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COMPROMISING EQUALITY: AN ANALYSIS OF THE RELIGIOUS EXEMPTION IN THE EMPLOYMENT NON-DISCRIMINATION ACT AND ITS IMPACT ON LGBT WORKERS

ERIK S. THOMPSON*

Abstract: On November 7, 2013, the U.S. Senate passed the Employment Non-Discrimination Act (“2013 ENDA”), a bill that attempted to incorporate both sexual orientation and gender identity as protected classes under Title VII of the Civil Rights Act of 1964. The 2013 ENDA was an important initiative that addressed a long history of employment discrimination against gay, lesbian, bisexual, and transgendered employees. The bill, however, provided a broad exemption for religiously affiliated organizations operating in secular fields. This religious exemption excluded a significant number of organizations hiring secular-in-function employees from the bill’s prohibition of discriminatory practices. Although Congress dismissed the 2013 ENDA in September 2014, the history of the bill suggests that future attempts by Congress to pass a similar antidiscrimination bill will likely offer the same broad exemption for secular-in-function but religious-in-name organizations. This Note examines the religious exemption issue and suggests that religiously affiliated but secular-in-function organizations be subject to a bona fide occupational qualification to enable them to practice their faith without undermining the very purpose of the proposed legislation.

INTRODUCTION

In December 2013, Mark Zmuda, vice principal at Eastside Catholic High School near Seattle, Washington, reluctantly resigned his position after the high school’s administration suggested that he leave the school.¹ The former vice principal was well regarded among students and other faculty at Eastside

* Executive Comments Editor, BOSTON COLLEGE JOURNAL OF LAW & SOCIAL JUSTICE, 2014–2015.

¹ Carol Kuruvilla, *Fired Gay Vice Principal Fighting Back Against Seattle-Area Catholic School*, N.Y. DAILY NEWS, Mar. 8, 2014, <http://www.nydailynews.com/news/national/ousted-gay-vice-principal-fighting-back-catholic-school-fired-article-1.1715326>; Michael Paulson, *Gay Marriages Confront Catholic School Rules*, N.Y. TIMES, Jan. 23, 2014, at A1. In an interview with the *New York Daily News*, Mr. Zmuda stated that the administration of Eastside Catholic High School offered him an option to either divorce his new husband or be terminated from his position as vice principal. Kuruvilla, *supra*.

Catholic.² Nonetheless, once the administration became aware that he had married his partner, another male, it asked for Mr. Zmuda's resignation.³

Employment practices that target lesbian, gay, bisexual, and transgendered (LGBT) employees are not uncommon, especially among religious sects whose tenets are particularly supportive of protecting a traditional heterosexual lifestyle.⁴ When Eastside Catholic discharged Mr. Zmuda, he joined a great number of LGBT employees across the United States who face sexuality-based harassment or who otherwise suffer under discriminatory employment practices.⁵ Although some states have addressed these issues, many states do not provide comprehensive protection from employment discrimination based on either sexual orientation or gender identity grounds, while other states have no protections for LGBT employees at all.⁶ Additionally, LGBT workers have

² See Paulson, *supra* note 1. Following Mr. Zmuda's resignation, students at Eastside Catholic organized rallies in support of him, protested outside City Hall, and petitioned the school to change its policies. *Id.*

³ *Id.*

⁴ See *id.*; Statement of Archbishop J. Peter Sartain regarding Eastside Catholic High School Personnel Action (Jan. 15, 2014), https://www.eastsidecatholic.org/ftpimages/528/download/download_986757.pdf (supporting the rights of Eastside Catholic to terminate Mark Zmuda in accordance with the free exercise of its Catholic mission and the belief in the sacredness of traditional marriage); see also Dave Bakke, *Wedding Announcement Costs Gay Woman Job at Benedictine*, ST. J.-REG. (Springfield, Ill.), Nov. 10, 2010, <http://www.sj-r.com/article/20101110/News/311109960>; Melissa Pinion-Whitt, *Glendora Catholic School Dismisses Gay Rancho Cucamonga Teacher After Publicized Wedding*, SAN BERNARDINO CNTY. SUN, Jul. 30, 2013, <http://www.sbsun.com/general-news/20130731/glendora-catholic-school-dismisses-gay-rancho-cucamonga-teacher-after-publicized-wedding>; Alissa Widman, *St. Mary Band Director Fired for Gay Wedding Plans*, SANDUSKY REG., Jan. 11, 2014, <http://www.sanduskyregister.com/article/st-mary-band-director-fired/5163951> (describing band director's resignation from Sandusky Central Catholic School after his wedding to another male, noting that all employees at the school "must sign a contract stating they will live a lifestyle according to the Catholic faith").

⁵ See Jamie M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey*, NAT'L GAY & LESBIAN TASK FORCE & NAT'L CTR. FOR TRANSGENDER EQUAL. 53 (2011), http://www.thetaskforce.org/downloads/reports/reports/ntds_full.pdf (reporting that forty-seven percent of transgendered employees felt they were directly discriminated against in the hiring process); Brad Sears & Christy Mallory, *Documented Evidence of Employment Discrimination & Its Effects on LGBT People*, WILLIAMS INST. 1 (July 2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf> (reporting that twenty-seven percent of LGBT employees faced discrimination or harassment in the workplace).

⁶ See Jerome Hunt, *A State-by-State Examination of Nondiscrimination Laws and Policies*, CTR. FOR AM. PROGRESS ACTION FUND 3-4 (2012), http://cdn.americanprogress.org/wp-content/uploads/issues/2012/06/pdf/state_nondiscrimination.pdf. Compare MASS. GEN. LAWS ch. 151B, § 4 (2013) (prohibiting all employment discrimination based on sexual orientation and gender identity, so as to include transgendered employees within the protected class), with MICH. EXECUTIVE DIRECTIVE NO. 2003-24 (2003), http://www.michigan.gov/formergovernors/0,4584,7-212-57648_36898-83560-.00.html (ordering a ban on public employment discrimination practices only based upon sexual orientation and gender identity and leaving out protections for transgendered employees).

little or no remedy under federal law.⁷ In 1964, Congress introduced the Civil Rights Act, which included Title VII, a provision designed to combat employment discrimination on the basis of race, sex, religion, and national origin.⁸ Despite the non-discriminatory spirit of Title VII, federal courts have long held that it does not protect LGBT employees against workplace discrimination based on their LGBT identity.⁹

Mr. Zmuda's termination based on his sexual orientation and similar ordeals faced by other LGBT individuals are not simply stories of sexuality-based discrimination.¹⁰ They are instead a reflection of the tension between LGBT employment rights and religious interests.¹¹ Many religious groups in the United States openly and vocally disapprove of homosexuality, oppose gay marriage, and generally disfavor any sexual identity that diverges from traditional heterosexuality.¹² Moreover, as a result of their religious affiliation, many organizations offering secular and general public services such as high schools, universities, hospitals, and nursing homes, have the power to hire and fire employees based upon their sexual identities and preferences.¹³ As illus-

⁷ See Civil Rights Act of 1964, 42 U.S.C. § 2000e (2012) (making no mention of LGBT workers as a protected class); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3rd Cir. 2001) ("Congress has not yet seen fit, however, to provide protection against such harassment [because of sexual orientation].").

⁸ See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); H.R. Rep. No. 88-914, at 2391 (1964). The text of the Civil Rights Act of 1964 explains that it "is designed primarily to protect and provide more effective means to enforce the civil rights of persons within the jurisdiction of the United States. In furtherance of these objectives the bill . . . establishe[d] a Federal Equal Employment Commission designed to eliminate discriminatory employment practices by business, labor unions, or employment agencies . . ." 42 U.S.C. § 2000e.

⁹ See, e.g., *Bibby*, 260 F.3d at 265 (stating that Title VII does not protect gay or lesbian employees from discriminatory employment practices); *Simonton v. Runyon*, 232 F.3d 33, 35 (2nd Cir. 2000) (dismissing claim of discrimination because Title VII does not prohibit discrimination based on sexual orientation); see 42 U.S.C. § 2000e.

¹⁰ See Kuruvilla, *supra* note 1; Paulson, *supra* note 1.

¹¹ See Kuruvilla, *supra* note 1; Paulson, *supra* note 1.

¹² See Bruce W. Dunne, *Homosexuality in the Middle East: An Agenda for Historical Research*, 12 ARAB STUD. Q. 55, 66 (1990) (noting that some Muslim scholars suggest the Quran's prohibition of sodomy also prohibits homosexuality); Yoel H. Khan, *Judaism and Homosexuality: The Traditionalist/Progressive Debate*, 18 J. OF HOMOSEXUALITY 49, 50-51 (1989) (highlighting that some traditionalist believers in Judaism disapprove of homosexuality); Eric M. Rodriguez & Suzanne C. Ouellette, *Gay and Lesbian Christians: Homosexuality and Religious Identity Integration in the Members and Participants of a Gay-Positive Church*, 39 J. FOR SCI. STUDY RELIGION 333, 333 (2000) (noting that seventy-two percent of surveyed Christian-denomination churches in the United States condemned homosexuals and homosexuality based upon religious beliefs); Marc L. Rubinstein, *Gay Rights and Religion: A Doctrinal Approach to the Argument That Anti-Gay-Rights Initiatives Violate the Establishment Clause*, 46 HASTINGS L.J. 1603, 1606 (1995) (illustrating that opponents of gay-rights legislation largely proffer arguments based upon religious condemnation of homosexuality).

¹³ See *Spencer v. World Vision, Inc.*, 633 F.3d 723, 741 (9th Cir. 2011) (holding that a non-profit organization offering soup kitchen and other welfare services to the poor qualified for a Title VII religious exemption because the organization was founded under religious ideals); *Saemodarae v.*

trated by Mr. Zmuda's case, these religiously affiliated organizations may legally exercise this power to the detriment of LGBT employees.¹⁴

On November 7, 2013, the U.S. Senate passed the Employment Non-Discrimination Act ("2013 ENDA"), a bill that incorporated both sexual orientation and gender identity into Title VII as protected classes.¹⁵ The 2013 ENDA included a broad exemption for religious organizations, which encompassed religious affiliates that engage in strictly secular activities.¹⁶ If the 2013 ENDA had been passed into law, these religiously affiliated organizations and institutions would be permitted to continue to make employment decisions based on sexuality and marital status, much as Eastside Catholic did in Zmuda's case.¹⁷

Despite the 2013 ENDA's passage in the Senate, the U.S. House of Representatives referred the 2013 ENDA to committee, and on September 17, 2014, the House Committee on Rules voted to discharge the bill from consideration—a vote that signaled the end for the 2013 ENDA.¹⁸ The failure of both houses to agree on the necessity of the LGBT employment protections continues a historical trend; however, members of Congress continually renew their efforts to pass a bill of this type and such a bill is likely to pass in the future.¹⁹

Mercy Health Servs.-Iowa Corp., 456 F. Supp. 2d 1021, 1043 (N.D. Iowa 2006) (holding that a Catholic hospital is exempt under Title VII's religious exemption despite providing medical services to the community at large); E.E.O.C. v. Presbyterian Ministries, Inc., 788 F. Supp. 1154, 1157 (W.D. Wash. 1992) (Presbyterian retirement home held exempt from Title VII religious discrimination prohibition); McClure v. Salvation Army, 323 F. Supp. 1100, 1107 (N.D. Ga. 1971) (holding that the Salvation Army is exempt as a religious organization); Bakke, *supra* note 4; Paulson, *supra* note 1; Widman, *supra* note 4.

¹⁴ See Bakke, *supra* note 4; Paulson, *supra* note 1; Widman, *supra* note 4.

¹⁵ See 42 U.S.C. § 2000e (2012); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013) (as passed by Senate November 7, 2013); Jeremy W. Peters, *Bill Advances to Outlaw Discrimination Against Gays*, N.Y. TIMES, Nov. 4, 2013, at A10 (pointing out that the basis for the ENDA is to add to the classes protected under Title VII).

¹⁶ See S. 815 § 6 (providing for the same religious exemption encoded in the Religious Organization Exemption for discrimination on the basis of religion of Title VII, 42 U.S.C. § 2000e-2(a)).

¹⁷ See 42 U.S.C. § 2000e-2(a); S. 815 § 6; Shelley K. Wessels, Note, *The Collision of Religious Exercise and Governmental Nondiscrimination Policies*, 41 STAN. L. REV. 5, 1201, 1201-02 (1989); Paulson, *supra* note 1.

¹⁸ See Employment Non-Discrimination Act of 2013, H.R. 1755 113th Cong. (2013) (referred to committee); H.R. Res. 678, 113th Cong. (2014) (providing for the consideration or discharge of S. 815); H.R. Doc. No. 011, 113th Cong. (2014) (documenting the committee vote and subsequent discharge of S. 815); Peters, *supra* note 15.

¹⁹ See, e.g., Employment Non-Discrimination Act of 2013, H.R. 1755; (referred to committee); Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. (2011) (dying in committee); Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009) (dying in committee); Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007) (passing in House alone but without protection for transgender employees); see also Editorial, *Toward Ending Workplace Discrimination*, N.Y. TIMES, Nov. 5, 2013, at A26 (arguing that the passage of the ENDA in the Senate is a significant step towards passing the ENDA in the near future).

The 2013 ENDA, nonetheless, required a debate about the construction of a religious exemption sufficient to allow free religious expression but narrow enough to maintain the integrity of the 2013 ENDA's protection of LGBT interests.²⁰

Part I of this Note discusses Title VII and the extent to which it provides protections to LGBT employees. Part I additionally outlines a brief history of congressional attempts to implement a ban on LGBT discrimination in the workplace and the historical developments leading up to the introduction of the 2013 ENDA. Part II analyzes the problems presented by the religious exemption as it was formulated in the 2013 ENDA and compares the religious exemption to others implemented by various state non-discrimination statutes. Part III argues for the implementation of a "religious-in-function" categorical test for determining which religiously based organizations ought to be exempt from the antidiscrimination law. A categorical test would best account for the commercial realities of many religiously affiliated organizations that operate almost entirely to provide secular goods or services. Such a test is necessary to ensure that large, secular-in-function employers open their doors to LGBT employees while still providing an exemption for religious-in-function organizations.

I. HISTORY OF DISCRIMINATORY EMPLOYMENT PRACTICES AGAINST LGBT EMPLOYEES AND THE LEGISLATIVE RESPONSE

In 1964, the United States adopted Title VII of the Civil Rights Act ("the Act") to combat rampant employment discrimination on the basis of race, religion, national origin, and sex.²¹ Despite the historic achievements of the Act to promote equality and prohibit discriminatory practices, the current employment provisions of Title VII do not prohibit private employers from discriminating on the basis of an employee's sexual orientation or gender identity.²² In

²⁰ See S. 815 § 6; Steven H. Aden & Stanley W. Carlson-Thies, *Catch or Release? The Employment Non-Discrimination Act's Exemption for Religious Organizations*, 11 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 4, 4 (2010).

²¹ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e; H.R. Rep. No. 88-914, at 2391 (1964) ("The [Civil Rights Act of 1964] is designed primarily to protect and provide more effective means to enforce the civil rights of persons within the jurisdiction of the United States. In furtherance of these objectives the bill . . . establishes a Federal Equal Employment Commission designed to eliminate discriminatory employment practices by business, labor unions, or employment agencies . . .").

²² See Title VII § 2000e-2(a)-(n); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1076 (9th Cir. 2002) (Hug, J., dissenting) (stating that if Title VII is to protect sexual orientation as a class, Congress must affirmatively enact the protection); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3rd Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 35 (2nd Cir. 2000) (holding that Title VII does not protect against discrimination the basis of sexual orientation because Congress expressly rejected previous bills that would include sexual orientation as a protected class); OFFICE OF THE PRESIDENT & COUNSEL OF ECON. ADVISORS, ECONOMIC REPORT OF THE PRESIDENT, App. B Tbls. B-36, B-37

the past twenty years, members of Congress have repeatedly sought to remedy this issue by proposing federal statutes that would extend Title VII protections to gay and transgendered persons.²³ On November 7, 2013, by a vote of sixty-four to thirty-two, the U.S. Senate passed the Employment Non-Discrimination Act (“2013 ENDA”), the first bill tailored towards prohibiting employment discrimination on the basis of sexual orientation and gender identity to survive a vote in either house of Congress.²⁴ Although the House of Representatives recently terminated its consideration of the 2013 ENDA, thus halting any further progress of enacting the legislation in this term, the passage of the 2013 ENDA in the Senate provided momentum for the continuing push to proscribe discriminatory employment practices against lesbian, gay, bisexual, and transgendered (LGBT) employees.²⁵

A. Title VII Coverage and Protections

In the midst of the remarkable domestic unrest over inequality and a call for civil rights in the 1960s, Congress passed the Civil Rights Act of 1964 to address the enduring mark of racial oppression and prejudice.²⁶ Congress in-

(2013) (demonstrating equality improvements in private sector employment as a result of nearly tripling the employment of women and doubling the employment of black employees since the inception of Title VII).

²³ See e.g., Employment Non-Discrimination Act of 2011, S. 811 (not passed by either house of Congress); Employment Non-Discrimination Act of 2009, S. 1584 (not passed by either house of Congress); Employment Non-Discrimination Act of 2007, H.R. 3685 (passing in House—without protection for transgender employees, but failing to pass in the Senate); Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995) (not passed by either house of Congress); Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994) (not passed by either house of Congress).

²⁴ See Employment Non-Discrimination Act of 2013, S. 815 (as passed by Senate November 7, 2013); Peters, *supra* note 15. The term “gender identity” means the manner in which an individual identifies his or her sexuality, and the term includes appearances, mannerisms, and any other gender-related characteristics that may or may not be specifically related to the individual’s designated sex at birth. See S. 815 § 3(a)(7). The purpose of including “gender identity” is to extend the act unambiguously to transgendered employees and other employees who do not identify as a traditional gender. See *Hearing on H.R. 3017, Employment Non-Discrimination Act of 2009 Before the H. Comm. on Educ. and Labor*, 111th Cong. 14 (2009) (statement of Stuart J. Ishimaru, Acting Chairman, Equal Employment Opportunity Commission).

²⁵ See H.R. Res. 678, 113th Cong. (2014) (providing for the consideration or discharge of S. 815); Employment Non-Discrimination Act of 2013, H.R. 1755 113th Cong. (2013) (referred to committee); *The Employment Nondiscrimination Act of 2013: Hearing on S. 815 Before the S. Comm. on Health, Education, Labor, and Pensions*, 113th Cong. 2 (2013); H.R. Doc. No. 011, 113th Cong. (2014) (documenting the committee vote and subsequent discharge of S. 815); Editorial, *supra* note 19.

²⁶ See Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964); Julius L. Chambers & Barry Goldstein, *Title VII: The Continuing Challenge of Establishing Fair Employment Practices*, 49 L. & CONTEMP. PROBS. 4, 12 (1986). Following a contentious battle in the Senate, Congress resolved to enact Title VII and the whole of the Civil Rights Act of 1964 in an effort to end racial conflicts and

cluded a guarantee of equal employment opportunity within Title VII, which established a comprehensive and absolute prohibition of discriminatory employment practices based on race or color.²⁷ Title VII also established equal opportunity employment guarantees for other traditionally oppressed groups, including women, persons of differing national origins, and members of non-majority religions.²⁸ Since its inception, Title VII has assisted in promoting employment equality.²⁹

Despite Title VII's successes, the Act notably excludes from its protection a distinct class of the American labor market, a class of citizens that has also faced tremendous prejudice and oppression in the workforce.³⁰ U.S. federal courts have construed "sex," one of the protected classes under Title VII, to exclude sexual orientation or transgendered status.³¹ For example, in *Simonton v. Runyon*, the plaintiff, an employee of the U.S. Postal Service, brought a Title VII claim against his employer, alleging abuse based upon his sexual orientation.³² The plaintiff argued that Title VII's guarantee that employees would be free of "discrimination based on 'sex' include[d] discrimination based on sexual orientation."³³ The U.S. Court of Appeals for the Second Circuit rejected the plaintiff's argument because Congress had repeatedly attempted but failed to

the legacy of racial oppression left in the wake of slavery and the Jim Crow laws. *See* Chambers & Goldstein, *supra*, at 26. According to President John F. Kennedy, the Civil Rights Act of 1964 was a conscientious effort to "settle the . . . matter . . . [of racial oppression] in the courts [rather] than on the streets . . ." *Id.*

²⁷ 42 U.S.C. § 2000e-2 (2012).

²⁸ *Id.* Unlike the Title's unconditional bar on race-based employment practices, however, Title VII provided for a limited bona fide occupational qualification exemption for preferential practices on the basis of sex, national origin, or religion. *Id.* § 2000e-2(e). A bona fide occupational qualification exemption allows an employer to select employees on the basis of the employee belonging to a particular class of individuals (i.e. male or female) so long as the employer can show that membership of said class is *necessary* for the employee to fulfill the duties his occupation requires. *See* Dothard v. Rawlinson, 433 U.S. 321, 335 (1977) (holding that being male was a bona fide occupational qualification for a "contact guard" in a male prison ward for extremely violent sexual convicts who often tried to assault female guards). Discriminatory practices on the basis of religion are further exempt from Title VII prohibitions under a broadly construed religious exemption clause. 42 U.S.C. § 2000e-1(a). Notably, the religious exemption clause as it currently applies to "discrimination on the basis of religion" would equally apply to discrimination on the basis of sexual orientation and gender identity under Section 6 of the ENDA of 2013. *See* S. 815 § 6 (exempting religious entities under same exemption as 42 U.S.C. § 2000e-1(a)).

²⁹ *See generally* OFFICE OF THE PRESIDENT & COUNSEL OF ECON. ADVISORS, *supra* note 22, App. B Tbls. B-36, B-37 (illustrating the increased rates of employment among classes protected by Title VII).

³⁰ *See* 42 U.S.C. § 2000e(k) (not mentioning sexual orientation as a protected class); *Bibby*, 260 F.3d at 265; *Simonton*, 232 F.3d at 35.

³¹ 42 U.S.C. § 2000e-2i; *see Rene*, 305 F.3d at 1076 (Hug, J., dissenting); *Bibby*, 260 F.3d at 265; *Simonton*, 232 F.3d at 35.

³² *Simonton*, 232 F.3d at 34.

³³ *Id.* at 35.

pass a bill that would include sexual orientation within Title VII's protections.³⁴ The court interpreted the congressional failings to be evidence of legislative intent to exclude sexual orientation from Title VII.³⁵ Accordingly, the court held that "[b]ecause the term 'sex' in Title VII refers only to membership in a class delineated by gender, and not to sexual affiliation, Title VII does not proscribe discrimination because of sexual orientation."³⁶

The U.S. Court of Appeals for the Third Circuit came to a similar conclusion in *Bibby v. Philadelphia Coca Cola Bottling Co.* when it held that the language of Title VII did not support a cause of action for discrimination solely on the basis of sexual orientation.³⁷ The plaintiff in *Bibby* brought both harassment and wrongful termination claims against his employer, arguing that he was discriminated against for being homosexual.³⁸ Although the Third Circuit stated that "[h]arassment on the basis of sexual orientation has no place in our society," it went on to hold that harassment claims are only actionable under Title VII on the basis of sex, defined strictly by one's biological gender rather than sexual orientation.³⁹ Accordingly, the Third Circuit held that the plaintiff's claim was not actionable.⁴⁰

Discrimination claims on the basis of sexual identity present a more complex issue for the courts, which collectively have not adopted a uniform stance on whether discrimination claims on the basis of sexual identity are actionable under Title VII.⁴¹ "Sexual identity" refers to one's personal identification with a particular gender or sex.⁴² Congress specifically construed the term sexual identity in the 2013 ENDA to include transgendered employees as well as other persons who may not identify as a member of a traditional gender or sex.⁴³

In *Etsitty v. Utah Transit Authority*, the U.S. Court of Appeals for the Tenth Circuit held that Title VII does not provide protection to transsexuals.⁴⁴

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 36. The Second Circuit held "because of sex" meant "sex" in a strict biologically delineated sense. *See id.*

³⁷ *Bibby*, 260 F.3d at 265.

³⁸ *Id.* at 260.

³⁹ *See id.* at 261, 264.

⁴⁰ *Id.* at 265.

⁴¹ *Compare Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) (holding that transsexual is not a protected class under Title VII), *with Schroer v. Billington*, 577 F. Supp. 2d 293, 307 (D.D.C. 2008) (suggesting that a traditional definition of "sex" is "no longer a tenable approach" to interpreting Title VII).

⁴² Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 3(a)(7) (2013) (stating that "the term 'gender identity' means the 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").

⁴³ *See S. Rep. No. 113-105*, at 2, 15 (2013).

⁴⁴ *Etsitty*, 502 F.3d at 1222.

Despite a clear showing that the *Etsitty* plaintiff was terminated solely due to the employer's concerns about the plaintiff's transition to a female, the Tenth Circuit strictly interpreted Title VII's definition of sex to mean only its "common and traditional interpretation."⁴⁵ The court concluded that sex based discrimination under Title VII is not actionable because a plaintiff is transgendered.⁴⁶

Etsitty was distinguished to a limited extent by the U.S. District Court for the District of Columbia in *Schroer v. Billington*.⁴⁷ In that case, the plaintiff, a male applicant for a position in the Library of Congress, was overwhelmingly qualified for the position, but the employer rejected the prospective employee's application subsequent to his transition to a woman.⁴⁸ The transgendered plaintiff asserted that Title VII protections applied primarily under the sex-stereotyping theory established by the U.S. Supreme Court in *Price Waterhouse v. Hopkins*.⁴⁹ The *Price Waterhouse* sex-stereotyping theory permits an employee to bring a Title VII sex discrimination claim if the employee was subject to workplace harassment or discrimination due to his or her failure to conform to gender norms.⁵⁰ The *Schroer* court agreed with the plaintiff's contention that the *Price Waterhouse* sex-stereotyping theory applied in his case and that the employer discriminated against the plaintiff solely because he

⁴⁵ See *id.* at 1219, 1221 (quoting *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1977)). Krystal Etsitty had undergone a male to female sex change following the completion of her training and commencement of employment as an operator for the Utah Transit Authority. *Id.* at 1219. Etsitty's transition was unquestioned until a manager at UTA expressed concern about Etsitty's use of public restrooms at work. *Id.* Etsitty was subsequently terminated because of concern over the employer's ability to accommodate her restroom needs. *Id.*

⁴⁶ See *Etsitty*, 502 F.3d at 1222; see also *Ulane*, 742 F.2d at 1085 ("Congress never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex."); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 664 (9th Cir. 1977) (stating that transsexuals are not protected by Title VII because Congress merely intended Title VII to treat men and women equally).

⁴⁷ See *Schroer*, 577 F. Supp. 2d at 307–08 (stating that sweeping reinterpretation of "sex" in Title VII is not necessary because the transsexual plaintiff was protected on other grounds, but the traditional interpretation of "sex" is unduly narrow).

⁴⁸ *Id.* at 295–98. David Schroer, a former serviceman in the U.S. Armed Forces and graduate of the National War College with a master's degree in history, applied for a specialist position with the Library of Congress. *Id.* at 295. Schroer was exceptionally qualified and received the highest interview score of all the candidates for the position. *Id.* at 296. After learning of Schroer's intent to undergo a gender transition, the hiring employer expressed concerns over the transition and rejected Schroer's application. *Id.* at 298–99.

⁴⁹ See *Schroer*, 577 F. Supp. 2d at 303, 305; *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250–51 (1989).

⁵⁰ See *Price Waterhouse*, 490 U.S. at 250–51. The plaintiff in *Price Waterhouse* was a female employee who had been denied partnership at an accounting firm due to her "masculine behavior." *Id.* at 235.

failed to conform to gender norms.⁵¹ In its ruling, the *Schroer* court carved out a possible avenue for transsexuals to assert protection under the Title VII “sex” framework, stating in dicta that discrimination because of sex encompasses those who have converted sexes.⁵² Nevertheless, the court ultimately held that the traditional “anatomical or chromosomal definition of sex remains good law”⁵³

B. The Effect of Title VII’s Exclusion of LGBT Employees and the Statutory Need for the Employment Non-Discrimination Act

The 2013 ENDA sought to address a history of discriminatory practices by private and public employers against individuals of varying sexual orientations and gender identities.⁵⁴ The bill would have created a nationwide uniform prohibition against employment discrimination based on gender identity or sexual orientation.⁵⁵ Because of the lack of uniformity in state-level protections and little federal protection, the 2013 ENDA would serve to clarify and solidify protections for LGBT employees.⁵⁶ A 2011 study by the Williams Institute reported that up to 27% of gay, lesbian, and bisexual employees believed that they had been discriminated against or harassed due to their sexual orientation.⁵⁷ Similarly, a joint study conducted in 2011 by the National Center for Transgender Equality and the National Gay and Lesbian Task Force reported that 47% of transgendered employees experienced some form of discrimination or harassment and 26% of transgendered employees believed they were fired directly because of their sexual identity.⁵⁸

Although several states have begun initiatives to codify employment protections for gay and transgendered persons, there remains a disparate treatment

⁵¹ See *Schroer*, 577 F. Supp. 2d at 308. The plaintiff in *Schroer* was successful in demonstrating that he was unlawfully discriminated against because of the employer’s fears that plaintiff did not conform to traditional gender stereotypes. *Id.*

⁵² See *id.* at 305–06. The court presented the following hypothetical:

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only ‘converts.’ That would be a clear case of discrimination ‘because of religion.’ No court would take seriously the notion that ‘converts’ are not covered by the statute.

Id. at 306.

⁵³ See *id.* at 308.

⁵⁴ See Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 2(1) (2013).

⁵⁵ See *id.* at § 2(2).

⁵⁶ See *Etsitty*, 502 F.3d at 1221; *Ulane*, 742 F.2d at 1085; *Schroer*, 577 F. Supp. 2d at 308; Hunt, *supra* note 6, at 3–4 (citing the non-uniform undertakings of the states to provide employment protections for LGBT employees).

⁵⁷ See Sears & Mallory, *supra* note 5, at 1.

⁵⁸ See Grant, *supra* note 5, at 3.

of sexual orientation and gender discrimination claims across the nation.⁵⁹ Currently, only sixteen states and the District of Columbia provide full employment protection, including a complete prohibition of discriminatory practices and equitable remedies such as back pay and reinstatement, for employees of varying sexual orientations and gender identities.⁶⁰ Other states provide protection for sexual orientation alone, some provide partial protection only for public employment, and nineteen states provide no statutory protection at all.⁶¹

In an early effort to address a pattern of discriminatory employment practices against gay and transgendered individuals, Massachusetts Congressman Gerry Studds introduced the first Employment Non-Discrimination legislation to the House of Representatives in 1994.⁶² Since then, Congress has considered several versions of the ENDA,⁶³ however, only the 2007 ENDA passed in

⁵⁹ See Hunt, *supra* note 6 (noting that nineteen states do not afford LGBT employees any employment protections). Compare N.Y. CIV. RIGHTS. LAW § 296 (McKinney 2010) (prohibiting discrimination on the basis of sexual orientation but not gender identity), with MICH. EXECUTIVE DIRECTIVE NO. 2003-24 (2003), http://www.michigan.gov/formergovernors/0,4584,7-212-57648_36898-83560—,00.html (prohibiting employment discrimination on the basis of both gender identity and sexual orientation for public employment alone).

⁶⁰ See Hunt, *supra* note 6, at 3–5 (citing the full list of states that provide employment protections for all LGBT employees in both private and public sectors). The Hunt study indicates that California, Connecticut, and Massachusetts, and thirteen other states have protections in place for gay and transgendered persons. Cal. Gender Non-Discrimination Act, CAL. GOV'T CODE § 12940 (West 2011); Employment Nondiscrimination Act, COLO. REV. STAT. § 24-34-402 (2014); CONN. GEN. STAT. ANN. § 46a-81c (West 2009); D.C. CODE § 2-1402.11 (LexisNexis 2012); HAW. REV. STAT. ANN. § 378-2 (LexisNexis 2010); 755 ILL. COMP. STAT. 5/1-102 (2006); MASS. GEN. LAWS ch. 151B, § 3 (2013).

⁶¹ See M.D. CODE ANN. STATE GOV'T § 20-606 (LexisNexis 2009) (providing full employment protections for sexual orientation alone); N.H. REV. STAT. ANN. § 354-A:6 (2009) (providing full employment protections for sexual orientation alone); N.Y. CIV. RIGHTS. LAW § 296 (providing full employment protections for sexual orientation alone). Six states prohibit discrimination based upon both sexual orientation and gender identity for public employment only. See, e.g., IND. GOVERNOR'S POLICY STATEMENT (Apr. 26, 2005), http://www.in.gov/spd/files/gov_policy.pdf (Governor Mitch Daniels announced that neither sexual orientation nor gender identity will be considered in state hiring, advancement, development, or termination); KAN. EXECUTIVE ORDER 2007-24 (2007), http://www.transgenderlaw.org/ndlaws/EO_KS_2007.pdf (Governor Kathleen Sebelius issued an order prohibiting any discrimination based on sexual orientation and gender identity in public employment); MICH. EXECUTIVE DIRECTIVE NO. 2003-24 (2003), http://www.michigan.gov/formergovernors/0,4584,7-212-57648_36898-83560—,00.html (Governor Jennifer Granholm ordered a ban on public employment discrimination practices based upon sexual orientation and gender identity). Thirty-one states have some sort of employment protection for LGBT employees. See Hunt, *supra* note 6, at 5 (noting the states that have no protections in place and no statutory mention of protection for LGBT persons).

⁶² See Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994) (stating that the purpose of the bill was to address discriminatory employment practices against LGBT persons).

⁶³ See Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. (2011); Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009); Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007) (passing in the House but without protection for transgender employees).

the House, due to a compromise that eliminated proposed protections for transgendered employees.⁶⁴ The 2013 ENDA, introduced by Oregon Senator Jeff Merkley, was the first bill providing for full Title VII protection for gay, lesbian, and transgendered persons to survive a vote in either house of Congress: with some bi-partisan support, it passed the Senate sixty-four to thirty-two.⁶⁵

The 2013 ENDA was not without its own compromises.⁶⁶ Had the 2013 ENDA passed the House of Representatives, it would have established that discriminating against an employee or firing a candidate on the basis of sexual orientation or gender identity is unlawful.⁶⁷ The 2013 ENDA, however, contained a significantly broad exemption for religious organizations that incorporates the immunity for religious discrimination in Title VII.⁶⁸ Title VII states that any religious corporation, association, educational institution, or society is exempt from the religious discrimination portion of the Act.⁶⁹ The religious exemption in Title VII thus grants a wide range of religiously founded organizations the ability to hire and fire employees on the basis of religion, regardless of the nature of the specific activities that those organizations carry out.⁷⁰

⁶⁴ See Employment Non-Discrimination Act of 2007, H.R. 3685; H. amend. 884 to H.R. 3685, 110th Cong. (2007) (striking “gender identity” from bill); H.R. Res. 793, 110th Cong. (2007) (calling for debate on the amendment to strike “gender identity” as a protected class and, ultimately, leading to the withdrawal of “gender identity” from the text of the bill).

⁶⁵ Employment Non-Discrimination Act, S. 815, 113th Cong. (2013) (providing employment protection for all persons on the basis of both sexual orientation and gender identity). Compare *id.*, with S. 811 (providing protection for employees only on the basis of sexual orientation).

⁶⁶ See *Employment Nondiscrimination Act of 2013: Hearing on S. 815 Before the S. Comm. on Health, Education, Labor, and Pensions*, 113th Cong. 21 (2013) (reporting that inclusion of the religious exemption was an effort to compromise to earn support for the ENDA from religious leaders).

⁶⁷ See S. 815; see also Employment Non-Discrimination Act of 2013 H.R. 1755 113th Cong. (2013) (referred to Committee).

⁶⁸ See S. 815 § 6(a). This Section provides:

IN GENERAL.—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 (42 U.S.C. 2000e et seq.) pursuant to section 702(a) or 703(e)(2) of such Act (42 U.S.C. 2000e-1(a), 2000e-2(e)(2)) (referred to in this section as a “religious employer”).

Id. Compare *id.* (ENDA religious exemption), with Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a) (2012) (“[The] subchapter shall not apply 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.”).

⁶⁹ 42 U.S.C. § 2000e-1(a).

⁷⁰ *Id.*; see, e.g., *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2769–70 (2014) (determining that a closely held for-profit corporation may assert free-exercise claims under the Religious Freedom Restoration Act); *Spencer v. World Vision, Inc.*, 633 F.3d 723, 741 (9th Cir. 2011) (holding that a non-profit organization unaffiliated with any particular Christian denomination is exempt because of its close ties to religious tenants and purpose); *Saeemodarae v. Mercy Health Servs.*, 456 F. Supp. 2d

Under the Title VII framework, the 2013 ENDA's prohibition of discriminatory employment practice on the basis of sexual orientation and gender identity would be inapplicable to any religious corporations, associations, educational institutions, or organization of the like.⁷¹

Congress contemplated a narrower construction of the religious exemption as applied to sexual orientation discrimination in the 2007 version of the ENDA.⁷² In that version, Massachusetts Representative Barney Frank introduced legislation that wholly exempted religious organizations whose primary purpose was to proliferate religious doctrine or perform rituals, but exempted other religious institutions only to the extent that the employee's primary duties served a religious purpose or function.⁷³ Representative Frank's proposal advanced a narrower construction than Title VII's religious exemption, which applies broadly to *any* religious corporation and any employee of such organizations derivatively.⁷⁴ The 2007 proposal targeted mixed secular and religious institutions so that these organizations could not discriminate against gay employees unless the employees were in positions teaching, supervising, or expressing religious ideals.⁷⁵ This particular formulation of a religious exemp-

1021, 1027, 1044 (N.D. Iowa 2006) (finding a Catholic hospital qualified for an exemption under the terms of Title VII despite hiring non-Catholic employees and having non-Catholics on its board of directors); *E.E.O.C. v. Presbyterian Ministries, Inc.*, 788 F. Supp. 1154, 1157 (W.D. Wash. 1992) (finding a Presbyterian retirement home exempt); *McClure v. Salvation Army*, 323 F. Supp. 1100, 1107 (N.D. Ga. 1971) (finding that the Salvation Army qualified as an exempt religious organization). Although *Burwell v. Hobby Lobby Stores* is not analogous to discrimination cases, it shows a trend of expanding what types of organizations are deemed "religious" for certain exemption statuses. See 134 S. Ct. 2751, 2769–70.

⁷¹ See 42 U.S.C. § 2000e-1(a); Employment Non-Discrimination Act, S. 815 § 6(a), 113th Cong. (2013) (incorporating Title VII's religious exemption into the language of the ENDA).

⁷² See Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007); Aden & Carlson-Thies, *supra* note 20, at 4.

⁷³ See H.R. 2015 at § 6(a)–(b); Aden & Carlson-Thies, *supra* note 20, at 4. The 2007 bill's religious exemption provided:

(a) In General.—This Act shall not apply to any of the employment practices of a religious corporation, association, educational institution, or society which has as its primary purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief.

(b) Certain Employees.—For any religious corporation, association, educational institution, or society that is not wholly exempt under subsection (a), this Act shall not apply with respect to the employment of individuals whose primary duties consist of teaching or spreading religious doctrine or belief, religious governance, supervision of a religious order, supervision of persons teaching or spreading religious doctrine or belief, or supervision or participation in religious ritual or worship.

H.R. 2015 at § 6(a)–(b).

⁷⁴ See 42 U.S.C. § 2000e-1(a) (2012); H.R. 2015 at § 6(a)–(b) (granting an exemption only to religious institutions whose primary goal is the teaching or spreading of religious doctrines).

⁷⁵ See H.R. 2015 at § 6(a)–(b).

tion, however, would not have protected LGBT persons employed in general administrative roles such as the former vice principal, Mr. Zmuda.⁷⁶

The 2007 bill was met with opposition in the House, in part due to the religious exemption provision's narrow construction.⁷⁷ Republican opponents to the 2007 bill and religious freedom advocates argued that Title VII should be the benchmark for religious exemption status.⁷⁸ The ENDA of 2007 passed the House only after the religious exemption section was amended to reflect the boundaries of Title VII.⁷⁹ The 2007 bill died before it reached the Senate floor.⁸⁰

Accordingly, the broad exemption found in the 2013 ENDA was a feature central to garnering bipartisan support and appeasing religious interests.⁸¹ An expansive religious exemption provision such as that found in the 2013 ENDA, however, may provide a safe harbor for many religiously affiliated institutions engaged in secular business to continue or begin to exhibit discriminatory hiring practices at the expense of gay and transgendered employees.⁸²

II. BALANCING RIGHTS OF RELIGIOUS EXPRESSION WITH LGBT PROTECTION AGAINST EMPLOYMENT DISCRIMINATION

In recent history, religious interests and those advocating for rights for lesbian, gay, bisexual, and transgendered (LGBT) individuals have clashed with regularity in the United States, often resulting in heated litigation.⁸³ Opponents

⁷⁶ See *id.*; Paulson, *supra* note 1.

⁷⁷ See H.R. Rep. No. 110-406, pt. 1, at 51-54 (2007) (relaying debates in the House which highlighted the contention over the proposed religious exemption).

⁷⁸ See *id.*; Aden & Carlson-Thies, *supra* note 20, at 4-5. Proponents of the religious exemption testified in committee that the broader Title VII exemption provides "greater certainty and is less problematic for religious and faith-based employers . . ." H.R. Rep. No. 110-406, pt. 1, at 51-52 (internal quotations omitted). Republican members of the house opposed a bona fide occupational qualification provision within the religious exemption, arguing that such a provision burdens the hiring prerogatives of religious schools and other religious institutions. *Id.* at 53-54.

⁷⁹ See Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007); H. amend. 882 to H.R. 3685, 110th Cong. (2007) (providing that any religious organization exempt under Title VII § 702(a) or § 703(e)(2) is also exempt under ENDA of 2007); H. amend. 884 to H.R. 3685, 110th Cong. (2007) (striking "gender identity" from bill).

⁸⁰ See Aden & Carlson-Thies, *supra* note 20, at 5.

⁸¹ See S. Rep. No. 113-105, at 21 (2013) ("This [religious] exemption . . . should ensure that religious freedom concerns don't hinder the passage of this critical legislation.") (internal quotations omitted); Aden & Carlson-Thies, *supra* note 20, at 4.

⁸² See Chai R. Feldblum, *Moral Conflict and Liberty: Gay Rights and Religion*, 72 BROOK. L. REV. 61, 122 (2006); Rachel Faithful, Note, *Religious Exemption or Exceptionalism? Exploring the Tension of First Amendment Religion Protections and Civil Rights Progress Within the Employment Non-Discrimination Act*, 3 AM. U. LEGIS. & POL'Y BRIEF 55, 80 (2011).

⁸³ See *Lawrence v. Texas*, 539 U.S. 558, 571, 577-78 (2003) (explicitly overruling *Bowers v. Hartwick*, 478 U.S. 186, 196 (1986) (upholding the criminalization of sodomy between consenting homosexual adults noting that "condemnation of [sodomy] is firmly rooted in Judeo-Christian [sic]

to homosexual rights most commonly articulate their disapproval in religious phraseology, such as the immorality of a homosexual lifestyle or the social evils created when family and sexual rights are extended to gay, lesbian, and transgendered citizens.⁸⁴ The Supreme Court in *Lawrence v. Texas* appeared to reject the notion that moral perspectives are a compelling state interest in the enactment of legislation that denies certain rights to homosexuals.⁸⁵ Yet in the context of employment discrimination legislation, the justification for a religious exemption is not an argument of morals, but rather one based on the First Amendment to the U.S. Constitution and the right of a religious organization to express its views of morality.⁸⁶ The need to protect the civil rights of gay and transgendered persons as well as the constitutional right of religious exercise and expression are the main issues that make the religious exemption of the 2013 Employment Non-Discrimination Act (“2013 ENDA”) so contentious.⁸⁷ Any version of an Employment Non-Discrimination Act (ENDA) with too nar-

moral and ethical standards”); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (prohibiting states from denying equal protection to homosexuals). *Compare* U.S. v. Windsor, 133 S. Ct. 2675, 2695–96 (2013) (holding that the Defense of Marriage Act’s definition of “marriage” as limited to heterosexual marriage is unconstitutional), with Cheryl Wetzstein, *Proposition 8 Backers Can’t Halt Gay Marriage Licenses*, WASH. TIMES, July 16, 2013, at A7 (noting that conservative Christian groups were major proponents of California’s Proposition 8 effort to stay gay marriages). *But see* *Romer*, 517 U.S. at 644 (Scalia, J., dissenting) (arguing moral disapproval of homosexuality as a source of social harm is a justification for denying homosexuals equal protection under state laws).

⁸⁴ See *Lawrence*, 539 U.S. at 571; *Romer*, 517 U.S. at 648 (Scalia, J. dissenting) (comparing homosexuality and polygamy); *Bowers*, 478 U.S. at 195–96 (comparing homosexual conduct to adultery, incest and other sexual crimes); see also Feldblum, *supra* note 82, at 70 (stating that common objections to gay family, sex, and marriage rights are often rooted in the notion that homosexuality is naturally sinful and immoral).

⁸⁵ See *Lawrence*, 539 U.S. at 571, 578–79 (acknowledging that condemnation of sodomy is based in religious and ethical beliefs, but then stating that those beliefs do not provide a “compelling” state interest).

⁸⁶ See U.S. CONST. amend. I; *Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 334–35 (1987) (holding that Title VII § 702 religious exemption serves a legitimate purpose of “limiting government interference with the exercise of religion”); Feldblum, *supra* note 82, at 83–84 (noting that religious employers often argue that they express their beliefs through their business and the character of their employees); Wessels, *supra* note 17, at 1228 (illuminating how religious groups who wish to treat homosexual groups disparately from heterosexual counterparts often argue protection under the Free Exercise Clause).

⁸⁷ See U.S. CONST. amend. I; *Employment Non-Discrimination Act of 2009, Hearing on H.R. 3017 Before the H. Comm. on Educ. and Labor*, 111th Cong. 52 (2009) (reporting that religious groups testifying that the proposed exemption is necessary in order to maintain the right to express their religion); Feldblum, *supra* note 82, at 115 (arguing that a direct and unconditional regulation of religious belief would violate First Amendment jurisprudence but achieving employment equality mandate justifies some burden on belief-based hiring practices); Matthew J. Murray, Note, *Gay Equality, Religious Liberty and the First Amendment*, 1 L.A. PUB. INT. L.J. 125, 191 (2009) (arguing that ENDA-like legislation involves a “direct tension” between religious freedom and the employment equality it intends to achieve).

row an exemption would violate free expression, while an exemption fashioned too broadly may undermine the very purpose of the ENDA.⁸⁸

A. An Analysis of Title VII's Religious Exemption

Federal courts have been generous in determining which types of organizations qualify for Title VII religious exemptions.⁸⁹ For example, a religious hospital is exempt from Title VII's ban on discriminatory practices based on religious preferences even if the hospital is engaged in secular healthcare practices and routinely hires employees of other religions.⁹⁰ In *Hall v. Baptist Memorial Health Care Corp.*, the U.S. Court of Appeals for the Sixth Circuit found that a nursing school with religious affiliations fell under the Title VII exemption and was free to accept or reject students on the basis of religion.⁹¹ The court held that the nursing school was exempt from the Title VII discrimination protections despite the fact that the school trained students to enter a secular professional field.⁹² The Sixth Circuit reasoned that because the school's atmosphere was peppered with religious ideals, hosted Baptist programs and services, and held itself out publically as a religious institution, the college was exempt from Title VII's religious discrimination prohibition.⁹³

In 2011, the U.S. Court of Appeals for the Ninth Circuit attempted to narrow the framework under which non-profit organizations might qualify as religiously exempt under Title VII.⁹⁴ In *Spencer v. World Vision, Inc.*, World Vision, a non-profit organization, had no official affiliation with any particular religious denomination but self-identified as a broad Christian organization

⁸⁸ See *Employment Non-Discrimination Act of 2009, Hearing on H.R. 3017 Before the H. Comm. on Educ. and Labor*, 111th Cong. 52; Feldblum, *supra* note 82, at 121.

⁸⁹ See *Amos*, 483 U.S. at 349 (O'Connor, J., concurring) (stating that exempting a non-profit organization leaves open the question as to whether a for-profit organization could qualify as a religious organization under Title VII); *Spencer v. World Vision, Inc.*, 633 F.3d 723, 741 (9th Cir. 2011) (holding that a non-profit organization unaffiliated with any particular Christian denomination is exempt because of its close ties to religious tenants and purpose); *E.E.O.C. v. Presbyterian Ministries, Inc.*, 788 F. Supp. 1154, 1157 (W.D. Wash. 1992) (finding a Presbyterian retirement home exempt); *McClure v. Salvation Army*, 323 F. Supp. 1100, 1107 (N.D. Ga. 1971) (finding that the Salvation Army qualified as an exempt religious organization).

⁹⁰ See 42 U.S.C. § 2000e-(1)(a) (2012); *Saeemodarae v. Mercy Health Servs.-Iowa Corp.*, 456 F. Supp. 2d 1021, 1044 (N.D. Iowa 2006) (finding a Catholic hospital exempt despite the fact that it hired non-Catholic employee and had non-Catholics on its board of directors).

⁹¹ See *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 624–25 (6th Cir. 2000).

⁹² *Id.*

⁹³ *Id.* at 625.

⁹⁴ See *Spencer*, 633 F.3d at 734 (imposing a three-part assessment to determine whether an organization was founded with religious ideals and therefore qualifies for a religious exemption under Title VII).

and carried out its activities under an umbrella of Christian values.⁹⁵ The organization provided services to needy children within the spirit of its Christian principles.⁹⁶ Though World Vision was not itself a church or religious school, the organization did incorporate religious symbols and rhetoric into its marketing instruments, and it self-identified as a religious group.⁹⁷ The two plaintiffs in *Spencer* each worked for World Vision for ten years and primarily provided maintenance services for the corporation's office facilities.⁹⁸ World Vision terminated the plaintiffs upon learning that the plaintiffs did not believe in the Christian Trinity.⁹⁹ The plaintiffs brought action under Title VII and World Vision defended the discrimination claim by asserting status as an exempt religious organization.¹⁰⁰

In determining the merits of World Vision's argument, the Ninth Circuit established a three-part test to assess exemption status under Title VII.¹⁰¹ The first part of the test probes a non-profit's religious purpose as identified by its incorporating or foundational documents; the second asks whether there is a close nexus between the organization's activity and its self-stated religious purpose; and, finally, the third part requires that the organization "holds itself out to the public as religious."¹⁰² The Ninth Circuit found that World Vision satisfied all three parts and therefore qualified as an exempt institution.¹⁰³

Despite the *Spencer* court's attempt to clarify the application of Title VII's religious exemption, Circuit Judge Berzon, in her dissent, criticized the majority's three-part analysis as far too broad.¹⁰⁴ Judge Berzon noted that nearly any

⁹⁵ See *id.* at 735–38. World Vision's Articles of Incorporation stated that its primary business was "to conduct Christian religious missionary services . . ." *Id.* at 736 (internal quotations omitted).

⁹⁶ See *id.* The court noted that World Vision's activity was simply providing aid to needy individuals—activity that would be secular aid but for World Vision's mission statement. *Id.*

⁹⁷ See *id.* at 738. The court found that World Vision "ma[de] no effort to disguise its Christian nature," though the court admitted the analysis was muddled by the fact that the organization did not have formal ties to a particular sect or church. See *id.* at 738, 740.

⁹⁸ See *id.* at 725.

⁹⁹ See *id.* The Trinity Doctrine "describes God the Father, Jesus Christ, and the Holy Spirit as three persons but one being." *Id.* at 725 n.1. World Vision discovered that the plaintiffs disavowed Christ and for that reason alone discharged the employees. *Id.* at 725.

¹⁰⁰ *Id.*

¹⁰¹ See *id.* at 734; see also 42 U.S.C. § 2000e-(1)(a) (2012).

¹⁰² See *Spencer*, 633 F.3d at 734.

¹⁰³ See *id.* at 748. The court noted that World Vision was founded as a Christian humanitarian organization, motivated by teachings of Jesus Christ. *Id.* at 739. The Ninth Circuit also found that World Vision's charitable activities, though highly secular in function, were connected to a religious purpose because the organization solicited donations via a website that portrayed Christian teachings and ideals. See *id.* at 740. Finally, the circuit court held that World Vision self-identified as a Christian organization despite not having a formal affiliation with any church. See *id.*

¹⁰⁴ *Id.* at 749 (Berzon, J., dissenting). "This test would allow a broad range of organizations to refuse to hire and to fire any employee on the basis of religious belief, including organizations that lack any ties to organized religion and perform daily operations entirely secular in nature." *Id.*

organization engaged in secular humanitarian efforts could hold itself under a religiously inspired umbrella.¹⁰⁵ Allowing these organizations to self-define the scope and nature of their activities would permit many loosely religious organizations to engage in secular activities, yet retain the ability to discriminate based upon religion, even if their employees perform entirely secular functions.¹⁰⁶

B. The 2013 ENDA's Application of Title VII's Exemption and Its Impact on the LGBT Workforce

The 2013 ENDA's direct usage of Title VII's religious discrimination exemption would have permitted an array of religious organizations and affiliates to actively discriminate against LGBT employees even if the organizations operate in a primarily secular field.¹⁰⁷ Religious institutions account for a significant portion of public service institutions; for example, religious hospitals constitute thirteen percent of the nation's community-based hospitals.¹⁰⁸ It would therefore be generally permissible under the 2013 ENDA for thirteen percent of U.S. hospitals to discriminate against the hiring of LGBT doctors, nurses, social workers, and general maintenance staff.¹⁰⁹

¹⁰⁵ See *id.*

¹⁰⁶ See *id.* at 748 n.1, 752. Judge Berzon commented on the Title VII exemption:

I refer to [42 U.S.C.] § 2000e-1(a) as the 'religious organization exemption.' It is the broadest of several Title VII provisions . . . that carve out religious entities for special treatment. Only § 2000e-1(a) permits religious organizations to hire and fire on the basis of religion without regard to the employee's function within the organization.

Id. at 748 n.1. Under the 2013 ENDA, religious organizations would similarly have been able to refuse to hire and fire employees on the basis of sexual orientation and gender identity as the act uses the Title VII framework for exemptions. See Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 6(a) (2013) (as passed by the Senate on November 7, 2013).

¹⁰⁷ See Michael W. McConnell, *What Would It Mean to Have a "First Amendment" for Sexual Orientation?*, in *SEXUAL ORIENTATION AND HUMAN RIGHTS IN AMERICAN RELIGIOUS DISCOURSE* 234, 236 (Saul M. Olyan & Martha C. Nussbaum eds., 1998) (arguing that parts of the private employment market are "public" for antidiscrimination purposes and a religious institution engaged in secular activity should not be able to offer religious rationales to discriminatory employment practices); Feldblum, *supra* note 82, at 115 ("If the 'justifying principle' of the legislation is to protect the liberty of LGBT people to live freely and safely in all parts of society, it is perfectly reasonable for a legislature not to provide any exemption that will cordon off a significant segment of society . . ."); Murray, *supra* note 87, at 160–61 (arguing that non-discrimination laws do not violate first amendment rights of institutions who maintain secular relationships with employees and, conversely, the harm imposed on LGBT population by allowing such discrimination is a secular harm).

¹⁰⁸ See Feldblum, *supra* note 82, at 121; Debra B. Stulberg et al., *Religious Hospitals and Primary Care Physicians: Conflicts over Policies for Patient Care*, 25 J. GEN. INTERNAL MED. 725, 725 (2010).

¹⁰⁹ See 42 U.S.C. § 2000e-1(a) (2012); *Hall*, 215 F.3d at 625 (stating that a religiously affiliated nursing home qualifies for a religious exemption under Title VII); S. 815, 113th Cong. § 6(a) (2013); 110 CONG. REC. 6, 7217 (1964) ("[A] hospital which is owned and operated by a religious order

Religious organizations also operate a significant number of elementary and secondary educational institutions in the United States.¹¹⁰ Private schools consist of approximately 24% of all elementary and secondary schools and also employ about 12% of all full-time teachers.¹¹¹ 76% of these private schools are religiously affiliated institutions.¹¹² Additionally, religious organizations provide approximately half of the nation's adoption services.¹¹³ Some legal scholars object to a wide religious institution exemption, arguing that non-discrimination laws should apply generally to any religiously affiliated organization that enters the secular stream of commerce by operating hospitals, retirement homes, large-scale adoption agencies, large schools or universities, and other public accommodations.¹¹⁴

It is clear that many religious groups have a legitimate interest in a ministerial or curriculum exemption because the First Amendment protects religious expression, which includes an interest in maintaining discretion in the employment of faith-expressive employees.¹¹⁵ While this interest furthers a compelling argument to protect the First Amendment rights of religious groups when selecting their leadership, doctrinal teachers, and other belief-oriented personnel, it fails to proffer a reasoned basis for discrimination as to secular-in-function employees, especially for organizations operating in the public market.¹¹⁶

would be exempt . . ."); Murray, *supra* note 87, at 226 (illustrating inconsistency in application of non-discrimination laws by comparing an impermissible situation where a religious hospital only hires male doctors against the permissible situation of only hiring heterosexual doctors).

¹¹⁰ See U.S. DEP'T EDUC., NCES 2008-315, CHARACTERISTICS OF PRIVATE SCHOOLS IN THE UNITED STATES: RESULTS FROM THE 2005–2006 PRIVATE SCHOOL UNIVERSE SURVEY 1 (2008).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ David Brodzinsky, *Adoption by Lesbians and Gay Men*, in ADOPTION BY LESBIANS AND GAY MEN: A NEW DIMENSION IN FAMILY DIVERSITY 62, 69 (David M. Brodzinsky & Adam Pertman, eds., 2012). Notably, the author's survey demonstrated that 17% of U.S. adoption agencies were affiliated with Catholicism, 5% were affiliated with Lutheranism, and 4% were affiliated with Judaism. *Id.*

¹¹⁴ See Feldblum, *supra* note 82, at 121.

¹¹⁵ See U.S. CONST. amend. I; 42 U.S.C. §§ 2000e-1(a), 2000e-2(e)(1) (2012); *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 708 (2012) (holding that the aggrieved employee was a minister and that Title VII protects the interests of a religious employer to choose who may preach their beliefs); S. 815 § 6(a) (2013); *Employment Non-Discrimination Act of 2013, Hearing on S. 815 Before the S. Comm. on Health, Educ., Labor, and Pensions*, 113th Cong., at 21 (2013) (reporting that the religious exemption garnered support for the ENDA from religious leaders). The ministerial exemption permits an institution to hire employees discriminately in certain positions of leadership and transmission of religious beliefs. 42 U.S.C. § 2000e-2(e)(1).

¹¹⁶ See U.S. CONST. amend I; Aden & Carlson-Thies, *supra* note 20, at 4 ("Without strong exemptions, religious organizations will be required, as a condition of seeking workers to carry out their faith-based missions, to affirm conduct that is in diametric opposition to the moral principles of their faith."); Feldblum, *supra* note 82, at 122 (stating that there is no reason to discriminate on the basis of sexual orientation where the employee's position is unconnected to religious expression or indoctrination); Wessels, *supra* note 17, at 1222 (arguing there is a genuine distinction between organizations that are pervasively religious and those that offer general free-market services).

Private religious schools are a brief example of one danger of failing to distinguish between religious-in-expression and secular-in-function type organizations.¹¹⁷ Some scholars have noted that parochial schools, particularly in urban areas, are in reality a “free-market” alternative to public schools.¹¹⁸ The Eastside Catholic High School near Seattle is one such example, where the vast majority of the school’s curriculum is secular and the school is open to students of all creeds and backgrounds.¹¹⁹ Although these schools do participate in expressive activity by requiring theology and religion classes, they are equally involved in the secular education arena, offering students advanced education in math, sciences, and English.¹²⁰

The blending of religious and secular commercial activities that occur in the context of private religious schools, as well as in the context of other religiously affiliated organizations, demonstrates the tension not addressed by the broad exemption furthered by the 2013 ENDA.¹²¹ The vast religious institution exemption does not protect LGBT employees charged with wholly secular tasks who work for an employer that operates in the secular market place but self-identifies as religious.¹²² Some scholars argue that when the employer is

¹¹⁷ See Wessels, *supra* note 17, at 1222; Paulson, *supra*, note 1.

¹¹⁸ See Wessels, *supra* note 17, at 1222. Wessels demonstrates that in urban areas the commercial reality of a private religious school is to:

offer a lower student-to-teacher ratio, more one-on-one instruction, specialized instruction, a safer environment, and other attractive characteristics. Even though a school may have a religious study requirement and the Ten Commandments on the wall, it might not require its students, teachers, or other personnel to adhere to its faith or to abide by its doctrine. In other words, though nominally parochial, they are practically secular.

Id. at 1223.

¹¹⁹ See Kuruvilla, *supra* note 1; Paulson, *supra* note 1 (citing that many students and teachers are not Catholic and that some students are attracted to the school for its educational quality).

¹²⁰ See, e.g., *Gay Rights Coal. v. Georgetown Univ.*, 496 A.2d 567, 574 n.12 (D.C. 1985), *aff’d in part and rev’d in part on reh’g*, 536 A.2d 1 (D.C. 1987) (en banc) (applying D.C. code protecting against disparate treatment on the basis of sexual orientation and holding that Georgetown University could provide equal protection to homosexual students without abandoning its religious objectives); Wessels, *supra* note 17, at 1222–23, 1228 (comparing *Gay Rights Coal.* to employment discrimination issues arising in parochial schools); Kuruvilla, *supra* note 1; Paulson, *supra* note 1 (noting that many students and teachers are not Catholic and that some students are attracted to the school for its educational quality).

¹²¹ See Feldblum, *supra* note 82, at 122 (arguing that many religious institutions should have freedom to hire and fire at a directorial level that actually involves religious expression but not at a level where the employees’ function remotely affects expressive interests); Wessels, *supra* note 17, at 1223 (arguing that these types of institutions have both religious and secular purposes, which undermines a broad application of religious exemptions).

¹²² 42 U.S.C. § 2000e-1(a) (2012); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 6(a) (2013) (as passed by the Senate on November 7, 2013); see Murray, *supra* note 87, at 171 (stating that objectors often assert that their religious beliefs condemn homosexuality and therefore requiring them to hire homosexuals infringes their religious beliefs).

not engaged in any inherently religiously expressive business, the employer has no right to control the private conduct of employees.¹²³ Accordingly, an employer may retain the right to religious beliefs and the right to believe that homosexuality and certain gender identities are immoral, but must nevertheless accommodate LGBT employees, as any employer in the public sphere would be required to do.¹²⁴

C. Freedom of Religious Expression: Analysis of Justifications for a Religious Exemption from the ENDA

The freedom to exercise and express religious beliefs has been a cornerstone of American liberty for over two centuries.¹²⁵ This principle underlies Title VII's religious exemptions.¹²⁶ Congress intended to protect the right of certain institutions to propagate their faith and religious beliefs by providing these institutions discretion in their hiring practices.¹²⁷ Title VII provides for three exemptions to the ban on religious employment discrimination: a bona fide occupational qualification, often referred to as the "ministerial exemption," a curriculum exemption, and the "religious organization" exemption, the broadest exemption of the three.¹²⁸

¹²³ See McConnell, *supra* note 107, at 254 ("One does not have to think homosexuality is moral to believe that employers have no business interfering in the private lives of their employees."); Feldblum, *supra* note 82, at 102–03; Murray, *supra* note 87, at 171.

¹²⁴ See Feldblum, *supra* note 82, at 102–03 (stating that "belief liberty" is the right to hold religious beliefs and regulating certain conduct does not necessarily infringe on belief liberty).

¹²⁵ See U.S. CONST. amend. I; *Amos*, 483 U.S. at 334, 338 (holding a church exempt from Title VII and permitting it, as a free exercise right, to fire janitor who could not prove membership to the Mormon Church); *Wisconsin v. Yoder*, 406 U.S. 205, 236 (1972) (holding that an Amish family has an exemption from the state's mandatory education law under free exercise clause); Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1421 (1990) (stating that the United States was founded to safeguard against government oppression of religion).

¹²⁶ U.S. CONST. amend. I; Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-1(a) (2012); see *Amos*, 483 U.S. at 338 (noting that Congress acted with the rational purpose to allow religious groups to carry out their beliefs in fashioning the Title VII religious exemption).

¹²⁷ See 42 U.S.C. § 2000e-1(a); *Hosanna-Tabor*, 132 S. Ct. at 714 (holding that a church must be free to choose its religious leadership without burden under the First Amendment); see *Amos*, 483 U.S. at 338 (stating that Congress intended to exempt all actions of religious organizations in within the Title VII exemption).

¹²⁸ See 42 U.S.C. § 2000e-1(a) (offering an exemption to religious corporations, associations, and organizations); *id.* § 2000e-2(e)(1) (addressing the bona fide occupational exemption by stating that it is not an unlawful employment practice to hire "on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a *bona fide occupational qualification* reasonably necessary to the normal operation of that particular business or enterprise . . .") (emphasis added); *id.* § 2000e-2(e)(2) (addressing the curriculum exemption by stating that "it shall not be an unlawful employment practice for a[n] educational institution . . . to hire and employ employees of a particular religion . . . if the curriculum of such . . . educational institution . . . is directed toward the propagation of a particular religion.") (emphasis added); *Hosanna-Tabor*, 565 U.S. at 13 (discussing

The ministerial exemption permits an institution to discriminately hire employees in certain positions of leadership and who are responsible for the transmission of religious beliefs.¹²⁹ This exemption, however, imposes a bona fide occupational qualification where the religious employer must show that the subject employee was charged primarily with duties of carrying out and expressing a church's religious beliefs.¹³⁰

Similar to the ministerial exemption, the curriculum exemption applies to religious schools and educational institutions hiring teachers or supervisors charged with indoctrinating, teaching, and guiding others in the practice of a particular faith.¹³¹ In 1993, the Ninth Circuit addressed the curriculum exemption in *E.E.O.C. v. Kamehameha Schools*, holding that the exemption was limited to a school whose curriculum "reflects an effort to spread and inculcate particular religious beliefs" and does not include a general educational curriculum in which faith is merely an underlying tenet.¹³²

The third category of exemptions has been interpreted to apply broadly to a host of organizations without regard for the qualifications or functions of the particular employees.¹³³ The 2013 ENDA religious exemption provided that its prohibitions would not apply to entities exempt from the religious discrimination provisions of Title VII.¹³⁴ The 2013 ENDA explicitly adopted the religious exemption found in section 702(a) of Title VII, which reads:

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform

the presence of a ministerial exemption in Title VII which is based off of the First Amendment, prohibiting the application of employment laws to a "religious institution and its ministers").

¹²⁹ 42 U.S.C. § 2000e-2(e)(1); see *Hosanna-Tabor*, 565 U.S. at 17–18 (holding that the aggrieved employee was a minister and that Title VII protects the interests of a religious employer to choose who may preach their beliefs).

¹³⁰ 42 U.S.C. § 2000e-2(e)(1); *Hosanna-Tabor*, 565 U.S. at 17–18.

¹³¹ 42 U.S.C. § 2000e-2(e)(2); see *E.E.O.C. v. Kamehameha Sch.*, 990 F.3d 458, 464–65 (9th Cir. 1993).

¹³² See *Kamehameha*, 990 F.3d at 464–65 (holding that Kamehameha Schools were not within "curriculum exemption" because school curriculum merely advanced general moral values and did not concern converting students to Protestantism or inoculating students with Protestant beliefs).

¹³³ 42 U.S.C. § 2000e-1(a); see *Amos*, 483 U.S. at 338 (stating that the intention of Congress in Title VII's religious exemption clause was to cover all religious activities and employers).

¹³⁴ Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 6(a) (2013) ("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 . . . (42 U.S.C. 2000e-1(a)) . . ."); see 42 U.S.C. § 2000e-1(a).

work connected with the carrying on by such corporation, association, educational institution, or society of its activities.¹³⁵

When Congress passed Title VII in 1964, the Act's religious exemption originally read, "to perform work connected with the carrying on by such corporation, association, or society of its *religious* activities."¹³⁶ Title VII exempted an organization only to the extent that the organization was engaged in activities that were religious in nature.¹³⁷

In 1972, Congress amended this section to remove the word "religious" before "activities," thereby eliminating the qualification that a religious institution be actively engaged in "religious activities" to benefit from the exemption.¹³⁸ The amendment made clear that the exemption would focus on the *affiliation* of the employing institution rather than the nature of the employer's business activities.¹³⁹ In essence, the exemption as currently construed permits a broad range of religious organizations to discriminate in their employment practices even if the organizations and their employees are engaged in traditionally secular activities such as operating hospitals or running professional trade schools.¹⁴⁰ The expansion of Title VII's religious exemption was a deliberate act by Congress.¹⁴¹ In fact, Senator Samuel Ervin, a co-sponsor of the 1972 amendment, stated in a prior session of Congress that, "[a]s a matter of policy, I think people who establish a religious institution and people who establish a church should be allowed to select a janitor or a secretary who is a member of the church in preference to someone who is an infidel or nonmember."¹⁴² Under the 2013 ENDA, the same policy articulated by Senator Ervin

¹³⁵ 42 U.S.C. § 2000e-1(a); S. 815, 113th Cong. § 6(a) (2013).

¹³⁶ Civil Rights Act of 1964, Pub. L. No. 88-352 § 702, 78 Stat. 255 (1964) (emphasis added).

¹³⁷ *See id.*

¹³⁸ *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261 § 3, 86 Stat. 103 (1972).

¹³⁹ *See* 42 U.S.C. § 2000e-1(a); *Amos*, 483 U.S. at 338 (focusing on the religious affiliation of the employer and not on the function of the employee's work activities).

¹⁴⁰ *See Hall*, 215 F.3d at 624–25; *Saeemodarae*, 456 F. Supp. 2d at 1027, 1044 (holding a Catholic hospital qualified for an exemption under the terms of Title VII despite hiring non-Catholic employees and having non-Catholics on its board of directors); 110 CONG. REC. 6, 7217 (1964) (Sen. Clark stating that "a hospital which is owned and operated by a religious order would be exempt"); Kaliko Warrington, *Preserving Religious Freedom and Autonomy of Religious Institutions After Equal Employment Opportunity Commission v. Kamehameha Schools/Bishop Estate*, 26 U. HAW. L. REV. 203, 207 (2003); *see also Amos*, 483 U.S. at 346 (O'Connor, J., concurring) (stating concern that the exemption will continue to grow to encompass organizations which have speculative religious underpinnings).

¹⁴¹ *See* Pub. L. No. 92-261 § 3, 86 Stat. 103 (1972) (enacted) (succeeding in amending the religious exemption of Title VII); S. 2453, 91st Cong., 116 CONG. REC. 34,565 (1970) (unenacted) (attempting to expand the scope of Title VII's exemption for religious organizations).

¹⁴² *See* S. 2453, 91st Cong., 116 CONG. REC. 34,565, at 1977 (1970) (unenacted).

would operate against gay, lesbian, and transgender employees despite working or attempting to work in a non-religious capacity.¹⁴³

III. NARROWING THE RELIGIOUS EXEMPTION IN THE ENDA: A SECULAR-IN-FUNCTION APPROACH TO LIMITING EMPLOYMENT DISCRIMINATION AGAINST LGBT EMPLOYEES

Although the House discontinued its consideration of any version of the Employment Non-Discrimination Act (ENDA) for this current term, the issues posed by a broad religious exemption nonetheless provide a critical discussion for future constructions of the act.¹⁴⁴ There is a need to pass federal non-discrimination legislation given the frightful statistics of employment discrimination against workers that are lesbian, gay, bisexual, and transgendered (LGBT).¹⁴⁵ Furthermore, Congress must understand that a religious exemption that appeals to the expansive Title VII exemption would contradict the very purpose of the ENDA.¹⁴⁶

Some states have attempted to address these concerns in their statewide prohibitions of employment discrimination based upon sexual orientation and sexual identity by implementing bona fide occupational qualification requirements or a categorical exclusion for religious corporations operating in fields such as health care.¹⁴⁷ While some of these approaches provide guidance, the

¹⁴³ See Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 6(a) (2013) (as passed by Senate November 7, 2013); Employment Non-Discrimination Act of 2013, H.R. 1755 113th Cong. (2013) (referred to committee); S. 2453, 91st Cong., 116 CONG. REC. 34,565 (1970) (unenacted); Murray, *supra* note 87, at 200 (pointing out that the current exemption can be extended to “secretaries, janitors, . . . accountants,” and similar positions).

¹⁴⁴ See S. 815 § 6(a); Employment Non-Discrimination Act of 2013, H.R. 1755 (referred to committee); S. 2453, 91st Cong., 116 CONG. REC. 34,565 (1970) (enacted); see also Sarah M. Stephens, *What Happens Next? Will Protection Against Gender Identity and Sexual Orientation Workplace Discrimination Expand During President Obama’s Second Term?* 19 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 365, 384 (2013).

¹⁴⁵ See *Employment Non-Discrimination Act of 2013, Hearing on S. 815 Before the S. Comm. on Health, Educ., Labor, and Pensions*, 113th Cong., at 15 (2013) (citing a 2011 survey illustrating that ninety percent of transgendered employees in the United States experienced some form of harassment or discrimination in the workplace); Grant, *supra* note 5, at 51; Sears & Mallory, *supra* note 5, at 1 (citing that twenty-seven percent of gay, lesbian, and bisexual employees believed that they had been discriminated against or harassed due to their sexual orientation).

¹⁴⁶ Compare S. 815 § 2 (stating that the purpose of the Act is to address the pattern of discrimination against LGBT employees and provide explicit federal protections from such discrimination to LGBT employees), with Feldblum, *supra* note 82, at 122 (arguing that if the purpose of the ENDA is in fact to protect LGBT employment interests, then the ENDA must protect LGBT employees against those employers who will proffer religious reasons for continuing discriminatory practices).

¹⁴⁷ See, e.g., Cal. Gender Non-Discrimination Act, CAL. GOV’T CODE § 12926.2 (West 2011); Employment Nondiscrimination Act, COLO. REV. STAT. § 24-34-402 (2014); CONN. GEN. STAT. ANN. § 46a-81c (West 2009); D.C. Code § 2-1402.11 (LexisNexis 2012); MASS. GEN. LAWS ch. 151B, § 4 (2013).

approaches vary by state and judicial interpretation varies by jurisdiction.¹⁴⁸ Some scholarly proposals offer a religious exemption solution to the ENDA question such as imposing an examination of the religious affiliate's expressive function.¹⁴⁹ Ultimately, however, a categorical exception for religious affiliates operating in a secular market would best balance the rights of LGBT employees to be free from prejudicial employment practices in a secular field while simultaneously protecting a religious organization's right to legitimate belief expression.¹⁵⁰

A. State-by-State Approach to Religious Exemptions for Employment Non-Discrimination Statutes

Currently, sixteen states and the District of Columbia prohibit discriminatory employment practices on the basis of sexual orientation and gender identity in both private and public employment.¹⁵¹ Although the exemption mechanisms for these statutes greatly differ from state to state, the various state exemptions provide some guidance on how to best tailor a religious organization exemption to the ENDA, so as to not license discrimination against the LGBT workforce under the veil of religious affiliation.¹⁵²

It is important to note that some states provide simply for a broad religious association exemption similar to the exemption for religious discrimination in section 702 of Title VII and, consequently, similar to section 6 of the 2013 version of the ENDA ("2013 ENDA").¹⁵³ For example, the District of Columbia provides for a religious exemption that encompasses nearly any reli-

¹⁴⁸ Compare Cal. Gender Non-Discrimination Act § 12926.2 (exempting religious organizations but excluding religious institutions that operate health care facilities), with MASS. GEN. LAWS ch. 151B, § 4(18) (exempting religious associations so long as the discriminatory hiring practice is calculated to further the religious purpose of the organization).

¹⁴⁹ See Murray, *supra* note 87, at 220–21; Kate B. Rhodes, Note, *Defending ENDA: The Ramifications of Omitting the BFOQ Defense in the Employment Non-Discrimination Act*, 19 L. & SEXUALITY REV. LESBIAN GAY BISEXUAL & TRANSGENDER LEGAL ISSUES 1, 13–14 (2010).

¹⁵⁰ See McConnell, *supra* note 107, at 254 (arguing that religious organizations who offer general public services should have more control over the private conduct of their employees than non-religious employers in the same market); Feldblum, *supra* note 82, at 121–22.

¹⁵¹ Grant, *supra* note 5, at 3–4 (citing the full list of the sixteen states that provide employment protections for all LGBT employees in both private and public sectors); see, e.g., Cal. Gender Non-Discrimination Act, CAL. GOV'T CODE § 12940 (West 2011); Employment Nondiscrimination Act, COLO. REV. STAT. § 24-34-402; CONN. GEN. STAT. ANN. § 46a-81c; D.C. CODE § 2-1402.11; HAW. REV. STAT. ANN. § 378-2 (LexisNexis 201); 755 ILL. COMP. STAT. 5/1-102 (2006); MASS. GEN. LAWS ch. 151B, § 4.

¹⁵² See Murray, *supra* note 87, at 233; see, e.g., Cal. Gender Non-Discrimination Act, CAL. GOV'T CODE § 12940; MASS. GEN. LAWS ch. 151B, § 4(18).

¹⁵³ 42 U.S.C. § 2000e-1(a) (2012); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 6(a) (2013) (as passed by Senate November 7, 2013); see, e.g., Employment Nondiscrimination Act, COLO. REV. STAT. § 24-34-401(3) (2014); D.C. CODE § 2-1401.03 (LexisNexis 2012).

giously founded organization so long as the organization's activities are reasonably calculated to promote its religious beliefs.¹⁵⁴ Colorado additionally exempts any non-profit religious organization or association.¹⁵⁵ The statutes establishing such policies do not provide much guidance in reformulating the ENDA religious exemption simply because the exemptions are nearly identical to what the 2013 ENDA proposed.¹⁵⁶

Other states, however, have attempted to narrow the religious exemption significantly.¹⁵⁷ Massachusetts, for example, exempts an organization controlled or operated by a religious institution in so far as the employer's hiring and firing practices, disciplinary methods, or training mechanisms are calculated to promote religious principles.¹⁵⁸ The Massachusetts statutory exemption requires the organization claiming the exemption to demonstrate that the prejudicial employment practice relates directly to a religious function.¹⁵⁹ Interestingly, Connecticut does not explicitly provide for a religious employer exemp-

¹⁵⁴ D.C. CODE § 2-1401.03. The law provides for an exemption relating to the chapter's prohibition on employment discrimination:

Nothing in this chapter shall be construed to bar any religious or political organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious or political organization, from limiting employment, or admission to or giving preference to persons of the same religion or political persuasion as is calculated by the organization to promote the religious or political principles for which it is established or maintained.

§ 2-1401.03(b).

¹⁵⁵ Employment Nondiscrimination Act, COLO. REV. STAT. § 24-34-401(3) (2014). Under the Colorado statute, the term "employer" does not include "religious organizations or associations, except such organizations or associations supported in whole or in part by money raised by taxation or public borrowing." *Id.*

¹⁵⁶ Compare 42 U.S.C. § 2000e-1(a) (exempting religious corporations, organizations, and schools broadly), and S. 815 § 6(a), with COLO. REV. STAT. § 24-34-401(3) (exempting "religious organizations or associations"), and D.C. CODE § 2-1401.03 (exempting religious organizations and associations).

¹⁵⁷ See, e.g., Cal. Gender Non-Discrimination Act, CAL. GOV'T CODE § 12926.2 (West 2011); MASS. GEN. LAWS ch. 151B, § 4(18) (2013).

¹⁵⁸ MASS. GEN. LAWS ch. 151B, § 4(18). The law states,

Notwithstanding the provisions of any general or special law nothing herein shall be construed to bar any religious or denominational institution or organization, or any organization operated for charitable or educational purposes, which is operated, supervised or controlled by or in connection with a religious organization, from limiting admission to or giving preference to persons of the same religion or denomination or from taking any action with respect to matters of employment, discipline, faith, internal organization, or ecclesiastical rule, custom, or law which are calculated by such organization to promote the religious principles for which it is established or maintained.

Id.

¹⁵⁹ *Id.*

tion at all in its prohibition of employment discrimination.¹⁶⁰ Rather, Connecticut simply exempts preferential employment practices on the basis of a bona fide occupational qualification.¹⁶¹

Finally, California began a noteworthy initiative to exclude religiously affiliated health care employers from its religious exemption to discriminatory employment practices.¹⁶² Under the California statute, a religious employer operating a health care facility cannot discriminate on the basis of sexual orientation and gender identity so long as the particular function of the employee is unrelated to doctrinal or pastoral duties.¹⁶³ The California law confronts religious affiliates operating in secular health care, a market in which religious organizations are heavily involved nationwide.¹⁶⁴ A similar provision in the next version of the ENDA could afford federal protections to LGBT employees who wish to enter such secular markets where religious affiliates constitute a significant portion of employers.¹⁶⁵ This narrow exclusion for health care providers, however, would have to be extended to prohibit discrimination carried out by other religious organizations offering secular public services, such as secondary and postsecondary education, humanitarian services, and adoption services.¹⁶⁶

¹⁶⁰ CONN. GEN. STAT. ANN. § 46a-60(a) (West 2009).

¹⁶¹ *Id.* A bona fide occupational qualification analyzes whether the particular job requires certain qualifications that incidentally excludes a protected class under the antidiscrimination statutes. *See* Curry v. Allan S. Goodman, Inc., 944 A.2d 925, 936 (Conn. 2008) (stating that a bona fide occupational qualification defense is the relevant portion that provides an exemption from the non-discrimination statute).

¹⁶² Cal. Gender Non-Discrimination Act, CAL. GOV'T CODE § 12926.2(c); *see* Murray, *supra* note 87, at 233.

¹⁶³ Cal. Gender Non-Discrimination Act § 12926.2(c). Despite exempting religious organizations from the definition of employer under the anti-discrimination statute, the law states that

“[E]mployer” includes a religious corporation with respect to persons employed by the religious association or corporation to perform duties, other than religious duties, at a health care facility operated by the religious association or corporation for the provision of health care that is not restricted to adherents of the religion that established the association or corporation.

Id.

¹⁶⁴ *See id.*; Stulberg, *supra* note 108, at 725 (noting that religiously affiliated hospitals constitute a significant percentage of nationwide hospital service providers).

¹⁶⁵ *See* Feldblum, *supra* note 82, at 122; Murray, *supra* note 87, at 226.

¹⁶⁶ *See* Cal. Gender Non-Discrimination Act § 12926.2(c) (excluding only health care providing organizations from the religious exemption); Feldblum, *supra* note 82, at 121–22 (noting that a narrower exemption is necessary to prohibit discriminatory practices of organizations that enter the public market and provide general services); Murray, *supra* note 87, at 226 (arguing that employees for a religiously affiliated hospital or drug rehabilitation center do not engage in belief expression and therefore said employees should be protected under antidiscrimination laws).

B. Proposed Solutions to the Over-Inclusive Religious Exemption

Scholars have offered proposals to narrow the scope of the 2013 ENDA's religious exemption and reconcile the disparate exemption methods proffered by the states.¹⁶⁷ One such option would be a narrow bona fide occupational qualification test that applies separately from the ministerial exemption provided for in section 703 of Title VII.¹⁶⁸ This bona fide occupational qualification approach appears to be popular among many states that have implemented sexual orientation and gender identity protections, including Connecticut, Massachusetts, and California.¹⁶⁹

With a bona fide occupational qualification requirement, an amended ENDA statute would require religious organizations to assess whether a particular employee's position and function necessitates adherence to religious tenets, specifically whether the position requires the employee to be heterosexual.¹⁷⁰ In states with sexual orientation and gender identity protections, federal courts that have upheld bona fide occupational requirements have interpreted the requirement using a two-part test: (1) whether the job requires the worker to be of a particular sexual orientation or gender identity, and, if so, (2) whether the requirement bears a reasonably necessary relationship to the employer's business.¹⁷¹ This test would alleviate discrimination against the LGBT workforce employed or applying for employment in a secular capacity.¹⁷²

¹⁶⁷ See Feldblum, *supra* note 82, at 122; Murray, *supra* note 87, at 220–21; Rhodes, *supra* note 148, at 13–14.

¹⁶⁸ See 42 U.S.C. § 2000e-2(e)(1) (2012) (providing a bona fide occupational qualification as related to 'sex'); Rhodes, *supra* note 148, at 13–14 (arguing that a bona fide occupational qualification test should be more of an assessment of whether an organization adheres to the principles of its identified faith).

¹⁶⁹ See 42 U.S.C. § 2000e-2(e)(1); Cal. Gender Non-Discrimination Act § 12926.2(c); CONN. GEN. STAT. ANN. § 46a-60(a) (West 2009); MASS. GEN. LAWS ch. 151B, § 4(18) (2013) (permitting disparate hiring practices when the employer's activity and employee's function relate to carrying out religious activities); Murray, *supra* note 87, at 173 n.149 (citing that some states exempt services performed specifically in connection with religious activities).

¹⁷⁰ See CONN. GEN. STAT. § 46a-60(a); Rhodes, *supra* note 148, at 18–19.

¹⁷¹ 42 U.S.C. § 2000e-2(e)(1) (providing a bona fide occupational qualification as related to 'sex'); see *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1199 (7th Cir. 1971) (holding that airline could not demonstrate that marital status of its female stewardesses had any relation to the bona fide qualifications of an airline stewardess); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir. 1971) (holding that an airline cannot exclude all males from becoming flight attendants because there is no reasonable relation between sex and the qualifications of a flight attendant); *Wilson v. Sw. Airlines*, 517 F. Supp. 292, 304–05 (N.D. Tex. 1981) (holding that airline could not establish that its policy of hiring only female flight attendants was exempt under a bona fide occupational qualification defense because sex characteristics were not reasonably related to the duties of a flight attendant); Rhodes, *supra* note 148, at 19.

¹⁷² Rhodes, *supra* note 148, at 13–14 (arguing that a bona fide occupational qualification would help protect LGBT interests against those employers claiming religious reasons for discrimination);

A glaring issue with the two-part test, however, is that the test would require a neutral court to adequately judge a religious employer's beliefs and how closely those beliefs relate to a particular mission.¹⁷³ Not only is this a difficult test for courts to administer as it necessitates a searching analysis of a particular employee's function, but the test also presents an issue for religious organizations that would be required to delineate detailed qualifications for employment positions.¹⁷⁴ The Supreme Court in *Presiding Bishop v. Amos* discussed this fear that the imposition of liability to certain employment circumstances but not others would create uncertainty and deter organizations from carrying out their religious missions.¹⁷⁵

An alternate approach would be to focus on the employer-employee relationship.¹⁷⁶ This exemption would analyze whether the employer-employee relationship is secular in nature or expressive of religious tenets—the former being subject to the ENDA's antidiscrimination protections, while the latter relationship would be exempt.¹⁷⁷ Essentially, an employee who is directly charged with carrying out and expressing the religious views of the employing organization would have an expressive relationship with the employer.¹⁷⁸ The employer would be exempt from the ENDA antidiscrimination provisions be-

see Murray, *supra* note 87, at 233 n.330 (citing that some states adopt a bona fide occupational qualification exemption to protect LGBT employees who perform secular functions).

¹⁷³ See Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 336 (1987) (stating that it would be a burden on free exercise of religion if religious organizations were required to examine the nature of its activities in relation to its beliefs); Aden & Carlson-Thies, *supra* note 20, at 5–6 (arguing that it is burdensome on both religious organizations and courts to require they examine the precise relationship between a belief and the particular activity performed).

¹⁷⁴ See Aden & Carlson-Thies, *supra* note 20, at 5–6 (“Given how important the moral issues implicated in sexual conduct are regarded to be by many religious communities and their religious organizations, this categorical ENDA exemption is an important confirmation of religious freedom.”).

¹⁷⁵ See *Amos*, 483 U.S. at 336; Aden & Carlson-Thies, *supra* note 20, at 5–6. In *Amos* the Supreme Court explained:

[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

483 U.S. at 336.

¹⁷⁶ Murray, *supra* note 87, at 220–21; see McConnell, *supra* note 107, at 254.

¹⁷⁷ See Murray, *supra* note 87, at 225–26. “Expressive” means that the employee is charged with carrying out the teachings and beliefs of the religion as opposed to carrying out a broadly humanitarian activity with religious justifications. *Id.*

¹⁷⁸ *Id.* at 226; see Feldblum, *supra* note 82, at 103 (“[C]ourts have recognized that certain [employee] conduct may be used to communicate an expressive belief.”).

cause the employer is expressing religious beliefs directly through the employee and the employee's duties.¹⁷⁹

In contrast, an employee who does nothing more than provide a secular service for the employer would not be engaged in expressive activity and in such circumstances, the employer would not be free to discriminate.¹⁸⁰ The relevant considerations would focus on the mission and business of the employer, the employee's particular function, and the nexus between employee activity and religious expression.¹⁸¹ Nevertheless, this relational approach would be difficult to administer, as a secular court would face the difficulty of judging the precise relationship between the employer and employee, as well as the difficulty of evaluating the genuine relationship between certain activities and religious beliefs.¹⁸²

C. A Categorical Exclusion for Religious-in-Name but Secular-in-Function Organizations

A final remedy for the 2013 ENDA's inability to fully protect LGBT employment rights would be to apply a categorical exclusion to the 2013 ENDA exception.¹⁸³ The categorical exclusion would maintain all three Title VII exemptions, yet within the broad religious institution exemption, it would carve out certain identifiable classes of institutions that would remain liable.¹⁸⁴ Institutions that should be subject to the ENDA's prohibition of discriminatory practices are those organizations that, despite a religious affiliation, are open to the public at large and offer a variety of non-religious and general services.¹⁸⁵ Under this construction of the exemption, religiously affiliated hospitals, adoption agencies, treatment centers, and welfare service providers would be pro-

¹⁷⁹ See Feldblum, *supra* note 82, at 121–22 (noting that religious leadership roles should be exempt because religious organizations ought to have discretion in hiring its leaders); Murray, *supra* note 87, at 225–26.

¹⁸⁰ See Feldblum, *supra* note 82, at 122 (stating that an employee with a wholly non-religious function should be afforded protection); Murray, *supra* note 87, at 225–26.

¹⁸¹ Murray, *supra* note 87, at 226; see McConnell, *supra* note 107, at 256.

¹⁸² See Aden & Carlson-Thies, *supra* note 20, at 5 (arguing that requiring a secular court to judge the value of certain religious activities poses undue restrictions on the rights of religious groups); Feldblum, *supra* note 82, at 122 (implying that a categorical exclusion for organizations operating in the public market would be a bright-line rule that is simple to administer).

¹⁸³ Feldblum, *supra* note 82, at 122.

¹⁸⁴ See 42 U.S.C. § 2000e (2012); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 6(a) (2013) (as passed by Senate November 7, 2013); Feldblum, *supra* note 82, at 122 (proposing that when religious institutions enter the public marketplace and offer general public services they should be required to provide such services without discriminating on the basis of sexual orientation and gender identity).

¹⁸⁵ Feldblum, *supra* note 82, at 121–22; see McConnell, *supra* note 107, at 256 (implying that there should be a narrowed exemption which addresses religious employers who enter the public market of non-religious services).

hibited from discriminating against LGBT persons applying for positions in which the individual's sexual orientation bears no relation to the performance of generally secular duties.¹⁸⁶

A categorical approach would be similar to California's exclusion of religious health care institutions from exemption status, but would broaden the exclusion to other secular-in-function organizations; including religious-affiliate universities and secondary schools that are open to non-members and instruct secular curricula.¹⁸⁷ The test would be easily administered because the focus of the analysis is simply whether the organizations operate within the "public" realm and offer public services.¹⁸⁸ Organizations operating in these public spheres are often readily identifiable, namely those organizations that principally offer general healthcare, educational, or humanitarian services to the community as a whole.¹⁸⁹ Therefore, a categorical standard would not require the courts to delve into an analysis of the particular belief-activity relationship but rather simply identify the market in which the organization typically operates.¹⁹⁰ This would prevent a religious hospital from denying employment to a gay doctor based on his sexual orientation, and also prevent a religious university from discriminatorily firing a transgendered janitor.¹⁹¹

¹⁸⁶ Feldblum, *supra* note 82, at 121–22. Professor Feldblum writes:

Many religious institutions operate the gamut of social services in the community, such as hospitals, gyms, adoption agencies and drug treatment centers. These enterprises are open and marketed to the general public and often receive governmental funds. It seems quite appropriate to require that the enterprises' services be delivered without regard to sexual orientation and that most employment positions in these enterprises be available without regard to sexual orientation.

Id. at 122.

¹⁸⁷ See Cal. Gender Non-Discrimination Act, CAL. GOV'T CODE § 12926.2(c) (West 2011); Feldblum, *supra* note 82, at 121–22; Wessels, *supra* note 17, at 1222 (illustrating that many urban-area parochial schools are in effect free-market alternatives to public schools); Faithful, *supra* note 82, at 83 (arguing that narrowing the exemption is necessary to over-accommodate religious groups and may be narrowed by imposing the antidiscrimination law on to large public organizations that exceed a certain employment threshold).

¹⁸⁸ See Feldblum, *supra* note 82, at 121; McConnell, *supra* note 107, at 255–56 (noting that religious organizations that operate in the public market are primarily easily and readily identifiable).

¹⁸⁹ Feldblum, *supra* note 82, at 121; see Wessels, *supra* note 17, at 1222; Faithful, *supra* note 82, at 83 (stating that one possible strategy would be to exempt small private organizations and churches but still subject large publicly operating organizations to the antidiscrimination laws).

¹⁹⁰ Compare Feldblum, *supra* note 82, at 122 (stating that some large religious organizations provide essential humanitarian services and operate in a general public market), with *Amos*, 483 U.S. at 336 (expressing a worry over the circumstantial evaluation of religious beliefs and the rational connection to an organization's activities).

¹⁹¹ See Feldblum, *supra* note 82, at 122; Murray, *supra* note 87, at 226–27 (arguing that a hospital should not be able to discriminate against gay doctors and general staff but would still have discretion over hiring hospital priests under as a right under the ministerial clause).

D. Adopting the Categorical Exclusion to Fully Protect LGBT Access to the Employment Market

Congress should consider narrowing the religious exemption when it revisits the ENDA.¹⁹² It is evident that under the most recent formulation of the ENDA's religious exemption in the 2013 ENDA, many organizations would be exempt based on religious identity or affiliation alone, despite the fact that such organizations operate in a non-religious market and perform non-religious functions.¹⁹³ If the next ENDA is to ensure LGBT citizens free access to the employment market, then the religious exemption cannot immunize such a significant segment of the nation's employment market through the religious institution exemption.¹⁹⁴ A categorical limitation for large secular-in-function institutions would be an equitable solution to protect the interests of LGBT employees who wish to enter secular fields in which a number of employers are religiously-affiliated institutions.¹⁹⁵

Under the framework of a categorical exclusion, religiously-owned hospitals, elder care facilities, and healthcare trade schools would be prohibited from discriminating against LGBT doctors, nurses, training staff, or general maintenance staff.¹⁹⁶ Likewise, organizations providing broad humanitarian services and welfare assistance to the public at large would be subject to the

¹⁹² Laura Meckler, *Religious Exemptions at Center of ENDA Debate*, WALL ST. J. (Nov. 1, 2013, 12:29 PM), <http://blogs.wsj.com/washwire/2013/11/01/religious-exemptions-at-center-of-enda-debate/>; see Stephens, *supra* note 143, at 384 (arguing that despite the unlikelihood of the ENDA passing in the House, the ENDA is nonetheless an important piece of legislation in need of review); Faithful, *supra* note 82, at 59 (arguing that the religious exemption within the ENDA is an essential provision in need of review by Congress). The ACLU is considering lobbying efforts to narrow the scope of the ENDA religious exemption so as to better promote the non-discriminatory purpose of the bill when Congress inevitably revisits the legislation in the future. Meckler, *supra*.

¹⁹³ McConnell, *supra* note 107, at 456; Feldblum, *supra* note 82, at 115.

¹⁹⁴ See Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 2 (2013) (as passed by Senate November 7, 2013) (stating that the purpose of Act is to address history of employment discrimination on the basis of sexual orientation and gender identity); Michael Kent Curtis, *A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married Or Marrying Gays in Context*, 47 WAKE FOREST L. REV. 173, 203 (2012) (stating that the broad exemptions undermine the purpose of nondiscrimination laws to promote liberty); Feldblum, *supra* note 82, at 115.

¹⁹⁵ See Curtis, *supra* note 196, at 208 (proffering a limited exemption only for churches, ministers, and employers with less than five employees); Feldblum, *supra* note 82, at 122.

¹⁹⁶ Compare Feldblum, *supra* note 82, at 122 (arguing that large public service institutions should not be exempt), and Murray, *supra* note 87, at 226–27 (arguing for an exemption that does not permit hospitals and health care facilities to discriminate against LGBT employees), with *Hall v. Baptist Mem'l Health Care Corp.*, 215 F.3d 618, 624–25 (6th Cir. 2000) (holding that a nursing school with Baptist affiliations met the religious institution exemption under Title VII despite training nurses to enter the secular medical field), and *E.E.O.C. v. Presbyterian Ministries, Inc.*, 788 F. Supp. 1154, 1157 (W.D. Wash. 1992) (holding that a nursing home controlled by a Presbyterian company was exempt under Title VII despite being open to the public and hiring non-Presbyterian staff).

ENDA's ban of discriminatory employment practices despite the organization's founding under religious ideals.¹⁹⁷ Employees similar to former vice principal Zmuda would be protected under the ENDA, as the categorical exclusion would not permit large educational institutions open to the public to discriminatorily hire and fire on the basis of sexual orientation and gender identity as to their employees whose functions are secular in nature.¹⁹⁸

Additionally, because such a categorical exclusion would apply specifically to employment practices regarding secular-in-function employees, the exclusion would not violate the well-established rule that religious organizations ought to control their leadership.¹⁹⁹ This suggested provision could act in conjunction with the common law ministerial exemption so as to permit these religious institutions the freedom and discretion to hire religious leadership and doctrinally focused instructors.²⁰⁰ For example, divinity schools would continue to be exempt from the ENDA because the curricula at such schools are directed wholly towards propagation of a particular faith and would only offer education to those willing to accept such beliefs.²⁰¹ The categorical ex-

¹⁹⁷ *Compare* *Spencer v. World Vision, Inc.*, 633 F.3d 723, 740–41 (9th Cir. 2011) (holding that a non-profit organization offering soup kitchen and other welfare services to the poor qualified for a Title VII religious exemption because the organization was founded under religious ideals), *with* Feldblum, *supra* note 82, at 121 (stating once a religious institution enters into the general stream of commerce, these enterprises should be required to conform to non-discrimination laws), *and* Faithful, *supra* note 82, at 81 (arguing that when the quality of a person's sexuality is unrelated to the work performed by the organization, there would be no substantial burden on these organizations to hire LGBT employees).

¹⁹⁸ *See* Feldblum, *supra* note 82, at 122 (stating religious schools should be exempt to the extent that they proffer beliefs inconsistent with acceptance of homosexuality and such schools offer education only to those students who want to be indoctrinated with said beliefs); Murray, *supra* note 87, at 228–29 (arguing that religious private schools would be exempt to the extent that the teachers or administrators are directly involved in communicating religious beliefs but would not be exempt as to teachers of a secular curriculum); Paulson, *supra* note 1 (reporting that Eastside Catholic High School is a private school that enrolls individuals of many beliefs despite the school's affiliation with Catholicism).

¹⁹⁹ *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C.*, 132 S. Ct. 694, 714 (2012) (holding that a church must be free to choose its religious leadership without burden under the First Amendment); *see* Feldblum, *supra* note 82, at 122 (agreeing with the general principle that religious organizations of all sizes and functions should be able to control its religiously-focused leadership).

²⁰⁰ 42 U.S.C. § 2000e-2(e)(1) (2012) (providing for a bona fide occupational qualification exemption); *id.* § 2000e-2(e)(2) (providing an exemption for religious educational institutions, schools, and colleges “*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*” (emphasis added)); *Hosanna-Tabor*, 132 S. Ct. at 709 (carving the ministerial exemption out of the bona fide occupational qualification of Title VII); *see* Feldblum, *supra* note 82, at 122 (proposing that religious organizations that enter the secular market place and offer general humanitarian services ought to comply with non-discrimination *except* for the hiring of religious leadership and ministers).

²⁰¹ 42 U.S.C. § 2000e-2(e)(2); *see* Feldblum, *supra* note 82, at 122 (pointing out that schools such as divinity schools or seminaries would continue to be exempt as a result of the nature of their work being designed to specifically “inculcate a set of beliefs”); Murray, *supra* note 87, at 227.

clusion would not additionally burden religious institutions, nor would it restrict the expression of faith.²⁰² This formulation of the ENDA's religious exemption, rather, serves to ensure that religious organizations choosing to operate in a secular and public market have a duty to treat all individuals entering a secular labor field equally.²⁰³

CONCLUSION

Legislation similar to the Employment Non-Discrimination Act (ENDA) is certainly a necessary step to carry on the spirit of Title VII and continue the fight against employment discrimination. Congress will need to revisit the legislation due to the rampant prejudice and historical pattern of discrimination against lesbian, gay, bisexual, and transgendered (LGBT) persons in the United States. The need to pass the antidiscrimination legislation, however, cannot come at the cost of denying LGBT employees protection against religious employers most prone to discriminate on the basis of sexual orientation and gender identity. This is especially true when religious employers operate in public-service fields and hire primarily secular-in-function employees. Future designs of the ENDA must narrow the religious exemption in order to address secular-in-function institutions despite any religious founding or oversight.

Should Congress reintroduce similar legislation, it ought to consider crafting the religious exemption to include a categorical exclusion in order to best protect LGBT employees who wish to enter secular markets in which religiously affiliated employers often participate. A categorical exclusion provides the most comprehensive balance between promoting employment equality and safeguarding the First Amendment rights of religious institutions. The need for this legislation is dire as is the need to rework the ENDA's exemption provisions. After all, the spirit of ENDA legislation advances one simple proposition: that LGBT employees deserve a fair and equitable opportunity to serve in the American job market without limitation.

²⁰² See Feldblum, *supra* note 82, at 122 (arguing that when a religious organization enters the public market there are limited circumstances where discriminatory hiring would be reasonably related to the expression and articulation of anti-homosexual beliefs).

²⁰³ See Feldblum, *supra* note 82, at 122; Faithful, *supra* note 82, at 81; Murray, *supra* note 87, at 238.