentum of social justice movements seemed unstoppable and the aspirations of gay rights activists for federal protections on the basis of

⁸³Congressional Research Service of the Library of Congress, *H.R. 14752 (93rd): Equality Act: Summary*, available at www.govtrack.us/congress/bills/93/hr14752 or <http://thomas.loc.gov/cgi-bin/bdquery/z?d093:hr14752>; see also National Gay and Lesbian Task Force Foundation, *Narrative: The Task Force's Commitment to Ending Discrimination Against Lesbian, Gay, Bisexual and Transgender Americans Has a Long History* (undated), available at www.thetaskforce.org/issues/nondiscrimination/narrative [hereinafter *Task Force Narrative*]; Jerome Hunt, *A History of the Employment Non-Discrimination Act: It's Past Time to Pass This Law* (Center for American Progress, July 19, 2011), available at www.americanprogress.org/issues/lgbt/news/2011/07/19/10006/a-history-of-the-employment-non-discrimination-act.

⁸⁴See sources cited in the previous footnote. The 1975 version of the legislation—the Civil Rights Amendments of 1975—would also have applied to workplace discrimination based on affectional or sexual orientation. *Id.*; Congressional Research Service of the Library of Congress, *H.R. 166 (94th): Civil Rights Amendments: Summary*, available at www.govtrack.us/congress/bills/94/hr166 and <http://thomas.loc.gov/cgi-bin/bdquery/z?d094:hr166>. The Senate did not introduce a bill addressing discrimination based on sexual orientation until December 5, 1979. *2007 House Report*, at 3, available at www.gpo.gov/fdsys/pkg/CRPT-110hrpt406/pdf/CRPT-110hrpt406-pt1.pdf.

⁸⁵*Task Force Narrative*. See Chapter 16 (The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973) for a brief history of the inclusion of homosexuality in the various iterations of the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*.

⁸⁶*Task Force Narrative*.

⁸⁷42 U.S.C. §2000a.

⁸⁸*Id.* §2000e-2.

⁸⁹*Task Force Narrative*, available at www.thetaskforce.org/issues/nondiscrimination/narrative; Roberta W. Francis, *The History Behind the Equal Rights Amendment* (Alice Paul Institute and National Council of Women's Organizations undated), available at www.equalrightsamendment.org/history.htm. During the 10 years that followed, the ERA failed to be ratified by the necessary number of states required for it to become a part of the U.S. Constitution.

sexual orientation seemed destined to rise on this incoming tide of equality under the law.⁹⁰

However, the Equality Act of 1974 and its descendants met with staunch opposition in both Houses of Congress. Proponents attribute the intense political opposition and obstruction to three social and political developments: (1) increasingly well-organized antipathy toward LGBT people; (2) the AIDS crisis, which diverted a large amount of LGBT attention and funds toward advocacy on behalf of other legislative initiatives; and (3) the incorporation of the “religious right” into the Republican Party coalition in 1994, as well as the Republican victories at the federal levels.⁹¹ Although some iteration of Abzug’s original proposal was introduced in every Congress from 1975 to 1992 and steadily gained cosponsors, only two House hearings were held, and the legislation remained within subcommittees.⁹² But by the 102nd Congress in 1991, 110 Representatives and 16 Senators had signed on to cosponsor proposals to amend the Civil Rights Act of 1964 to include sexual orientation protections, and momentum appeared to be growing, even if slowly.⁹³

2. *House Hearings in 1980 and 1982*

a. *1980 Hearing*

In the first hearing, which was held by the Subcommittee on Employment Opportunities of the House Committee on Education and Labor in 1980, the questions and evidence raised set the stage for the debate over ENDA in the ensuing three decades.⁹⁴ Although no opponents testified at the hearing, a question arose about whether sexual orientation warranted federal protection, based on the flawed view that LGB people have economic advantages over the general public.⁹⁵ This question would become a significant negative factor in ENDA’s reception by members of Congress each year going forward.

The statistical source for this assertion about LGB people’s wealth came from an early survey done by the *Advocate*, an LGBT news magazine. The survey indicated that the average income of an LGB individual was 50 percent above the national average; that 70 percent of LGB individuals

⁹⁰*Task Force Narrative*.

⁹¹*Id.*; 2007 House Report, at 2–5, available at www.gpo.gov/fdsys/pkg/CRPT-110hrpt406/pdf/CRPT-110hrpt406-pt1.pdf. See Chapter 16 (The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973) for a summary of the backlash toward the then-pending Americans with Disabilities Act of 1990 as a result of the inclusion of HIV and AIDS as protected disabilities. Ronald Reagan became president in 1981 after having run on the Republican Party platform that no longer supported the ERA.

⁹²2007 House Report, at 2–5.

⁹³*Id.* at 4–5.

⁹⁴1980 House Hearing, available at <http://catalog.hathitrust.org/Record/002755080>.

⁹⁵*Id.* at 17 (statement of James M. Stephens, Minority Associate Labor Counsel, Subcommittee on Employment and Labor).

were college graduates; and that LGB people controlled 19 percent of the spendable income in the United States. The survey, however, was based on a compilation of data from subscribers to the *Advocate*, a subscription base that does not reflect the demographics of the broader population. Although this survey has long been discredited as a source of information about LGB people generally, this “economic argument” is still present in myriad forms to this day.⁹⁶

The most problematic objection to the bill, however, has been that the bill would endorse “immoral” behavior. Reverend Charles A. McIlhenny, an ordained Orthodox Presbyterian minister and coauthor of the book, *When the Wicked Seize a City*,⁹⁷ presented the age-old objection in his testimony that “homosexual behavior can be changed if the individual really desires such a change” and, therefore, he argued that homosexuality is “not a bona fide minority.”⁹⁸ This “morality” argument can be seen again, repeatedly, in many of the ENDA hearings.⁹⁹

b. 1982 Hearing

In the 1982 House Subcommittee on Employment Opportunities hearing, for example, Representative Millicent Fenwick (R-N.J.)—the Republican champion of liberal causes, including civil rights—outright called homosexuality an “abomination”: “We were brought up on the Bible. . . . You cannot expect to proclaim something that is called an abomination in the Book we live by . . . and then expect to be guaranteed your right to teach the children of that town.”¹⁰⁰ In contrast, Avery Post, the president of the United Church

⁹⁶For current data regarding the existence and impact of employment discrimination against LGBT people, see Chapter 40 (Employment Discrimination Against LGBT People: Existence and Impact).

⁹⁷CHUCK MCILHENNY ET AL., *WHEN THE WICKED SEIZE A CITY* (1993).

⁹⁸1980 House Hearing, at 32, available at <http://catalog.hathitrust.org/Record/002755080>.

⁹⁹The same morality argument was used extensively, but ultimately with limited success, during the legislative debates on the Americans with Disabilities Act of 1990 as a result of the inclusion of HIV and AIDS as protected disabilities. See Chapter 16 (The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973). Of note, two of the most outspoken proponents of the belief that a person’s sexual orientation is freely changeable—psychiatrist Robert Spitzer, who authored the 2003 medical study used to support “reparative therapy” to “cure” LGB people, and Alan Chambers, the head of the now defunct Christian “gay cure” ministry Exodus International—recanted their positions in 2012 and 2013, respectively. See Gabriel Arana, *My So-Called Ex-Gay Life*, AMERICAN PROSPECT (Apr. 11, 2012), available at <http://prospect.org/article/my-so-called-ex-gay-life>; Benedict Carey, *Psychiatry Giant Sorry for Backing Gay “Cure,”* N.Y. TIMES (May 18, 2012), available at www.nytimes.com/2012/05/19/health/dr-robert-l-spitzer-noted-psychiatrist-apologizes-for-study-on-gay-cure.html; Alan Chambers, *I Am Sorry* (June 19, 2013), available at <http://web.archive.org/web/20130629061126/http://exodusinternational.org/2013/06/i-am-sorry>; Press Release, *Exodus International to Shut Down* (June 19, 2013), available at <http://web.archive.org/web/20130627052824/http://exodusinternational.org/2013/06/exodus-international-to-shut-down>; Erik Eckholm, *Rift Forms in Movement as Belief in Gay “Cure” Is Renounced*, N.Y. TIMES (July 6, 2012), available at <http://www.nytimes.com/2012/07/07/us/a-leaders-renunciation-of-ex-gay-tenets-causes-a-schism.html>.

¹⁰⁰*The Civil Rights Amendments Act of 1981: Hearing on H.R. 1454 Before the Subcommittee on Employment Opportunities of the U.S. House of Representatives Committee on Education and Labor*, 97th Cong. 18 (Jan. 27, 1982), available at <http://catalog.hathitrust.org/Record/002757819> [hereinafter *1982 House Hearing*] (remarks by Rep. Millicent Fenwick).

of Christ and the only minister to speak at the hearing, rejected Fenwick's reliance on the Bible and noted that his church had concluded that people do "not need to make an ethical judgment about same-gender relationships in order to realize that basic civil liberties are guaranteed to all under the Constitution."¹⁰¹ Still, the theme of homosexuality being a *moral* choice continued to influence the direction of the conversation for many years to come.

The response to Fenwick's speech would also influence the direction of several defenses raised year after year. Jean O'Leary—the executive director of Gay Rights Advocate, a board member of Gay Rights National Lobby, a former co-executive director of National Gay Task Force, and a former Catholic nun—responded tersely to Fenwick's sentiment: "H.R. 1454 will not condone homosexuality. Legislation to protect gay people from discrimination would not endorse or approve homosexuality[] any more than the inclusion of religion in civil rights legislation indicates support for any particular religion, religion in general, or even an absence of religion."¹⁰² Through O'Leary's statement, ENDA proponents would create another theme to win Republican votes. Namely, ENDA would not say "gay is good" but would say "equality for all." For some—such as Georgetown Law Professor Chai Feldblum, who was ENDA's lead drafter—this attitude toward the legislation was, in retrospect, perhaps unfortunate, because it passed on an opportunity to effect a cultural shift in American attitudes toward LGB people.¹⁰³ Nonetheless, "equality for all" has remained a consistent theme throughout the transformation of ENDA.

The underlying political thrust of the morality and economic arguments is the same: that the LGBT population does not deserve protection because it does not deserve to be treated on par with other protected groups. Thus, the ENDA proponents' counterarguments have largely tried to position the LGBT movement within the broader context of civil rights, including via the endorsement of highly respected civil rights leaders. Fast-forwarding to the present for a moment, however, the Supreme Court's 2013 rejection of DOMA's "'moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality'"¹⁰⁴ as a basis for lawmaking has been taken by some LGBT-rights advocates as a prompt for refocusing attention on the morality argument against ENDA.

Early signs of the business community's support of ENDA legislation were present in Congress, even at the 1982 hearing, with the American

¹⁰¹*Id.* at 36 (statement of Avery D. Post, President, United Church of Christ).

¹⁰²*Id.* at 8 (statement of Jean O'Leary, Director, National Association of Business Councils).

¹⁰³See *From Bella to ENDA*, at 187; Chai R. Feldblum, *The Moral Rhetoric of Legislation*, 72 N.Y.U. L. REV. 992 (1997), available at www.nyulawreview.org/sites/default/files/pdf/NYULawReview-72-5-Feldblum.pdf. EEOC Commissioner Feldblum discusses the intersection of Title VII and culture in her essay in Chapter 39 (Law and Culture in the Making of *Macy v. Holder*).

¹⁰⁴*United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675, 2693, 118 FEP 1417, 1425 (2013) (quoting H.R. REP. NO. 104-664, at 16 (July 9, 1996), available at www.gpo.gov/fdsys/pkg/CRPT-104hrpt664/pdf/CRPT-104hrpt664.pdf).

Telephone & Telegraph Company and the American Federation of State, County & Municipal Employees submitting written statements in support of the legislation.¹⁰⁵

B. 1993–2006

I. Overview

The year 1994 would prove to be a major turning point in the evolution of the fight of LGBT equality. In the 103rd Congress, the broader LGB rights bill of the previous 20 years was edited to its contemporary form and titled the Employment Non-Discrimination Act, or ENDA.¹⁰⁶ In this version, only employment discrimination was covered, and the bill explicitly stated that “quotas” and “preferential treatment” based on sexual orientation would not be allowed.¹⁰⁷ Lawmakers also chose to abandon attempts to enact the provision by amending Title VII, and instead created stand-alone legislation providing similar protections.

The decision to abandon an omnibus LGB-rights bill reflected a tactical choice of the sponsors and LGB-rights advocates. The failure in 1993 to overturn the ban on LGB people serving openly in the military¹⁰⁸ had created a perception that LGB rights had little momentum on Capitol Hill, but, at the same time, polling indicated that strong public support existed for employment nondiscrimination.¹⁰⁹ Under the revised strategy, the focus would be to get as many votes as possible by limiting the focus of ENDA.

Matters also became complicated in 1994 when activists on behalf of transgender individuals began to actively raise their concerns and pushed

¹⁰⁵1982 House Hearing, at 77, 83, available at <http://catalog.hathitrust.org/Record/002757819> (submitted statements of Robert E. Beck, AT&T, and Victor Gotbaum, Executive Director, American Federation of State, County and Municipal Employees).

¹⁰⁶A version of ENDA has been introduced in each subsequent Congress except for the 109th Congress. In the 109th Congress, the Civil Rights Amendments Act of 2005 was introduced, which would have barred discrimination based on sexual orientation in employment, housing, public accommodations, and federally assisted programs. *2007 House Report*, at 8, available at www.gpo.gov/fdsys/pkg/CRPT-110hrpt406/pdf/CRPT-110hrpt406-pt1.pdf.

¹⁰⁷Employment Non-Discrimination Act, H.R. 4636, 103rd Cong. §5 (1994); *2007 House Report*, at 5; *From Bella to ENDA*, at 178.

¹⁰⁸On November 30, 1993, President Clinton signed into law the National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160. Section 571 of the law (codified at 10 U.S.C. §654) provided for discharge from the military if a service member (1) engaged in, attempted to engage in, or solicited another to engage in a homosexual act; (2) stated that he or she is a homosexual or bisexual; or (3) had married or attempted to marry someone of the same sex. The law was referred to as the Don’t Ask, Don’t Tell, or DADT, policy. See generally David F. Burrelli, “Don’t Ask, Don’t Tell”: *The Law and Military Policy on Same-Sex Behavior* (Congressional Research Service Oct. 14, 2010), available at http://digital.library.unt.edu/ark:/67531/metadc29575/m1/1/high_res_d/R40782_2010Oct14.pdf. The DADT policy was repealed by the Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321 (Dec. 22, 2010). See Chapter 17 (Special Issues Involving Federal Employees, Employees of Federal Contractors, and Members of the Military), Section IV.A.

¹⁰⁹*From Bella to ENDA*, at 178–79.

for ENDA to include protections for the their community.¹¹⁰ At first, and to a significantly lesser extent today, many in the LGB movement were resistant to including protections based on gender identity in ENDA:

Congressional leaders and leading gay activists and organizations actively oppos[ed] this inclusion. Inclusion of gender identity threatens the homonormative construction of gays and lesbians by linking them with gender non-normativity. Gay and lesbian activists frequently fought—and still fight—against this linkage in order to be able to be incorporated into the normative state. As homonormative gays and lesbians constructed themselves as not threatening to the heteronormative state, they were able to gather more votes for ENDA.¹¹¹

As discussed later in this chapter, it would take 13 years before gender identity would be added to ENDA.

ENDA supporters also began to fit the LGBT population’s fight for equal rights within the broader civil rights movement. Although ENDA’s language complements Title VII, some were adamantly opposed to the comparison of sexual orientation and race and to the addition of LGBT rights to the broader civil rights movement.¹¹² But a hallmark moment for ENDA came during the congressional press conference on the day the 1994 bill was introduced, when Coretta Scott King, the widow of Martin Luther King, Jr., offered strong support for ENDA’s place in the civil rights movement. She stated: “I support [ENDA] . . . because I believe that freedom and justice cannot be parceled out in pieces to suit political convenience.”¹¹³

The 1994 Senate hearing was the first of four hearings that would take place during the period 1993 to 2006, hearings that would set the stage for the next, topsy-turvy phase in the evolution of ENDA.

2. *Hearings in 1994, 1996, 1997, and 2002; Senate Vote in 1996; and Senate Report in 2002*

a. *1994 Senate Hearing*

In the 1994 hearing regarding the employment-only bill, held by the Senate Committee on Labor and Human Resources, strong efforts were made to situate the LGBT rights movement within the broader civil rights

¹¹⁰Elias Vitulli, *A Defining Moment in Civil Rights History? The Employment Non-Discrimination Act, Trans-Inclusion, and Homonormativity*, 7 *SEXUALITY RES & SOC. POL’Y* 155, 161–62 (2010), available at <http://dx.doi.org/10.1007/s13178-010-0015-0> [hereinafter *A Defining Moment*]. The tensions between the transgender and LGB communities are highlighted in both *From Bella to ENDA*, at 183, and Phyllis Randolph Frye, *Facing Discrimination, Organizing for Freedom: The Transgender Community*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 451, 462–67 (John D’Emilio et. al. eds. 2000).

¹¹¹*A Defining Moment*, at 161.

¹¹²See, e.g., *1982 House Hearing*, at 17–19, available at <http://catalog.hathitrust.org/Record/002757819> (remarks by Rep. Millicent Fenwick).

¹¹³*The Employment Non-Discrimination Act of 1994: Hearing on S. 2238 Before the U.S. Senate Committee on Labor and Human Resources*, S. Hearing 103-703, 103rd Cong. 63 (July 29, 1994), available at <http://babel.hathitrust.org/cgi/pt?id=pst.000022827265> [hereinafter *1994 Senate Hearing*] (statement of Coretta Scott King upon the introduction of the Employment Non-Discrimination Act of 1994 on June 23, 1994).

movement, but the resistance the proponents met with was the strongest yet.¹¹⁴ Many arguments echoed those from the 1980s that LGBT individuals did not need the protections of ENDA or that they were distinctly *not* part of the broader civil rights movement.¹¹⁵

Indeed, many of the arguments renewed the questions raised in the 1980 House hearing. Joseph Broadus, a professor from George Mason School of Law, submitted a written statement asserting that LGB people constitute “[a]n elite whose insider status has permitted it to abuse the political process in search, not of equal opportunity, but of special privilege and public endorsement.”¹¹⁶ Senator Paul Wellstone (D-Minn.) challenged this argument, noting that “[t]his is precisely the argument that has been made in behalf of the worst kind of discrimination against Jewish people.”¹¹⁷

Robert Knight, director of cultural affairs at the Family Research Council, testified that ENDA is “less about tolerance than about the Federal Government forcing acceptance of homosexuality on tens of millions of unwilling Americans.”¹¹⁸ Justin Dart Jr., the chair of President George H.W. Bush’s Committee on Employment of People with Disabilities and a strong advocate for the enactment of the ADA, countered the immorality argument, observing the following:

[N]othing is wrong with denouncing that which you believe is immoral. Everything is wrong with acquiescing in vicious discrimination against American citizens because you disagree with their personal views and activities, activities which in no way infringe on the rights of others.

....

The gay and lesbian people I know are no amoral aliens.... They are solid, hardworking, committed, and caring people. They hold my family values.¹¹⁹

Leaders in the business community again supported the legislation, with testimony presented by representatives of Dow Jones & Company, Pacific Bell, and the AFL-CIO.¹²⁰

b. 1996 House Hearing

Two years later, in 1996, the Subcommittee on Government Programs of the House Committee on Small Business held a hearing on ENDA.¹²¹ For the first time, a representative spoke quite passionately of his moral

¹¹⁴1994 Senate Hearing.

¹¹⁵*See, e.g., id.* at 41 (in her testimony discussing the “comparison argument,” Professor Feldblum noted that there were “a number of African Americans in the back of the room who are wearing stickers that say, ‘There is no comparison.’”).

¹¹⁶*Id.* at 32 (statement of Joseph E. Broadus, Professor, George Mason School of Law).

¹¹⁷*Id.* (remarks of Sen. Paul Wellstone).

¹¹⁸1994 Senate Hearing, at 35, available at <http://babel.hathitrust.org/cgi/pt?id=pst.000022827265> (statement of Robert H. Knight, Director of Cultural Affairs, Family Research Council).

¹¹⁹*Id.* at 15 (statement of Justin Dart, Jr., Chairman, President Bush’s Committee on Employment of People with Disabilities).

¹²⁰*Id.* at 18–28 (statements of Warren Phillips, former CEO and Chairman, Dow Jones & Company; Steven Coulter, Vice President, Pacific Bell; and Richard Womack, Director of Civil Rights, AFL-CIO).

¹²¹*The Employment Non-Discrimination Act of 1995: Hearing on H.R. 1863 Before the Subcommittee on Government Programs of the U.S. House of Representatives Committee*

dilemma in being either a proponent or opponent of ENDA. Representative Glenn Poshard (D-III.) stated that his Christian faith taught him both that the “homosexual life-style is essentially unacceptable” and that he must also “do justice.”¹²² He posed a question before the committee, one that had haunted the LGB-rights bill before and would continue to haunt the bill in the future: “If we pass a law preventing discrimination against homosexuals in the workplace, does this mean that we, as a society, give more legitimacy to the practice of the life-style itself?”¹²³

Professor Feldblum’s submitted statement squarely addressed Poshard’s conundrum:

Passage of ENDA by Congress would thus be a profound *moral* response to the discrimination that currently exists in our nation. The U.S. Supreme Court in *Romer v. Evans* [, 517 U.S. 620, 70 FEP 1180 (1996),] recently invoked that moral spirit when it proclaimed that “the Constitution neither knows nor tolerates classes among citizens.”¹²⁴

In the face of such powerful dialogue during the hearing, it would be difficult for proponents of ENDA to argue that the passage of ENDA would convey no endorsement of homosexuality. How could they? The civil rights that Americans have embraced are part of the law precisely because Americans *believe* in them, not merely because statistically the protections would be better for the economy.

And again, the business community showed up to support ENDA.¹²⁵

c. 1996 Senate Vote

Within two months after the House hearing, the Senate leaders agreed to a compromise that would allow for up or down votes on both DOMA (which the House passed two months earlier) and ENDA on September 10, 1996.¹²⁶ Because advocates were pushing the idea that ENDA was not an affirmation of the “gay lifestyle,” many senators saw no hypocrisy in voting for both DOMA *and* ENDA.¹²⁷ ENDA was narrowly rejected, however, by a 49–50 vote.¹²⁸ An

on *Small Business*, 104th Cong. (July 17, 1996), available at <http://catalog.hathitrust.org/Record/008524494> [hereinafter *1996 House Hearing*].

¹²²*Id.* at 3 (remarks by Rep. Glenn Poshard); see also Chai R. Feldblum, *The Moral Rhetoric of Legislation*, 72 N.Y.U. L. REV. 992 (1997), available at www.nyulawreview.org/sites/default/files/pdf/NYULawReview-72-5-Feldblum.pdf (discussing the responses to Poshard’s dilemma during the hearing).

¹²³*1996 House Hearing*, at 4.

¹²⁴*Id.* at 152 (statement of Chai R. Feldblum, Professor, Georgetown University Law Center (footnote and internal quotation marks omitted) (quoting *Romer v. Evans*, 517 U.S. 620, 623, 70 FEP 1180 (1996) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting))).

¹²⁵See, e.g., *id.* at 14–24 (statements of Michael Morley, Senior Vice President and Director of Human Resources, Eastman Kodak Co.; Paula Alexander, Director of Human Resources, Eastman Gelatine Corp.; Patrick McVeigh, Senior Vice President, Franklin Research & Development Corp.; and Brenda Cole, Board Member, Wainwright Bank & Trust Co.).

¹²⁶See *From Bella to ENDA*, at 185.

¹²⁷*Id.*

¹²⁸U.S. Senate Roll Call Vote Summary on S. 2056, 104th Cong., Sept. 10, 1996 (Employment Non-Discrimination Act of 1996), available at www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=104&session=2&vote=00281. One Democratic senator who supported ENDA was absent due to his son’s surgery. In the event of a tie, Vice

hour earlier, the Senate passed DOMA by a vote of 85 to 14.¹²⁹ The fact that ENDA had significantly more support than DOMA provided a glimmer of hope that ENDA eventually would garner enough votes for passage.

As the Senate debate on ENDA showed, the morality and economic arguments were not the sole arguments against ENDA. Senator Orrin Hatch (R-Utah), for example, argued that ENDA would create a “litigation bonanza” and “would lead to scores of thousands of new law suits.”¹³⁰ This argument would also carry momentum up until the contemporary hearings and would be juxtaposed with opponents’ arguments indicating that ENDA would have the exact opposite effect: that it would lead to few cases, demonstrating there was no need for the bill. One law professor termed these arguments the “flood arguments” (i.e., too many cases) and the “drought arguments” (i.e., too few cases).¹³¹

d. 1997 Senate Hearing

In 1997, the Senate Committee on Labor and Human Resources held its second hearing on ENDA.¹³² After two witnesses recounted the employment discrimination they had faced because they were gay, two business executives testified regarding their organizations’ commitment to workplace equality. Raymond Smith, Chairman and Chief Executive Officer of Bell Atlantic Corporation, observed the following:

From a business perspective . . . [n]o one should have to fear loss of career opportunities or employment because of his or her . . . sexual orientation. It is unacceptable to employees . . . “to live and work in the shadows,” to hide a vital part of their personality and their life from their coworkers. It is not good for the employee, and it is not good for the company. No company can afford to waste the talents and contributions of valuable employees as we compete in the global marketplace. It is good for business, and it is good citizenship.¹³³

Smith’s comments were echoed by Tom Grote, Chief Operating Officer of Donato’s Pizza:

As a Republican, I am a strong believer in individual rights. I believe that an individual should have the right to work in our society as long as

President Al Gore would have cast the tie-breaking vote that would have resulted in ENDA’s passage. *See From Bella to ENDA*, at 185.

¹²⁹U.S. Senate Roll Call Vote Summary on H.R. 3396, 104th Cong., Sept. 10, 1996 (Defense of Marriage Act), available at http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=104&session=2&vote=00280.

¹³⁰142 CONG. REC. S10132–33 (Sept. 10, 1996), available at www.gpo.gov/fdsys/pkg/CREC-1996-09-10/pdf/CREC-1996-09-10-senate.pdf (remarks by Sen. Orrin G. Hatch).

¹³¹William B. Rubenstein, *Do Gay Rights Laws Matter?: An Empirical Assessment*, 75 S. CAL. L. REV. 65, 65–67 (2001), available at www-bcf.usc.edu/~usclrev/pdf/075102.pdf.

¹³²U.S. SENATE COMMITTEE ON LABOR & HUMAN RESOURCES, EMPLOYMENT NON-DISCRIMINATION ACT OF 1997 HEARING OF THE COMMITTEE ON LABOR AND HUMAN RESOURCES, UNITED STATES SENATE, ONE HUNDRED FIFTH CONGRESS, FIRST SESSION, ON S. 869, TO PROHIBIT EMPLOYMENT DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION, OCTOBER 23, 1997 (1998) (S. Hrg. 105-279, 105th Cong.), available at <http://search.library.wisc.edu/catalog/WU9439822> and <https://library.lehigh.edu/asa2.0/Record/494764>.

¹³³*Id.* at 10 (statement of Raymond Smith, Chairman and Chief Executive Officer, Bell Atlantic Corp.).

they [sic] have the desire, the work ethic and the ability to do the job. . . . As a Christian, . . . I personally do not believe the right to hold a particular view on sexual orientation supersedes the right of the individual to be treated fairly in the workplace, just as a racist does not have the right to discriminate in the workplace.¹³⁴

Because the hearing was cut short as a result of a procedural maneuver,¹³⁵ several witnesses had to submit their testimony in writing. One of those witnesses was Oliver Thomas, Special Counsel for Civil and Religious Liberties for the National Council of the Churches of Christ, who explained that “[t]here is broad support within our faith communities for [ENDA]. . . . These faith groups understand that this is not an issue which requires a choice between their faith and their commitment to fairness.”¹³⁶

Two significant events occurred during the period 1997 to 1999 that would help shape the future of ENDA. First, President Bill Clinton became the first sitting president to endorse the legislation, first in 1997, and then again in his 1999 State of the Union address. In May 1998, he took the additional step of issuing Executive Order 13087, which expanded the federal government’s equal employment policy to prohibited discrimination based on sexual orientation.¹³⁷

Second, in 1999, the NGLTF broke ranks with the HRC with respect to ENDA. The NGLTF announced that it could no longer support a version of ENDA that did not include protections for the transgender community.¹³⁸ Soon thereafter, other major LGB organizations followed in the steps of the NGLTF.¹³⁹

e. 2002 Senate Hearing

In 2002, the Senate HELP Committee held another hearing on ENDA.¹⁴⁰ The focus of the hearing was on the business community’s support for ENDA

¹³⁴*Id.* at 13 (statement of Tom Grote, Chief Operating Officer, Donato’s Pizza).

¹³⁵*Id.* at 20 (an unidentified senator objected to the fact that the hearing was about to extend beyond two hours and, by Senate rules, a committee hearing cannot extend beyond two hours if someone objects).

¹³⁶*Id.* at 22 (statement of Oliver Thomas, Special Counsel for Civil and Religious Liberties, National Council of the Churches of Christ in the U.S.A.). Thomas listed the following religious groups as among those who support ENDA: “American Ethical Union, American Jewish Committee, American Jewish Congress, Anti-Defamation League of B’nai B’rith, Central Conference of American Rabbis, Church Women United, Episcopal Church, Evangelical Lutheran Church in America, General Assembly of the Presbyterian Church (USA), General Board of Church and Society of the United Methodist Church, Jewish Women International, National Council of Jewish Women, Office for Church in Society of the United Church of Christ, Union of American Hebrew Congregations, and the Unitarian Universalist Association of Congregations.” *Id.*

¹³⁷Exec. Order No. 13087 (May 28, 1998), available at www.gpo.gov/fdsys/pkg/FR-1998-06-02/pdf/98-14689.pdf (amending Exec. Order No. 11478 (Aug. 8, 1969)). See Chapter 17 (Special Issues Involving Federal Employees, Employees of Federal Contractors, and Members of the Military).

¹³⁸*From Bella to ENDA*, at 186.

¹³⁹*A Defining Moment*, at 162.

¹⁴⁰*The Employment Non-Discrimination Act: Hearing on S. 1284 Before the U.S. Senate Committee on Health, Education, Labor, and Pensions*, S. Hearing 107-307, 107th Cong. (Feb. 27, 2002), available at www.gpo.gov/fdsys/pkg/CHRG-107shrg78032/pdf/CHRG-107shrg78032.pdf [hereinafter *2002 Senate Hearing*].

and included the testimony of senior officers of employers and unions. Charles Gifford, President and Chief Executive Officer of FleetBoston Financial Corporation, observed that:

The business reasons [for ENDA] are compelling. I am reminded of this fact each time I meet with a member of the FleetBoston gay and lesbian family. When we talk, they remind me of how tiring it can be to stay in the closet and how much energy is wasted and how focus is diverted from their job when they feel they must conceal so much of who they are. Their lives and our business would be greatly diminished if a gay and lesbian employee only brought a piece of themselves and not their whole self to work every day because of the fear of discrimination.

...
... When a person is gay and lesbian, that is who they are, and I think that is what they should be respected for, no more and no less.¹⁴¹

Robert Berman, Director of Human Resources and Vice President of Eastman Kodak Company, testified that:

It is an understatement to say that it is unusual for a company to support legislation that invites further Federal regulation of our business. However, Kodak believes that protection against discrimination because of one's sexual orientation is a basic civil right.

This issue is so fundamental to core principles of fairness that we believe the value of Federal leadership outweighs concerns we might otherwise have about Federal intervention with our business.¹⁴²

Lucy Billingsley, a partner in the Billingsley Company who spoke on behalf of small businesses, noted that ENDA "gives [her company] lower turnover, higher morale, and better productivity."¹⁴³ She also pointed to the duty of business and community leaders to set the tone by taking the lead on an important issue such as ENDA.¹⁴⁴

Richard Womack, Director of the AFL-CIO's Department of Civil Rights, commented that ENDA embodied "a fundamental American value—that people who do their jobs, pay their taxes, contribute to their communities should not be singled out for unfair discrimination. Most Americans and many employers believe that this kind of discrimination is wrong."¹⁴⁵

f. 2002 Senate Report

Later in 2002, the Senate HELP Committee favorably reported the bill,¹⁴⁶ but, with President George W. Bush in office, no further action was taken

¹⁴¹*Id.* at 8, 16 (statement of Charles K. Gifford, President and Chief Executive Officer, FleetBoston Financial Corp.).

¹⁴²*Id.* at 11 (statement of Robert L. Berman, Director of Human Resources and Vice President, Eastman Kodak Co.).

¹⁴³*Id.* at 10 (statement of Lucy Billingsley, Partner, Billingsley Company).

¹⁴⁴*Id.* at 15.

¹⁴⁵2002 *Senate Hearing*, at 12, available at www.gpo.gov/fdsys/pkg/CHRG-107shrg78032/pdf/CHRG-107shrg78032.pdf (statement of Richard G. Womack, Director, Department of Civil Rights, AFL-CIO).

¹⁴⁶2002 *Senate Report*, available at www.gpo.gov/fdsys/pkg/CRPT-107srpt341/pdf/CRPT-107srpt341.pdf.

(on the assumption that the legislation would face a presidential veto).¹⁴⁷ The Senate report concluded the following:

Ample evidence has been presented to this Committee to show that intentional employment discrimination on the basis of sexual orientation causes harm to individual employees. It puts them at an economic disadvantage by threatening job security and by fostering an oppressive work environment in which gay, lesbian, and bisexual employees fear that their sexual orientation may be revealed to the detriment of their careers. As long as tens of thousands of people go to work each day with fear in their hearts—fear not only for themselves and their individual welfare, but also for their continued ability to provide for the families they love—our nation is failing to live up to its promise of basic fairness and dignity for all.

....

The consequence of Congress' failure to take a stance on anti-gay discrimination in the workplace is a tacit endorsement by the Federal Government of anti-gay bias. By failing to provide recourse for sexual orientation discrimination in employment—the very essence of economic security—Congress has effectively given its nod of approval to a regime of second class citizenship for gay, lesbian, and bisexual Americans.¹⁴⁸

Six Republican senators dissented from the report, opining that the bill was “overly-broad and unclear in many respects, specifically, with regard to its effect on individual, constitutional and States’ rights.”¹⁴⁹

For the LGBT community, the period 1993 to 2006 thus was marked at one end by a heartbreaking one-vote loss in the Senate in 1996 and, at the other, an expected presidential veto in 2002. On the positive side, the number of co-sponsors continued to increase steadily. Nonetheless, the series of challenges presented by ENDA’s opponents remained: What would a bill protecting sexual orientation signal about the government’s position on homosexuality? Are LGB individuals in need of protection? Should they become a part of the civil rights movement? Resolution of these issues would need to wait, as another issue took center stage in 2007: Should gender identity be included in ENDA?

C. 2007–2012

1. Overview

In April 2007, Representative Frank introduced a version of ENDA that, for the first time, included protections for gender identity.¹⁵⁰ Within five months after introduction, the Subcommittee on Health, Employment,

¹⁴⁷See U.S. COMMISSION ON CIVIL RIGHTS, *REDEFINING RIGHTS IN AMERICA: THE CIVIL RIGHTS RECORD OF THE GEORGE W. BUSH ADMINISTRATION, 2001–2004*, 131–32, 134–35 (Draft Report for Commissioners’ Review Sept. 2004), available at <http://health-equity.pitt.edu/57>.

¹⁴⁸2002 Senate Report, at 10–11.

¹⁴⁹*Id.* at 39 (minority views of Sens. Judd Gregg (R-N.H.), Bill Frist (R-Tenn.), Michael B. Enzi (R-Wyo.), Tim Hutchinson (R-Ark.), Christopher S. Bond (R-Mo.), and Jeff Sessions (R-Ala.)).

¹⁵⁰Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:hr2015::>; 2007 House Report, at 9, available at www.gpo.gov/fdsys/pkg/CRPT-110hrpt406/pdf/CRPT-110hrpt406-pt1.pdf.

Labor, and Pensions of the House Committee on Education and Labor (House HELP Subcommittee) held a hearing on the bill.¹⁵¹

Just over three weeks later, Frank introduced a second version of ENDA that did not contain protections for gender identity¹⁵² and a third version that contained protections for gender identity only.¹⁵³ This strategic decision resulted in a seismic fracture between LGBT advocacy groups. It also led four Democratic representatives to issue a dissent from the majority view in the House Committee on Education and Labor’s report on ENDA, taking the position that gender identity should be included.¹⁵⁴ The House would pass the gender identity–free version of ENDA later in 2007 and take no action on the gender identity–only bill.

After the House HELP Subcommittee held a 2008 hearing on the topic of transgender Americans,¹⁵⁵ all subsequent versions of ENDA have included protection against gender identity discrimination. During the following four years, three more hearings would be held on ENDA: in the House in September 2009¹⁵⁶ and in the Senate in November 2009¹⁵⁷ and June 2012.¹⁵⁸

2. 2007–2008 Gender Identity Debate: House Hearings, Report, and Vote

After spending 10 years lining up nearly all the major LGBT advocacy groups to support a “gender identity–inclusive” version of ENDA, transgender advocates were able to garner the support of the lone significant—and

¹⁵¹*The Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Before the Subcommittee on Health, Employment, Labor and Pensions of the U.S. House of Representatives Committee on Education and Labor*, Serial No. 110–60 (Sept. 5, 2007), available at www.gpo.gov/fdsys/pkg/CHRG-110hhrg37637/pdf/CHRG-110hhrg37637.pdf [hereinafter *2007 House Hearing*].

¹⁵²*Employment Non-Discrimination Act of 2007*, H.R. 3685, 110th Cong. (2007), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:hr3685;> *2007 House Report*, at 9.

¹⁵³H.R. 3686, 110th Cong. (2007), available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d110:hr3686>. This bill did not refer to the legislation as “ENDA.”

¹⁵⁴*2007 House Report*, at 44–45 (dissenting views of Reps. Rush Holt (D-N.J.), Yvette Clarke (D-N.Y.), Linda Sánchez (D-Cal.), and Dennis Kucinich (D-Ohio)).

¹⁵⁵*An Examination of Discrimination Against Transgender Americans in the Workplace: Hearing Before the Subcommittee on Health, Employment, Labor and Pensions of the U.S. House of Representatives Committee on Education and Labor*, Serial No. 110–99 (June 26, 2008), available at www.gpo.gov/fdsys/pkg/CHRG-110hhrg43027/pdf/CHRG-110hhrg43027.pdf [hereinafter *2008 House Hearing*]. The video recording of the hearing is available at <http://edwork.edgeboss.net/wmedia/edwork/help/help062608.vwx>.

¹⁵⁶*2009 House Hearing*, available at www.gpo.gov/fdsys/pkg/CHRG-111hhrg52242/pdf/CHRG-111hhrg52242.pdf and <http://democrats.edworkforce.house.gov/hearing/hr-3017-employment-non-discrimination-act-2009>. The video recording of the hearing is available at <http://edwork.edgeboss.net/wmedia/edwork/fc/fc092309.vwx>.

¹⁵⁷*The Employment Non-Discrimination Act of 2009: Ensuring Opportunity for All Americans*, Hearing on S. 1584 Before the U.S. Senate Committee on Health, Education, Labor, and Pensions, S. HEARING NO. 111-1134 (Nov. 5, 2009), available at www.gpo.gov/fdsys/pkg/CHRG-111shrg75804/pdf/CHRG-111shrg75804.pdf [hereinafter *2009 Senate Hearing*]. The video recording of the hearing and the prepared statements submitted by the witnesses who testified live are available at www.help.senate.gov/hearings/hearing/?id=030ecf2b-b2e5-5793-09e9-306e004d19fb.

¹⁵⁸*2012 Senate Hearing*. The video recording of the hearing and the prepared statements submitted by the witnesses who testified live are available at www.help.senate.gov/hearings/hearing/?id=bc503bd3-5056-9502-5da9-beea5048efc9.

politically influential—holdout: the HRC.¹⁵⁹ In August 2004, the HRC announced that its “board of directors took the historic step of adopting a policy that HRC would not support a version of [ENDA] that doesn’t include gender identity or expression.”¹⁶⁰

a. 2007 House Hearing

With the LGBT-advocacy community unified, the gender-inclusive version of ENDA was introduced in the House in April 2007.¹⁶¹ By the time the House HELP Subcommittee held its hearing in September 2007, the issue of including gender identity had already made headlines across the country and most realized that it would dominate the hearing. Although marriage was an issue,¹⁶² the attention to gender identity brought two other issues to the fore in the 2007 hearing: bathrooms and dress codes. Diane Gramley, the president of the American Family Association of Pennsylvania, submitted a letter about what was, in her view, the absurdity of the government forcing employers to allow men to use women’s bathrooms (although, as transgender advocates would also explain, the law would mandate bathroom access consistent with an individual’s gender identity). She asked, “When in our nation’s history has the government forced employers to permit men to use the women’s restroom or vice versa?”¹⁶³ She went on to argue that “radical transgender activists will . . . demand full ‘inclusion’ in all shower facilities.”¹⁶⁴

¹⁵⁹*A Defining Moment*, at 161–62.

¹⁶⁰Cheryl Jacques, *Putting the “T” into ENDA: HRC’s Board Has Decided Not to Support ENDA Without Transgender Protections. It’s the Right and Pragmatic Thing to Do*, WASH. BLADE (Aug. 13, 2004), available at <http://web.archive.org/web/20060220001630/http://washblade.com/2004/8-13/view/columns/putting.cfm>. Ms. Jacques was president of the HRC at the time.

¹⁶¹*A Defining Moment*, at 162–63; Angela Clements, *Sexual Orientation, Gender Non-conformity, and Trait-Based Discrimination: Cautionary Tales From Title VII & an Argument for Inclusion*, 24 BERKELEY J. GENDER L. & JUST. 166, 168–69 (2009), available at www.law.berkeley.edu/files/chefs/Clements_Sexual_Orientation.pdf.

¹⁶²By 2007, one state (Massachusetts) had authorized equal marriage rights for same-sex couples and more than a majority of states had amended their laws to define marriage as the union of one man and one woman. Numerous courts were also in the midst of hearing cases about marriage equality and, for the most part, rejecting the claims. See, e.g., *Hernandez v. Robles*, 7 N.Y.3d 338, 855 N.E.2d 1, 821 N.Y.S.2d 770 (2006) (holding that the New York Constitution does not require the recognition of same-sex marriages). See Chapter 20 (Survey of State Laws Regarding Gender Identity and Sexual Orientation Discrimination in the Workplace).

Because of the burgeoning debate among American voters regarding marriage equality, Wendy Wright, President of the Concerned Women for America, submitted written testimony to the House that “[m]arriage as an institution will be undermined if ENDA is enacted.” *2007 House Hearing*, at 75, available at www.gpo.gov/fdsys/pkg/CHRG-110hhr37637/pdf/CHRG-110hhr37637.pdf (statement of Wendy Wright, President, Concerned Women for America). Representative Emanuel Cleaver II (D-Mo.) spoke of the opposition focusing on ENDA being “some kind of an attack on family values.” *Id.* at 15 (remarks of Rep. Emanuel Cleaver). He continued to argue that although he is “certainly pro-marriage . . . [ENDA is not about] whether a state should recognize an individual’s right to marry.” *Id.* at 16.

¹⁶³*2007 House Hearing*, at 74 (statement of Diane Gramley, President, American Family Association of Pennsylvania).

¹⁶⁴*Id.* Gender-segregated facilities are discussed extensively in Chapters 36 (Gender-Segregated Facilities) and 42 (The “Bathroom Bill” Security Concerns Debunked).

Lawrence Lorber, a labor and employment lawyer with the national law firm Proskauer Rose, raised his own concerns about legal issues surrounding the inclusion of gender identity in the bill. First, he stated, “[i]t is simply unclear how a reasonable dress code can coexist with the added, indefinite classifications of self-perceived gender identity.”¹⁶⁵ He also argued that *Price Waterhouse v. Hopkins*,¹⁶⁶ decided in 1989, “would seem to adequately deal with the issue raised by the addition of gender identity into the proposed legislation.”¹⁶⁷ *Price Waterhouse* involved a female plaintiff who prevailed in a discrimination lawsuit based on a sex-stereotyping theory—she had been denied partnership at a major accounting firm based in part on views that her personality was too abrasive and she did not dress femininely enough.¹⁶⁸ Indeed, since her victory, a growing number of jurisdictions have used *Price Waterhouse* to protect transgender, as well as LGB, individuals based on their nonconformity with gender stereotypes.¹⁶⁹

Supporters of a gender identity–inclusive ENDA would rely on the same arguments that had been made about prohibiting discrimination against LGB people: that they are discriminated against and that all Americans have the right to be judged on their work performance and not on non-work-related indicia. The underlying studies of transgender individuals had not been done by 2007, however, and this would affect the crucial testimony heard by Congress. M.V. Lee Badgett, a professor of economics at the University of Massachusetts Amherst, testified that although “national studies have not been done on gender identity discrimination, . . . 11 recent local surveys of transgender people have found that at least 20 percent, and as many as 57 percent, report having experienced some form of employment discrimination.”¹⁷⁰ Unfortunately, this data barely touched on the significant discrimination against transgender individuals. Later studies would show that 90 percent of transgender individuals had experienced harassment or mistreatment on the job.¹⁷¹ Further, transgender individuals are twice as

¹⁶⁵2007 House Hearing at 38 (statement of Lawrence Z. Lorber, Partner, Proskauer Rose, LLP). It should be noted that numerous jurisdictions have upheld the right of gender-affirmed workers to dress in accordance with their gender identity. See Chapters 20 (Survey of State Laws Regarding Gender Identity and Sexual Orientation Discrimination in the Workplace) and 35 (Appearance, Dress, and Grooming Codes).

¹⁶⁶490 U.S. 228, 49 FEP 954 (1989).

¹⁶⁷2007 House Hearing, at 37, available at www.gpo.gov/fdsys/pkg/CHRG-110hrg37637/pdf/CHRG-110hrg37637.pdf.

¹⁶⁸*Price Waterhouse*, 490 U.S. at 234–35. *Price Waterhouse* is discussed extensively in Chapters 14 (Title VII of the Civil Rights Act of 1964) and 39 (Law and Culture in the Making of *Macy v. Holder*).

¹⁶⁹See Chapters 14 (Title VII of the Civil Rights Act of 1964) and 20 (Survey of State Laws Regarding Gender Identity and Sexual Orientation Discrimination in the Workplace).

¹⁷⁰2007 House Hearing, at 39 (statement of M.V. Lee Badgett, Associate Professor, University of Massachusetts; Research Director, The Institute for Gay and Lesbian Strategic Studies).

¹⁷¹See, e.g., Crosby Burns & Jeff Krehely, *Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment*, CENTER FOR AMERICAN PROGRESS (June 2, 2011), available at www.americanprogress.org/issues/2011/06/workplace_discrimination.html. See Chapter 40 (Employment Discrimination Against LGBT People: Existence and Impact) for more robust data documenting the existence of discrimination against transgender individuals that has been accumulated subsequent to the 2007 hearing.

likely to be found below the federal poverty line, much more so than studies showed for LGB individuals.¹⁷²

The business community was represented at the hearing by Kelly Baker, Vice President for Diversity at General Mills, who explained the following:

We know that providing an environment where people of different backgrounds and lifestyles can grow and thrive is essential to our long-term success. In our business, innovation is the key to survival. People with diverse experiences and backgrounds bring different and uniquely valuable perspectives and solutions. This diversity drives innovation. That's why we support any practice or public policy that encourages bringing diversity to the table.¹⁷³

Her testimony was buttressed in the hearing record by an exhibit showing that the Business Coalition for Workplace Fairness, which at the time consisted of more than 100 large and small companies, supported ENDA.¹⁷⁴

But the fear and hostility toward transgender individuals that presented themselves in the 2007 House hearing shook the confidence of some supporters of a gender identity–inclusive ENDA. However, nine days after the hearing, at a major transgender conference, the HRC's president reaffirmed the organization's firm commitment to a gender identity–inclusive ENDA: “We try to walk a thin line in terms of keeping everything in play, and making sure that we move forward but always being clear that we absolutely do not support and in fact oppose any legislation that is not absolutely inclusive.”¹⁷⁵

Less than two weeks later, on September 27, 2007, Representative Frank introduced the version of ENDA that did not contain protections for gender identity. On October 2, 2007, the HRC's Board of Directors issued a statement that “we are not able to support, nor will we encourage Members of Congress to vote against, the newly introduced sexual orientation only bill.”¹⁷⁶ This statement was in sharp contrast to the joint letter that many other LGBT advocacy groups sent to Congress the day before, advising, “We oppose legislation that leaves part of our community without protections and basic security that the rest of us are provided.”¹⁷⁷ Despite saying it would

¹⁷²See, e.g., Nico Sifra Quintana, *Poverty in the LGBT Community*, CENTER FOR AMERICAN PROGRESS (July 1, 2009), available at www.americanprogress.org/issues/2009/07/lgbt_rights.html.

¹⁷³2007 House Hearing, at 33, available at www.gpo.gov/fdsys/pkg/CHRG-110hhr37637/pdf/CHRG-110hhr37637.pdf (statement of Kelly Baker, Vice President, Diversity, General Mills, Inc.)

¹⁷⁴*Id.* at 70–71 (two-page listing of employers supporting ENDA).

¹⁷⁵*Speech of Joe Solmonese*, Southern Comfort Conference video (Sept. 14, 2007), available at www.youtube.com/watch?v=p-6ZoNj-bU.

¹⁷⁶Chris Johnson, *Human Rights Campaign Board of Directors Votes to Reaffirm 2004 Policy on ENDA*, HRC BACK STORY (Oct. 2, 2007), available at <http://web.archive.org/web/20080919032018/http://www.hrcbackstory.org/2007/10/human-rights-ca.html> (internal quotation marks omitted).

¹⁷⁷Letter From the United ENDA Coalition to the U.S. House of Representatives (Oct. 1, 2007), available at www.thetaskforce.org/activist_center/ENDA_oct1_letter, www.thetaskforce.org/enda07/tools/united_enda_materials_1.pdf, or <http://web.archive.org/web/20071016041813/http://unitedenda.org>. On the same day, some of these same groups and the HRC sent a letter to the chair of the House Education and Labor Committee, opposing “the [mistaken] strategy and process by which the” the sexual orientation only bill was introduced and scheduled for markup on October 2, 2007. Letter From Human Rights Campaign and Eighteen Other Organizations to Hon. George Miller, Chairman, Committee on Education and Labor, U.S. House of Representatives (Oct. 1, 2007), available at www.civilrights.org/advocacy/letters/2007/enda-strategy.html or <http://web.archive.org/web/20081101074717/http://www.hrc.org/documents/LCCR-ENDA.pdf>.

not support the sexual-orientation-only version of ENDA, a month later, the HRC came out in support of that version.¹⁷⁸

b. 2007 House Report

On October 22, 2007, the House Education and Labor Committee issued a report in support of the gender identity–free version of ENDA.¹⁷⁹ The report made it clear that ENDA “would create no ‘special rights,’ but will guarantee equal rights” to LGB individuals.¹⁸⁰ The report pointed to the fact that numerous religious faiths oppose discrimination based on sexual orientation and cited the comment of Representative Emanuel Cleaver II (D-Mo.), who is also a minister, that “no one has yet explained to me how keeping someone from gaining equal consideration based on their individual skill set to obtain lawful employment pleases God.”¹⁸¹ As noted earlier, four Democratic representatives dissented from the report because of the exclusion of gender identity from ENDA.¹⁸² Eight Republican representatives dissented, arguing that the bill “fail[ed] to protect the hiring prerogatives of religious schools,” “provide[d] vague prohibitions based on ‘perceived’ sexual orientation,” and would impair “[p]olicies conditioning employment on marriage.”¹⁸³

c. 2007 House Vote

In spite of the controversy over the exclusion of gender identity, in November 2007 ENDA passed the House by a vote of 235 to 184.¹⁸⁴ The Senate did not take any action on ENDA, however, which prevented ENDA from becoming law.

d. 2008 House Hearing

The proponents of a gender identity–inclusive bill began to assemble the evidence and show that transgender individuals needed to be included in ENDA. In June 2008, the House HELP Subcommittee held another hearing, titled “An Examination of Discrimination Against Transgender Americans in the Workplace.”¹⁸⁵ Representative Robert Andrews (D-N.J.), the chair of

¹⁷⁸Letter From Human Rights Campaign and Eight Other Organizations to U.S. House of Representatives (Nov. 6, 2007), *available at* www.civilrights.org/advocacy/letters/2007/enda-lccr-sign-on-letter.html *or* <http://web.archive.org/web/20081106234215/http://www.hrc.org/documents/LCCRENDASupportletter.pdf>.

¹⁷⁹*2007 House Report*, *available at* www.gpo.gov/fdsys/pkg/CRPT-110hrpt406/pdf/CRPT-110hrpt406-pt1.pdf.

¹⁸⁰*Id.* at 11.

¹⁸¹*Id.* at 27 (internal quotation marks omitted).

¹⁸²*Id.* at 44–45 (dissenting views of Reps. Rush Holt (D-N.J.), Yvette Clarke (D-N.Y.), Linda Sánchez (D-Cal.), and Dennis Kucinich (D-Ohio)).

¹⁸³*Id.* at 53, 56–57 (minority views of Reps. Howard P. McKeon (R-Cal.), Pete Hoekstra (R-Mich.), Mark Souder (R-Ind.), Joe Wilson (R-S.C.), John Kline (R-Minn.), Cathy McMorris Rodgers (R-Wash.), Tom Price (R-Ga.), Charles W. Boustany, Jr. (R-La.), David Davis (R-Tenn.), and Tim Walberg (R-Mich.)).

¹⁸⁴U.S. House Roll Call Vote Summary on H.R. 3685, Nov. 7, 2007 (Employment Non-Discrimination Act of 2007), *available at* <http://clerk.house.gov/evs/2007/roll11057.xml>.

¹⁸⁵*2008 House Hearing*, *available at* www.gpo.gov/fdsys/pkg/CHRG-110hhr43027/pdf/CHRG-110hhr43027.pdf.

the subcommittee, started his remarks with a clear statement of purpose: “[T]here is context for this hearing. . . . It needs to be . . . reminded[] that the bill that passed the House . . . did not include protection for transgender people. I believe it should have.”¹⁸⁶ For the first time, transgender individuals were invited to testify before Congress regarding ENDA, including Shannon Price Minter, Legal Director of the National Center for Lesbian Rights; Diego Miguel Sanchez, Director of Public Relations & External Affairs for the AIDS Action Committee; Diane Schroer, a retired Colonel in the U.S. Army (Ret.) and successful plaintiff in *Schroer v. Billington*;¹⁸⁷ and Sabrina Marcus Taraboletti, an aeronautics engineer. Their professional accomplishments and personal demeanor were in sharp contrast to the stereotypical image that many people had about who transgender people are.¹⁸⁸

The behind-the-scenes maneuvering that led to the removal of gender identity from ENDA in 2007 became an issue in litigation that Schroer had brought—and ultimately won—in challenging discrimination she faced from the Library of Congress. That litigation and the ramifications of the maneuvering in her case are discussed in Chapter 14 (Title VII of the Civil Rights Act of 1964), Section IV.C.

3. 2009 House and Senate Hearings

Appreciating that its unsuccessful political gambit had alienated the majority of LGBT advocates and a significant portion of the LGBT community, the HRC reverted to its fully inclusive ENDA position in March 2009, stating the following:

It’s the policy of HRC that the organization will only support an inclusive ENDA. In 2007 House leadership informed us that there were insufficient votes to pass an inclusive bill, so they decided to vote on a sexual orientation only bill. We made a one time exception to our policy in 2007 because we strongly believed that supporting this vote would do more to advance inclusive legislation. We will not support such a strategy again. We look forward to Congress sending President [Barack] Obama a fully inclusive ENDA for his signature.¹⁸⁹

a. 2009 House Hearing

With the HRC on board and both Houses of Congress introducing the gender identity–inclusive version of ENDA in 2009, support for ENDA appeared to be growing. During the September 2009 House Education and Labor Committee hearing, Vandy Beth Glenn testified before Congress

¹⁸⁶*Id.* at 2 (remarks by Rep. Robert E. Andrews, Subcommittee Chairman).

¹⁸⁷577 F. Supp. 2d 293, 104 FEP 628 (D.D.C. 2008). The landmark *Schroer* litigation is discussed at length in Chapter 14 (Title VII of the Civil Rights Act of 1964).

¹⁸⁸The video recording of the hearing is available at <http://edwork.edgeboss.net/wmedia/edwork/help/help062608.wvx>.

¹⁸⁹Human Rights Campaign, *HRC Board ENDA Policy*, available at <http://web.archive.org/web/20090328133426/http://www.hrc.org/issues/workplace/12346.htm>. The policy is undated, but apparently was posted on March 25, 2009. See Bil Browning, *Breaking: HRC Board Issues Statement on New ENDA Policy*, BILERICO PROJECT (Mar. 25, 2009), available at www.bilerico.com/2009/03/breaking_hrc_board_issues_statement_on_n.php.

about her termination from work when she came out as a gender-affirmed woman.¹⁹⁰ In addition, EEOC Acting Chairman Stuart Ishimaru testified in support of ENDA on behalf of the Obama administration:

I have found in the other areas that Congress has covered by the civil rights laws . . . that prejudice often is overcome by exposure to other people. And in the workplace I have found, during my time at the EEOC, people are working with people of different races, people of different genders, people of different religions. And they find that they have common interests, common hopes, common dreams and aspirations. And from that, they learn that people aren't that different from themselves. And I am hopeful that enactment of legislation that will prohibit discrimination on the basis of sexual orientation and gender identity will do the same type of thing here.¹⁹¹

Camille Olson, a labor and employment lawyer from the national law firm Seyfarth Shaw, testified without taking a position on ENDA. Instead, she highlighted six areas in which she felt the bill needed clarification, involving duplicate claims, disparate impact claims, remedies, the trigger for an employer's affirmative obligations with respect to gender identity, the definition of a gender transition, and gender-segregated facilities.¹⁹²

b. 2009 Senate Hearing

Then, in November 2009, the Senate HELP Committee heard testimony from several witnesses.¹⁹³ Thomas Perez, the Assistant Attorney General overseeing the federal Department of Justice's Civil Rights Division, cited the critical need for ENDA:

The Civil Rights Division regularly hears from individuals describing the same kind of hostility, bigotry, and hatred based on sexual orientation or gender identity that other groups faced for much of our history. There's nothing more frustrating for a law enforcement officer than to hear a horrific tale and to tell that person, "You have been wronged, and there's nothing I can do for you." That is a horrible feeling, whether it's hate crimes or whether it is discrimination in the workplace. This bill is going to enable us to correct that.¹⁹⁴

And in 2009, a Gallup poll showed that 67 percent of Americans agreed that employees should receive health insurance and other employment-related

¹⁹⁰ 2009 House Hearing, at 31–34, available at www.gpo.gov/fdsys/pkg/CHRG-111hhrg52242/pdf/CHRG-111hhrg52242.pdf (statement of Vandy Beth Glenn). The video recording of her testimony is available at <http://edwork.edgeboss.net/wmedia/edwork/fc/fc092309.wvx>. In Chapter 6 (*Glenn v. Brumby: Forty Years After Grossman*), Glenn recounts her termination and her successful, landmark litigation—*Glenn v. Brumby*, 663 F.3d 1312, 113 FEP 1543 (11th Cir. 2011)—which resulted in her reinstatement.

¹⁹¹ 2009 House Hearing, at 14 (statement of Stuart J. Ishimaru, Acting Chairman, U.S. Equal Employment Opportunity Commission) (formatting modified).

¹⁹² *Id.* at 34–44 (statement of Camille A. Olson, Partner, Seyfarth Shaw, LLP).

¹⁹³ 2009 Senate Hearing, available at www.gpo.gov/fdsys/pkg/CHRG-111shrg75804/pdf/CHRG-111shrg75804.pdf. The video recording of the hearing and the prepared statements submitted by the witnesses who testified live are available at www.help.senate.gov/hearings/hearing/?id=030ecf2b-b2e5-5793-09e9-306e004d19fb.

¹⁹⁴ *Id.* at 6 (statement of Thomas E. Perez, Assistant Attorney General, Civil Rights Division, U.S. Department of Justice). In July 2013, Perez became Secretary of the U.S. Department of Labor.

benefits for their same-sex partners.¹⁹⁵ Further, businesses had increasingly begun to realize the economic benefits from banning employment discrimination based on sexual orientation and, in some cases, gender identity as well. Eighty-five percent of Fortune 500 companies barred discrimination based on sexual orientation, and more than one third barred discrimination based on gender identity.¹⁹⁶ In addition, there was an explosion of witnesses testifying before Congress about their support for ENDA and the economic advantages of nondiscrimination, including a representative from Nike, who spoke on behalf of a coalition of more than 80 leading companies that supported ENDA.¹⁹⁷ The previous perceived deficiency in documenting evidence of employment discrimination against LGBT individuals was cured by the Williams Institute at the UCLA School of Law. Brad Sears, the Institute's Executive Director, testified and presented to Congress an extensive report, *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment*.¹⁹⁸

4. 2012 Senate Hearing

With the foundation set by the 2009 hearings, widespread positive news stories about who transgender people are, and evidence that nearly three quarters of Americans support legislation protecting the LGBT community in the workplace,¹⁹⁹ by 2012 it appeared the time for enacting ENDA had

¹⁹⁵Jeffrey M. Jones, *Majority of Americans Continue to Oppose Gay Marriage* (May 27, 2009), available at www.gallup.com/poll/118378/majority-americans-continue-oppose-gay-marriage.aspx. Note that as of July 2013, Gallup reports that 77% of Americans support health insurance and other employment-related benefits for their same-sex partners and 54% support same-sex marriage. Gallup, *Gay and Lesbian Rights*, available at www.gallup.com/poll/1651/gay-lesbian-rights.aspx (new poll results added periodically; inclusive of July 2013 poll results here).

¹⁹⁶See, e.g., *2009 House Hearing*, at 9, available at www.gpo.gov/fdsys/pkg/CHRG-111hrg52242/pdf/CHRG-111hrg52242.pdf (statement of Rep. Tammy Baldwin (D-Wis.)); *2009 Senate Hearing*, at 34–35 (statement of Virginia Nguyen, Diversity and Inclusion Team Member, Nike, Inc.). As explained in Section II.E. *supra*, by 2012 nearly 97% of the Fortune 500 companies voluntarily included sexual orientation in their employment nondiscrimination policies, and by 2013 61% of these companies also included gender identity in their nondiscrimination policies.

¹⁹⁷*2009 Senate Hearing*, at 34–35 (statement of Virginia Nguyen, Diversity and Inclusion Team Member, Nike, Inc.). The current list of members of the Business Coalition for Workplace Fairness and the statements in support of ENDA that they have submitted to Congress are available at Business Coalition for Workplace Fairness, Members (Human Rights Campaign undated), www.hrc.org/resources/entry/business-coalition-for-workplace-fairness-members.

¹⁹⁸*2009 House Hearing*, at 47–52 (statement of Brad Sears, Executive Director, UCLA School of Law Williams Institute). See Brad Sears et al., *Documenting Discrimination on the Basis of Sexual Orientation and Gender Identity in State Employment* (2009), available at <http://williamsinstitute.law.ucla.edu/research/workplace/documenting-discrimination-on-the-basis-of-sexual-orientation-and-gender-identity-in-state-employment>. Brad Sears and Christy Mallory also discuss this topic in Chapter 40 (Employment Discrimination Against LGBT People: Existence and Impact).

¹⁹⁹Jeff Krehely, *Polls Show Huge Public Support for Gay and Transgender Workplace Protections*, CENTER FOR AMERICAN PROGRESS 1–2 (May 2011), available at www.american-progress.org/wp-content/uploads/issues/2011/06/pdf/protection_poll.pdf. The poll also showed that “9 of out 10 voters erroneously think that a federal law is already in place protecting gay and transgender people from workplace discrimination.” *Id.* A 2008 Gallup poll showed that

come closer. Congressional gridlock, however, presented significant barriers for LGBT advocates and ENDA proponents. As a result, they began pursuing nonlegislative options. On April 2, 2012, 72 members of the House of Representatives sent President Obama a letter asking him to issue an executive order prohibiting federal contractors from discriminating in the workplace on the basis of sexual orientation or gender identity.²⁰⁰ However, Obama declined to do so, on the basis that he favored “lasting and comprehensive non-discrimination protections,” such as ENDA.²⁰¹

In June 2012, the Senate HELP Committee held the hearing in which Kylar Broadus spoke candidly of his experience with employment discrimination.²⁰² It was also the hearing where a growing number of witnesses and a burgeoning set of data reinforced for members of Congress the continuing, significant need for federal protections for LGBT employees. For example, Professor Badgett provided updated data on the discrimination faced by LGBT individuals.²⁰³ Broadus’ live testimony was supported by the written testimony of Rea Carey, Executive Director of the NGLTF, which a year earlier issued its groundbreaking report, *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*.²⁰⁴ Later that month, the American Bar Association, which has supported a fully inclusive version of ENDA since 2006, urged Congress to enact ENDA, observing, “Whenever any of our basic civil rights are diminished or marginalized unjustifiably on the basis of personal characteristics, all of our basic civil rights are diminished and jeopardized.”²⁰⁵

89% of Americans support equal employment rights for LGB people. Gallup, *Gay and Lesbian Rights*, available at www.gallup.com/poll/1651/gay-lesbian-rights.aspx (new poll results added periodically; viewed as of inclusion of July 2013 poll results).

²⁰⁰Chris Johnson, *72 Lawmakers to Obama: Sign ENDA Exec Order*, WASH. BLADE (Apr. 3, 2012), available at www.washingtonblade.com/2012/04/03/72-lawmakers-to-obama-sign-enda-exec-order.

²⁰¹Press Briefing by [White House] Press Secretary Jay Carney (Apr. 12, 2012), available at www.whitehouse.gov/the-press-office/2012/04/12/press-briefing-press-secretary-jay-carney-41212.

²⁰²See *2012 Senate Hearing*, available at www.help.senate.gov/hearings/hearing/?id=bc503bd3-5056-9502-5da9-beea5048efc9; Kimberley McLeod, *Senate Hears from First Transgender Witness on Employment Non-Discrimination Act*, NATIONAL BLACK JUSTICE COALITION (June 13, 2012), available at <http://nbjc.org/media-center/releases/broadus-first-transgender-witness>.

²⁰³*2012 Senate Hearing* (testimony of M.V. Lee Badgett, Research Director, UCLA Law School Williams Institute, and Director, University of Massachusetts Center for Public Policy and Administration). The text of Badgett’s supplementary written statement is available at www.help.senate.gov/imo/media/doc/Badgett.pdf and <http://williamsinstitute.law.ucla.edu/research/workplace/testimony-s811-061212>.

²⁰⁴*2012 Senate Hearing*, available at www.thetaskforce.org/downloads/release_materials/TF_enda_testimony_061112.pdf (written statement of Rea Carey, Executive Director, National Gay and Lesbian Task Force). See JAIME M. GRANT ET AL., *INJUSTICE AT EVERY TURN: A REPORT OF THE NATIONAL TRANSGENDER DISCRIMINATION SURVEY* (2011), available at www.thetaskforce.org/reports_and_research/ntds.

²⁰⁵Letter From William T. (Bill) Robinson III, President, American Bar Association, to Hon. Tom Harkin, Chair, and Hon. Michael B. Enzi, Ranking Member, Committee on Health, Education, Labor & Pensions, U.S. Senate (June 21, 2012), available at www.americanbar.org/content/dam/aba/uncategorized/GAO/2012june21_enda_l.authcheckdam.pdf.

D. 2013

With congressional inactivity continuing in the first few months of 2013, LGBT advocates and lawmakers revived the push for an executive order that would prohibit discrimination based on sexual orientation or gender identity by federal contractors. In February and March, 37 members of the Senate,²⁰⁶ a coalition of 54 LGBT advocacy groups and their allies,²⁰⁷ and 110 members of the House²⁰⁸ each separately wrote to President Obama to ask him to reconsider issuing such an executive order. As of April 30, 2014, the White House had not taken action on these requests,²⁰⁹ but it did so in July 2014. Interestingly, shortly before President Obama issued his July 2014 executive order, leading LGBT advocacy groups withdrew their support for ENDA. See the Editor's Note at the beginning of Chapter 17 of this treatise.

1. *Differences Between the 2011 and 2013 Bills*

On April 25, 2013, the focus of lawmakers once again returned to the legislative arena. A bipartisan group of legislators introduced an updated version of ENDA in both the House of Representatives and the Senate.²¹⁰ Substantively, the newly introduced version of ENDA differs little from the 2011 bill, although five provisions of the 2011 bill were removed before ENDA's reintroduction.²¹¹

The first and second removed provisions had reaffirmed the ability of an employer to (1) enforce policies that are not subterfuges to intentionally circumvent ENDA and (2) take adverse actions against employees charged with sexual harassment, provided that in both situations its policies are designed for and uniformly applied to all employees regardless of their sexual orientation or gender identity.²¹² These provisions were deemed unnecessary given that ENDA itself would prohibit disparate treatment—i.e.,

²⁰⁶Letter From 37 U.S. Senators to President Barack Obama (Feb. 14, 2013), *available at* www.washingtonpost.com/r/2010-2019/WashingtonPost/2013/02/14/Editorial-Opinion/Graphics/2.14.13ExecutiveOrder%20FINAL.pdf.

²⁰⁷Letter From 54 Pro-LGBT Equality Advocacy Groups to President Barack Obama Regarding Executive Order Adding LGBT Protections to Millions of Jobs (Feb. 20, 2013), *available at* www.scribd.com/doc/126448503/Letter.

²⁰⁸Chris Johnson, *110 House Lawmakers Call for ENDA Executive Order*, WASH. BLADE (Mar. 20, 2013), *available at* www.washingtonblade.com/2013/03/20/110-house-lawmakers-latest-to-call-for-enda-executive-order.

²⁰⁹See also Chris Johnson, *Perez Says ENDA Executive Order Under Consideration*, WASH. BLADE (Feb. 12, 2014), *available at* www.washingtonblade.com/2014/02/12/perez-says-enda-directive-issue-contemplated (“Labor Secretary Thomas Perez said [today] the issue of an executive order prohibiting anti-LGBT discrimination among federal contractors is something ‘we continue to contemplate and work on. . . .’”).

²¹⁰Crosby Burns, *ENDA Once Again Introduced by Bipartisan Group of Lawmakers*, THINKPROGRESS (Apr. 25, 2013), *available at* <http://thinkprogress.org/lgbt/2013/04/25/1923071/enda-once-again-introduced-by-bipartisan-group-of-lawmakers>.

²¹¹*Compare* Employment Non-Discrimination Act, S. 815, 113th Cong. § 8 (2013) *with* Employment Non-Discrimination Act, S. 811, 112th Cong. § 8 (2011). For ease of discussion, the 2011 version of ENDA will be referred to as S. 811 (2011).

²¹²S. 811, § 8(a)(1)–(2) (2011).

intentional discrimination—based on sexual orientation or gender identity and given that ENDA does not limit the rights, remedies, or procedures available to individuals claiming discrimination prohibited by any other federal, state, or local law, such as Title VII’s prohibition against sexual harassment.²¹³

The third removed provision allowed employers to deny access to “shared shower or dressing facilities in which being seen unclothed is unavoidable” as long as an employer provided “reasonable access to adequate facilities not inconsistent with an employee’s gender identity.”²¹⁴ Thus, under the 2013 version of ENDA, an employer who denies access to any shower or dressing facility on the basis of an employee’s gender identity would violate ENDA, regardless of whether being seen unclothed is unavoidable or whether there are alternative facilities available.²¹⁵ The removal of this provision is consistent with the guidance from governmental agencies, including the U.S. Office of Personnel Management, that once an employee going through a gender affirmation “has begun living and working full-time in the gender that reflects his or her gender identity, [employers] should allow access to restrooms and . . . locker room facilities consistent with his or her gender identity.”²¹⁶

The fourth removed provision reserved the right of employers to treat unmarried and married couples differently for the purposes of employee benefits, and the fifth removed provision incorporated the definition of “married” from Section 3 of DOMA, which had limited marriages to those between a man and a woman.²¹⁷ Taken together, these two provisions would have allowed employers to deny same-sex couples—even if married under state law—the same benefits as different-sex married couples. The removal of these two provisions may have been in anticipation of the Supreme Court’s then-forthcoming decision in the challenge to DOMA²¹⁸ and the growing call for congressional action to repeal DOMA if the Court declined to find it unconstitutional.²¹⁹

²¹³S. 815, 113th Cong. §15.

²¹⁴S. 811, §8(a)(3) (2011).

²¹⁵As explained earlier, the 2013 version of ENDA provides that employers need not construct new or additional facilities. S. 815, 113th Cong. §8(b). The 2011 version contained the same provision. S. 811, §8(a)(4) (2011).

²¹⁶U.S. Office of Personnel Management, Guidance Regarding the Employment of Transgender Individuals in the Federal Workplace (Transition While Employed, Sanitary and Related Facilities) (May 27, 2011), available at www.opm.gov/policy-data-oversight/diversity-and-inclusion/reference-materials/gender-identity-guidance (reproduced in Appendix A). See Chapters 36 (Gender-Segregated Facilities) and 42 (The “Bathroom Bill” Security Concerns Debunked).

²¹⁷S. 811, §8(b)–(c) (2011).

²¹⁸As explained earlier in this chapter, the Supreme Court issued its decision in June 2013, declaring DOMA unconstitutional. See *United States v. Windsor*, 570 U.S. ___, 133 S. Ct. 2675, 118 FEP 1417 (2013).

²¹⁹See, e.g., Reid Pillifant, [*U.S. Senator Kirsten Gillibrand Is “Quite Optimistic” About Repealing DOMA Soon*], CAPITAL NEW YORK (June 18, 2013), available at www.capitalnewyork.com/article/politics/2013/06/8531044/gillibrand-quite-optimistic-about-repealing-doma-soon; President Bill Clinton, *It’s Time to Overturn DOMA*, WASH. POST (Mar. 7, 2013), available at www.washingtonpost.com/opinions/bill-clinton-its-time-to-overturn-doma/2013/03/07/fc184408-8747-11e2-98a3-b3db6b9ac586_story.html.

2. July 2013 Amendments and Senate Committee Vote

On July 10, 2013, the Senate HELP Committee held an executive session to mark up S. 815. A substitute version of the bill, which made two substantive amendments to the text, was approved by a vote of 15 to 7.²²⁰ Of note, three Republican senators—Orrin Hatch, Lisa Murkowski (R-Alaska), and Mark Kirk (R-Ill.)—voted in favor of the legislation. This marked the first time members of either House of Congress voted on a version of ENDA that included gender identity.

The first amendment makes it clear that to prevail in litigation, the plaintiff bears the burdens of production and persuasion to show that gender identity or sexual orientation was “a motivating factor” in an employer’s decision to discriminate.²²¹ This standard of proof is the one Congress adopted in 1991 for Title VII litigation and is lower than the “but for” standard the Supreme Court deemed applicable in 2009 to age discrimination claims under the ADEA and in 2013 to retaliation claims under Title VII.²²² However, the amendment also provides that if the employer then demonstrates that it would have taken the same action in the absence of the impermissible factor, it will not be liable for monetary damages or subject to an order requiring the plaintiff’s reinstatement or promotion. The court may still award the plaintiff declaratory relief, injunctive relief (not including reinstatement or promotion), and attorney’s fees.²²³ This is the same standard that Congress enacted in 1991 for Title VII cases. During the executive session, Ranking Committee Member Lamar Alexander (R-Tenn.) advised that he had filed an amendment that apparently would require that plaintiffs meet the “but for” test to prevail.²²⁴

The second amendment provides that a plaintiff alleging discrimination under ENDA and sex discrimination under Title VII may not recover damages under both laws.²²⁵

²²⁰ See *Employment Non-Discrimination Act of 2013: U.S. Senate Committee on Health, Education, Labor, and Pensions Executive Session on S. 815*, 113th Cong. (July 10, 2013) [hereinafter *2013 Senate Executive Session*]. The video recording of the session is available at www.help.senate.gov/hearings/hearing/?id=495623c9-5056-a032-52e4-f47523519a5a. The revised version of S. 811, which was reported to the Senate on September 12, 2013, is available at www.gpo.gov/fdsys/pkg/BILLS-113s815rs/pdf/BILLS-113s815rs.pdf. Several minor amendments were made to S. 815. To the extent relevant to the discussion in this chapter, those amendments are discussed in earlier footnotes.

²²¹ S. 815, 113th Cong. §§3(a)(3), 4(h), as added by the July 10, 2013 Senate HELP Committee’s manager’s amendment.

²²² *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176, 106 FEP 833 (2009) (ADEA case); *University of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. ___, 133 S. Ct. 2517, 2526–33, 118 FEP 1504, 1509–14 (2013) (Title VII retaliation case). For an additional discussion of burdens of proof and remedies, see Chapter 14 (Title VII of the Civil Rights Act of 1964), Section II.

²²³ S. 815, 113th Cong. §10(e), as added by the July 10, 2013, Senate HELP Committee’s manager’s amendment.

²²⁴ *2013 Senate Executive Session*, available at www.help.senate.gov/hearings/hearing/?id=495623c9-5056-a032-52e4-f47523519a5a (statement of Sen. Lamar Alexander).

²²⁵ S. 815, 113th Cong. §10(d), as added by the July 10, 2013, Senate HELP Committee’s manager’s amendment. Based on existing practice in employment litigation, it is highly unlikely that a tribunal would have allowed double recovery in the absence of the language added by the

As explained earlier, S. 815 as introduced provides that “[n]othing in this Act shall be construed to require the construction of new or additional facilities.”²²⁶ Senator Alexander indicated that he had a second proposed amendment that “would clarify that employers would not be required to reconstruct or alter existing facilities under the bill” and would “provide employers with a ‘safe harbor to assign a transitioning employee to either gender’s bathroom or shared facility, as long as the decision is based on good faith belief that the assignment is least disruptive to the workplace.’”²²⁷

Senator Alexander also indicated that he had a third amendment, which would provide that employers could not be held liable for gender identity discrimination until after the EEOC issues regulations defining the term “transition.”²²⁸ None of Alexander’s amendments was voted on. There were two additional amendments that had been filed but not offered at the markup. Senator Michael Enzi (R-Wyo.) proposed that schools be exempted from ENDA, and Senator Rand Paul (R-Ky.) recommended that “the bill’s selective religious exemption” should be replaced “with a comprehensive religious exemption for religious employers.”²²⁹

Senator Hatch explained why he voted in favor of ENDA:

I appreciate that the authors of the bill were willing to include a robust religious exemption in this bill. I voted for the bill in Committee because it prohibits discrimination that should not occur in the workplace, it protects the rights of religious entities, and minimizes legal burdens on employers. I look forward to working to improve the bill as it moves to debate in the full Senate.²³⁰

On July 15, 2013, the Congressional Research Service issued its analysis of ENDA, as amended by the Senate HELP Committee.²³¹

amendment. *See* EEOC v. Waffle House, Inc., 534 U.S. 279, 297, 12 AD 1001 (2002) (“it ‘goes without saying that the courts can and should preclude double recovery by an individual’”).

²²⁶S. 815, 113th Cong. §8(b).

²²⁷Michael Rose, *Senate HELP Committee Reports ENDA To Full Senate on Bipartisan 15–7 Vote*, 132 Daily Lab. Rep. A-2 (July 10, 2013); *see* Daniel Strauss, *Senate Panel Approves Bill Banning LGBT Discrimination At Work*, THE HILL (July 10, 2013), available at <http://thehill.com/blogs/blog-briefing-room/news/310111-enda-passes-help-committee>; *2013 Senate Executive Session* (statement of Sen. Lamar Alexander).

²²⁸*Id.*

²²⁹2013 *Senate Report*, at 26–27, available at www.gpo.gov/fdsys/pkg/CRPT-113srpt105/pdf/CRPT-113srpt105.pdf.

²³⁰Statement of Sen. Orrin Hatch Regarding ENDA (July 10, 2013), reprinted in Chris Johnson, *HISTORIC: Senate Panel Advances Trans-Inclusive ENDA*, WASH. BLADE (July 10, 2013), available at www.washingtonblade.com/2013/07/10/historic-senate-panel-advances-trans-inclusive-enda, and *Hatch Surprises Washington on Gay Rights Vote*, KSTU-FOX 13 (July 10, 2013) (written statement embedded in video), available at <http://fox13now.com/2013/07/10/hatch-surprises-washington-on-gay-rights-vote>.

²³¹JODY FEDER & CYNTHIA BROUGH, *SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION IN EMPLOYMENT: A LEGAL ANALYSIS OF THE EMPLOYMENT NON-DISCRIMINATION ACT (ENDA)* (July 15, 2013), Congressional Research Service, R40934, available at www.fas.org/sgp/crs/misc/R40934.pdf.

3. *September 2013 Senate Report*

In September 2013, the Senate HELP Committee favorably reported the ENDA bill to the full Senate.²³² The Senate report sets forth at length the extensive record of persistent and systemic discrimination against LGBT individuals, as well as the severe adverse economic and psychological impact of the discrimination on these individuals.²³³ The committee concluded that

... passage of legislation that explicitly prohibits discrimination on the basis of sexual orientation and gender identity will send a strong signal that in American workplaces, people should be judged on their skills, abilities and accomplishments. The bill will clearly articulate a national commitment to equal employment opportunity regardless of sexual orientation and gender identity. And, just as passage of legislation such as title VII and the ADA helped to change attitudes and diminish the social acceptability of bias, prejudice and bigotry, the committee believes passage of ENDA will make clear that lesbian, gay, bisexual and transgender Americans are equal, first-class citizens. They are fully recognized and welcomed as members of our American family.²³⁴

Senators Alexander, Enzi, Johnny Isakson (R-Ga.), Paul, Pat Roberts (R-Kan.), and Tim Scott (R-S.C.) briefly expressed their reasons for voting against S. 815. In particular, they objected to (1) the committee's rapid passage of the bill without following the "regular order" of the committee; (2) the bill's failure to address or otherwise "acknowledge the potential for[] nefarious abuse of employment protections and gender-specific area access privileges;" (3) the bill's "devastating" consequences to employers by forcing them to permit transgender employees to use gender-segregated facilities that correspond to their gender identity; (4) "the bill's poorly defined or completely undefined terms"; (5) the bill's imposition of "individual values upon society," which may "conflict with deeply held religious beliefs" of employers that would not qualify for the bill's religious exemption; (6) the bill's grant to LGBT employees "rights that are elevated above those granted to existing protected classes of race, sex, national origin, religion, age and disability"; and (7) the bill's creation of a new federal remedy when more than half of the states have declined to do so and the courts have already extended Title VII to protect LGBT employees from discrimination based on gender stereotypes.²³⁵

4. *Renewed Debate Over the Employment Non-Discrimination Act's Religious Exemption*

In addition, ENDA's religious exemption, discussed in Section II.A. *supra*, has also begun to garner significant attention. The provision itself

²³²2013 Senate Report.

²³³*Id.* at 14–18.

²³⁴*Id.* at 21–22 (formatting modified).

²³⁵*Id.* at 24–26.

remains unchanged between the 2011 and the 2013 versions of the bill.²³⁶ However, supporters of ENDA began, in 2013, to express more vocally their concern that the religious exemption is too broad; in a joint press release, the American Civil Liberties Union, Lambda Legal, National Center for Lesbian Rights, and the Transgender Law Center argued that the religious exemption is the equivalent of a “blank check to engage in employment discrimination against LGBT people.”²³⁷ These groups observed that because it could be possible for employers such as religiously affiliated hospitals or universities, which have a mission that extends well beyond celebration or promotion of a religious faith, to claim the exemption, the “exemption undermines the core goal of ENDA by leaving too many jobs, and LGBT workers, outside the scope of its protections.”²³⁸

In the prior year, for the Senate’s 2012 hearing, the Center for American Progress took a somewhat different approach in its detailed analysis of the religious exemption, suggesting that the exemption presented a balanced approach and observing that “a number of religious organizations articulated their support [for ENDA,] noting that with ENDA’s religious exemption lawmakers can simultaneously advance the freedom to work while protecting the freedom of religion.”²³⁹ The Center also set forth the various arguments that religious organizations opposing ENDA have raised and then explained why those arguments are without merit.²⁴⁰

In its September 2013 report, the Senate HELP Committee explained its position on the religious exemption:

[Section 6 of ENDA] exempts from its coverage those religious institutions that are exempt under title VII’s prohibition on discrimination based on religion. Title VII’s language has been in effect since 1972, and thus the committee believes it is simple for organizations to understand who falls under the exemption. ENDA would apply, however, to entities that are not primarily religious in purpose and character. A non-religious entity would not be able to not hire, fire, or otherwise take an adverse employment action against someone because of their sexual orientation or gender identity, even if his or her boss has a deeply held belief against homosexuality. For example, an entity that is for-profit, produces a secular product and is not affiliated with a church would not be exempt from the law.

²³⁶Compare S. 815, 113th Cong. §6 with S. 811, 112th Cong. §6 (2011). In the November 2013 version of the Senate bill, the full text of what was §6 in the initial version of the 2013 Senate bill was recast as new subsection 6(a), with the new subsection referring to the exempted religious organizations as “religious employers.” S. 815, 113th Cong. §6(a) (as passed by the full Senate on Nov. 7, 2013).

²³⁷Press Release, American Civil Liberties Union, Lambda Legal, National Center for Lesbian Rights, Transgender Law Center, *Employment Non-Discrimination Act Statement* (Apr. 25, 2013), available at www.aclu.org/lgbt-rights/employment-non-discrimination-act-statement.

²³⁸*Id.*

²³⁹Crosby Burns & Jeff Krehely, *The Freedom to Work, the Freedom to Worship: The Employment Non-Discrimination Act Advances Workplace Equality and Protects Religious Liberty*, CENTER FOR AMERICAN PROGRESS 4 (June 2012), available at www.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/enda_final.pdf.

²⁴⁰*Id.* at 4–6.

Despite the Act's religious exemption, some have expressed concern that the religious beliefs of employers and employees are not sufficiently protected. They argue that those whose religion dictates that homosexuality is wrong will be forced to hire or work with gay men and lesbians. Similar arguments are not new to the civil rights debate, but our Nation's civil rights laws rightly require nonreligious organizations and entities, particularly those who participate in commercial activity, to adhere to broad principles of fairness and equality. The committee further notes that the religious exemption contained in ENDA is broader than that contained in other civil rights laws. For example, under title VII, religious organizations are not permitted to discriminate based on race, sex and national origin.²⁴¹

Concern among groups, even those that support ENDA's passage, regarding the scope of the religious exemption is indicative of the rigorous debate that ENDA will continue to generate.

5. *November 2013 Senate Vote*

In November 2013, for the second time the full Senate debated ENDA. As explained in Section III.B.2.c. *supra*, in 1996 ENDA failed to pass the Senate by one vote. In 2013, however, the bill—which was discussed on the floor of the Senate over the course of four days—passed by a vote of 64 to 32.²⁴²

Before passage, two related provisions were added to ENDA to satisfy the concerns of some senators.²⁴³ First, the following subsection was added to Section 6:

A religious employer's exemption under this section shall not result in any action by a Federal agency, or any State or local agency that receives Federal funding or financial assistance, to penalize or withhold licenses, permits, certifications, accreditation, contracts, grants, guarantees, tax-exempt status, or any benefits or exemptions from that employer, or to prohibit the employer's participation in programs or activities sponsored by that Federal, State, or local agency. Nothing in this subsection shall be construed to invalidate any

²⁴¹2013 *Senate Report*, at 8–9, available at www.gpo.gov/fdsys/pkg/CRPT-113srpt105/pdf/CRPT-113srpt105.pdf (one footnoted citation omitted and one footnote incorporated into the text above).

²⁴²See 159 CONG. REC. S7781–7800 (Nov. 4, 2013), S7801–34 (Nov. 5, 2013), S7837–89 (Nov. 6, 2013), S7892–7909 (Nov. 7, 2013); U.S. Senate Roll Call Vote Summary on S. 815, 113th Cong. (Nov. 7, 2013) (Employment Non-Discrimination Act of 2013), available at www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00232.

²⁴³The two new provisions were added to ENDA by the “Portman-Ayotte-Heller-Hatch-McCain Amendment.” See 159 CONG. REC. S7841, 7846–47, 7880–81 (Nov. 6, 2013). Numerous other amendments were either rejected or withdrawn, including (1) provisions dealing with right-to-work, sex-selection abortions, military service discrimination, and the effective date of ENDA; (2) a requirement that the EEOC issue guidance with respect to ENDA (including defining the term “transition” and guidance on shared facilities); and (3) the “Toomey-Flake-McCain Amendment,” which would have significantly expanded the number of organizations that would qualify as “religious employers.” With respect to the Toomey-Flake-McCain Amendment, see 159 CONG. REC. S7841, 7846–47, 7864–65, 7881 (Nov. 6, 2013) and 159 CONG. REC. S7894, 7900–02 (Nov. 7, 2013). Although the Toomey-Flake-McCain Amendment was defeated (43 to 55), Senators Pat Toomey (R-Pa.), Jeff Flake (R-Ariz.), and John McCain (R-Ariz.) voted in favor of ENDA. 159 CONG. REC. S7902, 7907 (Nov. 7, 2013).

other Federal, State, or local law (including a regulation) that otherwise applies to a religious employer exempt under this section.²⁴⁴

One of the sponsors of this provision, Senator Rob Portman (R-Ohio), explained that “[i]n practical terms,” the first sentence of the foregoing subsection “means the government cannot use activities protected by ENDA’s religious exemption as a basis to deny religious employers government grants, contracts, their tax-exempt status, or other benefit.”²⁴⁵ With respect to the second sentence, Senators Tom Harkin (D-Iowa) and Patrick Leahy (D-Vt.) made it clear that ENDA does not preempt the enforcement of federal, state, and local laws that provide broader protections against discrimination based on gender identity or sexual orientation.²⁴⁶

Second, the amendment added a fourth subsection to Section 2 of ENDA, stating that one of the four purposes of ENDA is “to reinforce the Nation’s commitment to fairness and equal opportunity in the workplace consistent with the fundamental right of religious freedom.”²⁴⁷

During the four days of debate over ENDA, except for senators who argued in favor of a broader religious exemption, not a single senator rose in opposition to ENDA. Numerous senators observed the following:

- ENDA has broad support among the public (including majorities of Democrats, Independents, and Republicans), religious communities (including majorities in every Christian denomination), and the business sector.
- In each of the jurisdictions that bar discrimination based on gender identity or sexual orientation, there has been no explosion in litigation, including in Wisconsin, which in 1982 enacted the first state law barring sexual orientation discrimination, and in Minnesota,

²⁴⁴S. 815, 113th Cong. §6(b), as added on November 7, 2013, by the full Senate. The revised version of S. 811, which was passed by the Senate on November 7, 2013, and sent to the House on November 12, 2013, is available at www.gpo.gov/fdsys/pkg/BILLS-113s815rfh/pdf/BILLS-113s815rfh.pdf.

²⁴⁵159 CONG. REC. S7848 (Nov. 6, 2013) (remarks of Sen. Portman); *accord* 159 CONG. REC. S7847 (Nov. 6, 2013) (remarks of Sen. Ayotte (R-N.H.)) (“In practical terms, the government may not use activities protected by the religious exemption as a basis to deny a religious employer a government grant or tax-exempt status or any other benefit that may be conferred by the government”); 159 CONG. REC. S7849 (Nov. 6, 2013) (remarks of Sen. Susan Collins (R-Me.)) (“What it simply says is that if an organization is exempt from ENDA for religious reasons, then government cannot turn around and somehow retaliate against this employer based on his claiming or her claiming a legitimate religious exemption as provided by ENDA.”).

²⁴⁶159 Cong. Rec. S7846 (Nov. 6, 2013) (colloquy between Sens. Harkin and Leahy); 159 Cong. Rec. S7906 (Nov. 7, 2013) (remarks Sen. Harkin) (“The amendment is not intended to undermine in any way current or future Federal, State, or local civil rights protections—States and localities can still enforce their own nondiscrimination laws for violations within their jurisdiction, regardless of whether an entity is exempt under the national ENDA legislation.”); *see also* S. 815, 113th Cong. §15 (ENDA does not invalidate or limit the rights, remedies, or procedures available to individuals claiming discrimination prohibited by any other federal, state, or local law).

²⁴⁷S. 815, 113th Cong. §2(4), as added on November 7, 2013, by the full Senate.

which in 1993 enacted the first state law barring gender identity discrimination.²⁴⁸

- ENDA is a simple reflection of the cherished American value that individuals should be measured by their abilities, competence, integrity, qualifications, and/or skills and not by who they are or whom they love.
- ENDA reasonably accommodates the needs of religious employers.

6. *The Employment Non-Discrimination Act's Status as of April 2014*

As of April 30, 2014, ENDA had 203 cosponsors in the House and 56 in the Senate. As was noted by several senators during the 2013 Senate debate, House Speaker John Boehner (R-Ohio) had made it clear before the Senate vote that he opposes ENDA and would not bring the bill up for a vote in the House.²⁴⁹ In response, President Obama challenged Boehner to move forward with a vote, observing the following:

This bill has the overwhelming support of the American people, including a majority of Republican voters, as well as many corporations, small businesses and faith communities. They recognize that our country will be more just and more prosperous when we harness the God-given talents of every individual.

One party in one house of Congress should not stand in the way of millions of Americans who want to go to work each day and simply be judged by the job they do. Now is the time to end this kind of discrimination in the workplace, not enable it. I urge the House Republican leadership to bring this bill to the floor for a vote and send it to my desk so I can sign it into

²⁴⁸State laws are discussed in Chapter 20 (Survey of State Laws Regarding Gender Identity and Sexual Orientation Discrimination in the Workplace). See also the six reports provided to the Senate HELP Committee by the GAO that discuss the status of state laws prohibiting discrimination based on sexual orientation and gender identity and the limited number of discrimination claims filed under those laws. These reports, issued on October 23, 1997 (GAO/OGC-98-7R), April 28, 2000 (GAO/OGC-00-27R), April 19, 2002 (GAO-02-665R), July 9, 2002 (GAO-02-878R), October 1, 2009 (GAO-10-135R), and July 31, 2013 (GAO-13-700R), are available on the GAO's website at www.gao.gov. Links to GAO reports are set forth in the overview in Chapter 20.

²⁴⁹See also Robert Farley, *Spinning ENDA*, FACTCHECK.ORG (Annenberg Public Policy Center Nov. 6, 2013), available at www.factcheck.org/2013/11/spinning-enda (quoting official statement from House Speaker Boehner's office that ENDA would "increase frivolous litigation and cost American jobs, especially small business jobs"); Laura E. Durso & Winnie Stachelberg, *Business Support for [ENDA]—Fact Not Fiction* (Center for American Progress Nov. 5, 2013), available at www.americanprogress.org/issues/lgbt/news/2013/11/05/78894/business-support-for-the-employment-non-discrimination-act-fact-not-fiction (same). Speaker Boehner's claims regarding an increase in frivolous litigation and the impact on small businesses are unsupported by the evidence in the states that have already enacted laws barring discrimination based on gender identity or sexual orientation. See Katharine H. Parker, *Litigation Implications for Employers under ENDA*, LAW360 (Dec. 6, 2013), available at www.proskauer.com/publications/published-article/litigation-implications-for-employers-under-enda (observing that the data indicate that "'relatively few employment discrimination complaints based on sexual orientation and gender identity' have been filed in those states" and "the cost to private sector employers is projected to be minor. Since ENDA would not apply to companies with fewer than 15 employees, its impact on small businesses would be innately limited.").

law. On that day, our nation will take another historic step toward fulfilling the founding ideals that define us as Americans.²⁵⁰

In November 2013, attorneys general in 14 states sent a letter to Boehner that similarly urged him to permit a vote by the House.²⁵¹

IV. CONCLUSION

Although the issues raised in debate over ENDA have remained largely the same since the first hearing more than three decades ago, the context has changed dramatically. In 1980, ENDA supporters were primarily grassroots LGB organizations and other relatively marginal groups desperately fighting for their voice to be heard. In 2012, General Mills' public endorsement of ENDA on behalf of Corporate America was emblematic of many others, stating in testimony to Congress that ENDA "is good for business and good for America."²⁵²

Notably, too, although the fight for equality has gained some powerful supporters, it has lost some along the way as well, with a number of organizations concluding that the "compromises" made to pass ENDA have gone too far.²⁵³ In 1994, as discussed above, protections in other areas, such as housing and public accommodations, were removed from the bill. The supporters of this more comprehensive version claimed that now the bill would easily pass through Congress, or would pass at least as easily as the employment-focused bill.²⁵⁴

Despite ENDA's lively history and its changes over time, the key points of opposition have remained fairly stagnant since the first iteration of this civil rights bill was introduced in 1980: (1) Is the religious exemption broad enough?; (2) Does this legislation impose a moral viewpoint about homosexuality on an unwilling public?; and (3) Can the LGBT community really be considered a population in need of protection?²⁵⁵

²⁵⁰Barack Obama, *Statement by the President on Senate Passage of the Employment Non-Discrimination Act of 2013* (Nov. 7, 2013), available at www.whitehouse.gov/the-press-office/2013/11/07/statement-president-senate-passage-employment-non-discrimination-act-2013. See also Barack Obama, *Congress Needs to Pass the Employment Non-Discrimination Act*, HUFFINGTON POST (Nov. 3, 2013), available at www.huffingtonpost.com/barack-obama/enda-congress_b_4209115.html.

²⁵¹Letter from 14 States Attorney Generals to Hon. John Boehner, Speaker, U.S. House of Representatives (Nov. 18, 2013), available at www.ag.ny.gov/pdfs/ENDA_Letter.pdf.

²⁵²2012 Senate Hearing, available at www.help.senate.gov/hearings/hearing/?id=bc503bd3-5056-9502-5da9-beea5048efc9 (testimony of Kenneth Charles, Vice President, Global Diversity & Inclusion, General Mills, Inc.). The text of Charles' supplementary written statement is available at www.help.senate.gov/imo/media/doc/Charles1.pdf.

²⁵³See, e.g., DEAN SPADE, *NORMAL LIFE: ADMINISTRATIVE VIOLENCE, CRITICAL TRANS POLITICS, AND THE LIMITS OF THE LAW* 62–64 (2011).

²⁵⁴See, e.g., *From Bella to ENDA*, at 178–79.

²⁵⁵With respect to the third question, see the discussions in Chapter 15 (Federal Equal Protection), Section V., and Chapter 16 (The Americans with Disabilities Act of 1990 and the Rehabilitation Act of 1973), Section III.G.3., regarding LGBT people being entitled to the benefits of the heightened scrutiny standard in equal protection cases.

Yet even as these questions continue to be raised by adversaries, support for ENDA is undeniably growing. Indeed, states, local governments, and private employers are speaking for themselves and implementing their own employment protections for LGBT individuals.²⁵⁶ Support among members of Congress and the general public is also at an all-time high and continues to rise. Taken together, the substantial proof of sexual orientation and gender identity discrimination in the workplace, the growing intolerance for that discrimination among a substantial majority of Americans, and the Supreme Court's declaration that DOMA violates the constitutional rights of same-sex couples and their families suggests that ENDA may soon make the all-important leap from bill to federal law.

²⁵⁶See New York City Bar, *The Employment Non-Discrimination Act* 9–10 (Apr. 2011), available at www.nycbar.org/pdf/report/uploads/20072091-TheEmploymentNon-DiscriminationAct.pdf.