

## **Adequate Religious Freedom Protections in ENDA**

**Current Religious Exemption.** The Employment Non-Discrimination Act of 2013 (S. 815, H.R. 1755) includes this religious freedom provision:

**Sec. 6. Exemption for Religious Organizations.** This Act shall not apply to a corporation, association, educational institution or institution of learning, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Act of 1964 pursuant (42 U.S.C. 2000e et seq.) to section 702(a) or 703(e)(2) of such Act (42 U.S.C. 2000e-1(a), 2000e-2(e)(2)).

This language, first adopted as part of ENDA by the House in 2007, is intended to fulfill the promise of ENDA supporters not to diminish religious freedom in the course of securing protection against LGBT employment discrimination. However, for the employment practices of religious organizations actually to be protected, ENDA **must be amended** in several vital ways.

**Ensure that religious freedom is not inadvertently undermined by the new rights.** The Religious Freedom Restoration Act was adopted by Congress in 1993 to restore the “compelling interest” standard undermined by the *Smith* decision, and thereby protect religious freedom. Yet in the current environment of heightened activism to curtail LGBT discrimination, some may say that by adopting ENDA Congress has implicitly announced that the federal government has a “compelling interest” *not* to accommodate the employment practices of religious organizations even though compliance with ENDA would substantially burden their religious exercise. ENDA should be amended to guard against this undermining of its intention.

### **Recommended Changes to Sec. 2. Purposes:**

**[amended]** Subsec. (1) to address the history and persistent, widespread pattern of discrimination, ~~including unconstitutional discrimination~~, on the bases of sexual orientation and gender identity by private sector employers and local, State, and Federal Government employers;

**[new]** Subsec. (3) to help strengthen civil society and preserve institutional pluralism by providing sensible accommodations for religious freedom; and

### **Recommended Change To Sec. 8. Construction:**

**[new]** Subsec. (d) Religious Freedom. Nothing in this Act shall be evidence of or construed to establish a compelling government interest with respect to a claim under the First Amendment of the Constitution of the United States or under 42 U.S.C. §2000bb *et seq.* (the Religious Freedom Restoration Act of 1993).

**Ensure that religious freedom is not nullified by governmental retaliation.** Developments in parallel areas of law and contemporary activism demonstrate the need to forestall retaliation against organizations eligible for an exemption by specifically prohibiting such retaliation. Other laws do this. Retaliation by government officials against the Boy Scouts following the Su-

preme Court's upholding of its policy on openly gay Scoutmasters led Congress to adopt the Boy Scouts of America Equal Access Act (2002). In the same-sex marriage context, various jurisdictions (e.g., Connecticut, the District of Columbia, Maryland, New Hampshire, New York, and Washington) expressly protect religious organizations that object to treating same-sex marriage as equivalent to traditional marriage from being penalized by the government for such a refusal through, e.g., the loss of government grants. Similarly, some legislation to protect staff and organizations from being required to participate in procedures they regard as morally objectionable includes specific non-retaliation requirements. The U.S. Leadership Against HIV/AIDS, Tuberculosis, and Malaria Act, as reauthorized in 2008, for example, forbids excluding an objecting organization from federal grants, contracts, and cooperative agreements. The Public Health Service Act includes several measures, including the Church amendment, prohibiting covered entities from retaliating against individuals or organizations that exercise their right not to participate in elective abortions or assisted suicide.

### **Recommended Change to Sec. 6. Exemption of Religious Organizations:**

**[new]** Subsec. (b) A religious employer's exemption under this Act shall not result in any action by a federal, state, or local government agency, which receives Federal financial assistance, to penalize or withhold licenses, permits, certifications, accreditation, contracts, grants, guarantees, tax-exempt status, or any other benefits or exemptions from that employer, or prohibit the employer's participation in programs or activity sponsored by that federal, state, or local government agency.

**Recommendation. Add a Bona Fide Occupational Qualification (BFOQ).** To provide for those instances when an employer, whether religious or secular, should reasonably be able to specify that a particular employee, because of his or her duties, must comply with the tenets and teachings of a religion or should fit with some other lifestyle pattern, a Bona Fide Occupational Qualification provision should be added to ENDA. This would make ENDA parallel to Title VII, which itself has a BFOQ. A BFOQ provides a legislative accommodation for predictable employment instances such as these: a non-religious counseling agency desires to engage a counselor who can serve a religious population that has deep objections to homosexual activity; a secular food-processing facility serves, among others, a clientele that adheres to certain religious standards for the handling of food; a dating agency hopes in particular to attract a gay clientele. Language such as this will serve the purpose:

[New section] Nothing in this Act shall be deemed to prohibit or prevent a covered entity from establishing or maintaining practices or policies based upon sexual orientation or gender identity in those certain instances where sexual orientation or gender identity is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

**Effective Religious Freedom Protections.** These five recommended changes do not expand the scope of the existing ENDA religious exemption. They simply—yet vitally—ensure that the religious freedom protection promised by the Sec. 6 exemption will be effectual in practice.