Civil Rights

Catch or Release? The Employment Non-Discrimination Act's Exemption for Religious Organizations

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The "Employment Non-Discrimination Act" ("ENDA") currently under consideration in Congress would in effect[1] expand Title VII of the 1964 Civil Rights Act to add "sexual orientation" and "gender identity"(transgender status) to the list of statuses protected under federal law from employment discrimination. ENDA has been introduced in various forms since the 1970s.[2] With the increased strength of Democrats in Congress and the backing of President Barack Obama,[3] ENDA's prospects for enactment have improved.[4]

ENDA's proponents assert that the bill promotes the goal of embracing diversity in the workplace. Proponents also argue that sexual orientation is protected under the U.S. Constitution's guarantees of equal protection and due process. Without a federal statute, they claim, victims of discrimination are subject to a patchwork of state-law protections that provide uneven and often insufficient protection, hence the need for a national standard in the form of ENDA.

Critics argue that antidiscrimination laws promote *intolerance* of faith if they are not accompanied by meaningful exemptions for religious organizations and other faith-based employers with religiously grounded moral objections to homosexual conduct.[5] 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. Critics assert that, unlike other established statutory protections such as race and gender, legal protections for sexual orientation inevitably clash with the right to free exercise and expression of religion, including the right to believe and express that homosexual conduct is sinful.

In the words of the Supreme Court, protecting expressive associations from antidiscrimination laws "is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular ideas."[6] This concern has been acknowledged by a number of ENDA's proponents[7] and thus ENDA bills have routinely incorporated an exemption for religious organizations. The key question for this article is whether the proffered religious exemption adequately protects the religious freedom of religious organizations; in a phrase, will the circle drawn by the exemption operate to "catch" or "release" faith-based institutions?[8]

ENDA History

Until 2007, ENDA versions provided that the Act "shall not apply to a religious organization," with additional minimal language to define "religious organization."[9] In the 110th Congress, Rep. Barney Frank introduced a version (H.R. 2015) that included a complex and significantly narrower exemption.[10] After a hearing in the House Labor and Education Committee and opposition from religious freedom organizations,[11] the committee took no further action. One source of opposition was the bill's incorporation of gender identity, along with sexual orientation, as a protected status. In place of H.R. 2015, efforts turned to another Frank bill, H.R. 3685, which did not include gender identity protection but did in simple terms exempt religious organizations.[12] However, this bill additionally provided the following specific definition of such organizations:

> (A) a religious corporation, association, or society; or
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> (B) a school, college, university, or other educational institution or institution of learning, if—
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> (i) the institution is in whole or substantial part controlled, managed, owned, or supported by a particular religion, religious corporation, association, or society; or
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> (ii) the curriculum of the institution is directed toward the propagation of a particular religion.[13]

The majority claimed that this definition of "religious organization" was congruent with the Title VII religious exemption: "This definition of a religious organization is taken directly from Title VII's descriptions of religious organizations exempt from that law's religious discrimination prohibitions. If an organization qualifies for Title VII's religious exemption from religious discrimination claims, it would qualify for ENDA's religious organization exemption as well."[14]

The minority complained, "H.R. 3685 revises the religious exemption, ostensibly to conform to the exemption under Title VII. The new provision, however, still fails to protect many religious organizations that would qualify for an exemption under Title VII."[15]

The bill passed the Labor and Education Committee along party lines, with four Republican amendments offered and rejected.[16] Two amendments offered by Rep. Mark Souder would have eliminated the protection for "perceived" sexual orientation and permitted employers to condition employment on being married or being eligible to marry.[17] A third Souder amendment would have prohibited retaliation against an employee who refused to sign an employer's anti-discrimination or anti-harassment policy or refused to participate in diversity training because such policy is against the individual's religious beliefs regarding homosexual conduct.[18] The fourth amendment, offered by Rep. Pete Hoekstra, would have expanded the religious exemption to include institutions that maintain a faith-based mission, although they are not

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controlled by a church or denomination. The committee, in rejecting the Hoekstra amendment, again stated: "H.R. 3685 adopts Title VII's definition of a religious organization and thereby imports long-standing existing law on who is or is not a religious organization. The scope of its religious exemption is to those organizations who are covered by Title VII's exemption, no more and no less."[19]

However, religious-freedom and faith-based organizations protested that the scope of the proposed ENDA religious exemption was narrower than Title VII's exemption, due to the definition of "religious organization" incorporated into ENDA. Because of that definition, seminaries (by virtue of their curriculum) and church-controlled colleges (by virtue of that denominational control) would be exempt from ENDA but a nondenominational liberal arts college such as Wheaton College, Illinois, would not be exempt.[20]

When the bill moved to consideration on the House floor, several amendments were offered. Important for this discussion is the friendly amendment offered by Rep. George Miller, a co-sponsor of the bill. This amendment incorporated by reference the actual language of Title VII's religious exemption: "This Act shall not apply to a corporation, association, educational institution, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Act of 1964 pursuant to section 702(a) or 703(e)(2) of such Act (42 U.S.C. 2000e-1(a); 2000e-2(e)(2))."[21]

Rep. Souder offered an amendment to strike the bill's prohibition of employers conditioning employment on a person being married or being eligible to be married.[22] The amendment passed overwhelmingly, by a vote of 325-101.[23] A third amendment, offered by Rep. Tammy Baldwin, to add "gender identity" to the bill's protections, was withdrawn by unanimous consent after discussion.[24] Thus amended, the bill passed the House by a vote of 235-184, but the Senate took no action.[25]

The effort to pass an ENDA bill has been renewed in the 111th Congress, with two new versions of ENDA having been introduced by Rep. Frank on June 19, 2009 (H.R. 2981), and June 24, 2009 (H.R. 3017), and a third bill in the Senate by Sen. Jeff Merkley (S. 1584). All of these new versions recapitulate the exemption for religious institutions based on Title VII's exemption as previously set out in H.R. 3685 (110th Cong.), as modified by the Miller Amendment on the floor.[26] All three versions also add "gender identity" as a protected status, and provide that ENDA gives no protection against discrimination based on "unmarried" status, with "marriage" defined by reference to the federal Defense of Marriage Act.[27]

Analysis of the Religious Exemption in the Current ENDA Bills

The first part of the religious exemption incorporated by reference into ENDA, Section 2000e-1(a), is a general exemption for religious hiring by religious entities. Sec. 2000e-1(a) provides that Title VII "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." This provision has been quite broadly construed by the courts, and its protections for hiring based upon religious status or beliefs have been routinely applied to churches, faith-based nonprofit organizations, and religious educational institutions.[28] However, there have been disputes in the courts regarding some institutions' eligibility for the exemption, and these disputes lead to intrusive analyses of the institutions' religious beliefs and practice to determine whether they, and thus their employment practices, are exempt.[29] This uncertainty renders the religious exemption something less than a reliable categorical protection from litigation, and thus exempting religious organizations from ENDA's strictures by referencing the Title VII exemption provides to religious organizations something less than complete confidence in making employment decisions involving sexual status and conduct.[30]

The second part of the Title VII exemption, Section 2000e-2(e)(2), protects religious hiring in religious education by providing,

> [I]t shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if [the institution] is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.[31]

There is a paucity of case law interpreting the provision, likely because many consider it redundant of the general exemption provided in 2000e-1(a). What precedent exists suggests that analysis under this provision follows one or both of two distinct lines of inquiry: the "control or support test" and the "curriculum" test. The former test is more commonly applied, with varied results.[32] The Ninth Circuit utilized the curriculum test in *EEOC v. Kamehameha Schools/Bishop Estate*, but interpreted "curriculum" narrowly in light of its context in 2000e-2(e)(2), ruled its ordinary meaning to be "limited to coursework and required school activities," and held that nothing in the school's curriculum justified the school's assertion that its teachers had to be of the Protestant faith.[33]

These Title VII statutory exemptions derive from First Amendment principles of religious exercise and church-state separation[34] that proponents argue protect the autonomy of churches and faith-based organizations by permitting them to maintain their religious mission and character by selecting employees who agree and act in accordance with the organizations' respective religious views. The Supreme Court unanimously approved the broad—institution-wide or categorical—exemption provided in 42 U.S.C. § 2000e-1, in part with the argument that

> [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.[35]

The Court's words demonstrate how important it is that the Title VII religious exemption is categorical or institution-wide, rather than being limited to purportedly "religious" or "ministerial" posts within an organization.[36] Assuming that the courts and regulators continue to interpret the exemption broadly to include faith-based nonprofits—parachurch organizations—as well as houses of worship and denominational entitities—churches—then the current ENDA religious exemption, based on the Title VII exemption, is a strong one (although, as noted above, courts at times have been uncertain about whether particular organizations should be included among the religious entities referenced in the Title VII exemption). 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.

However, the authors believe that, to be effectual, the current ENDA exemption needs to be supplemented.[37] The intent of the changes would not be to expand the religious exemption but rather to ensure that it is carried out in the practice of court and regulatory decisions. We note two areas of concern.

The first might be called the "*Bob Jones*" issue: the creation of a compelling governmental interest that is held to overbalance religious freedom claims.[38] With regard to ENDA the concern is the possibility that a court, notwithstanding ENDA's religious exemption, would regard the enactment of ENDA to have created a compelling governmental interest in suppressing certain forms of employment discrimination, undermining ENDA's supposed acknowledgement of the freedom for religious organizations to engage in those forms of employment decisionmaking.[39] The 1990 Supreme Court decision, *Employment Division* v. *Smith*,[40] limited the constitutional requirement to minimize burdens on religious exercise, such that legislatures must now take exceptional care in drafting statutes in order to preserve religious freedom in the context of a generally applicable law such as ENDA. The Religious Freedom Restoration Act of 1993[41] was enacted to restore the pre-Smith "compelling interest" standard and thereby again to more robustly protect religious freedom. Yet, in the current environment of heightened activism, some may say that by adopting ENDA Congress has implicitly announced that the federal government has a "compelling interest" *not* to accommodate the employment practices of religious organizations even though compliance with ENDA would substantially burden their religious exercise.

This problem might be addressed by adding a statement in the "purposes" section of ENDA that announces the congressional intention not to inadvertently undermine religious freedom in the course of enhancing employment nondiscrimination protections.[42] Similarly, in the "construction" section of ENDA a statement could be added saying that ENDA shall not be construed to have created a compelling governmental interest in the context of claims arising from the First Amendment or from the Religious Freedom Restoration Act.[43]

The second area of concern about how practically efficacious the religious exemption might be in our current era of activism might be labeled the "*Boy Scouts*" problem: the courts hold that some action is constitutionally protected but governmental entities retaliate against organizations that engage in that action by withdrawing from them various benefits.[44] The likelihood of such retaliation is not limited to the Boy Scouts, of course, and legislatures have acted in advance to forestall retaliation when dealing with volatile issues. The retaliation by public officials against the Boy Scouts following the Supreme Court decision upholding the organization's policy on openly homosexual Scoutmasters led Congress to adopt the Boy Scouts of America Equal Access Act (2002).[45] Congressional efforts to protect medical personnel and institutions that object to performing or aiding in abortions has gone beyond legal prohibitions to include provisions to protect objecting persons and institutions from being penalized by government action. The 1996 Danforth Amendment forbids governmental entities from denying "federal financial assistance, certifications, or licenses" to doctors, students, and training programs because of their refusal to support abortions.[46] Similarly, the Weldon Amendment, added to appropriations bills since 2004, withholds appropriated funds from any federal, state, or local governmental entity that discriminates against a health institution or professional because of the institution's or person's lack of support for abortion.[47] The same-sex marriage law adopted in New Hampshire not only provides that religious organizations cannot be compelled to provide services, facilities, and the like to aid in the solemnization or promotion of same-sex marriages but specifically provides that a refusal to provide such services, facilities, etc., "shall not create any civil claim or cause of action or result in any state action to penalize or withhold benefit from such religious organization, association, or society . . . ."[48] The Canadian same-sex marriage act (Bill C-38) includes language amending the Income Tax Act to ensure that religious charities do not lose their registration consequent to exercising their freedom not to support marriages that conflict with their fundamental convictions.[49]

By enacting such provisions, legislatures have acknowledged the importance of providing statutory protection to exempted religious organizations against likely retaliatory action. New ENDA language could provide that religious organizations are not to be subject to retaliation by governmental entities, such as the loss of licenses, permits, grants, tax-exempt status, etc., on the grounds that the religious organization is entitled to the religious exemption or because it has utilized the exemption and engaged in otherwise prohibited employment decisions.[50]

The goal of such changes would not be to expand the religious freedom protections afforded by the religious exemption in ENDA but rather to ensure that those protections are made effective in governmental practice and court decisions. The authors of, and advocates for, ENDA have often stated that it is their intention to suppress employment discrimination against persons who regard themselves as homosexuals or transgendered, but that it is not their intention to suppress

the freedom of religious organizations to follow their religious convictions about these matters in their employment decisions. For that balance of anti-discrimination action with protection for religious freedom to be implemented in practice, the formal words of the religious exemption need to be supplemented by provisions restricting governmental action that undermines the exemption.

Endnotes

1 ENDA does not amend Title VII itself. Indeed, as discussed below, the exemption for religious organizations contained in the current versions of ENDA specifically reference the Title VII exemption for religious organizations and provide that an organization entitled to that exemption would be exempt from ENDA's sexual orientation and gender identity discrimination prohibitions. Conversely, if ENDA amended Title VII by adding sexual orientation and gender identity as statuses protected by Title VII, then religious organizations would be subject to these new nondiscrimination requirements, for the religious exemption in Title VII only exempts religious organizations from the requirement not to engage in religious employment discrimination, while not removing the obligation not to engage in employment discrimination with respect to the other protected statuses.

2 *See, e.g.*, S. 1705, § 9 (introduced Oct. 2, 2003); H.R. 3285, § 9 (introduced Oct. 8, 2003); H.R. 2692, § 9 (introduced July 31, 2001); S. 869, § 9 (introduced June 10, 1997); H.R. 4636 § 6(a) (introduced June 23, 1994). A recitation of the history of ENDA-like legislation may be found at http://thomas.loc.gov/cgi-bin/cpquery/?&dbname=cp110&sid=cp110RHAit&refer=&r_n=hr406p1.110&item=&sel=TOC_3501&.

3 According to the White House web site, "President Obama also continues to support the Employment Non-Discrimination Act and believes that our anti-discrimination employment laws should be expanded to include sexual orientation and gender identity." White House, *Issues – Civil Rights*, http://www.whitehouse.gov/issues/civil_rights/.

4 This brief article discusses only the religious exemption incorporated into recent versions of ENDA, and nothing herein should be construed as an endorsement of ENDA by the authors or the organizations with which they are associated. There are other, equally serious, concerns that ENDA presents from the standpoint of religious freedom, public policy, and practical implementation that are beyond the scope of this article, but should also be carefully considered. Among the broader religious freedom concerns are the following: ENDA does not accept the distinction made by many religions between homosexual orientation and homosexual conduct; organizations with this view do not desire to exclude from employment persons with a homosexual inclination but do insist on maintaining a sexual conduct policy that would ban sexual activity by employees outside the context of a man and woman married to each other. Adoption of ENDA may undermine the Defense of Marriage Act (DOMA) (even though the current versions of ENDA and the version adopted by the House in 2007 reference DOMA) and thus lead to the spread of "same-sex marriage," against the conviction of many religions that such unions do not constitute marriage and should not receive such recognition. While ENDA's religious exemption is an effort to protect religious organizations, it does not protect employment decisions by persons with religious or conscientious objections to homosexuality who lead organizations not regarded as "religious organizations." Such organizations may be secular entities that nevertheless desire to maintain a certain ethos to be attractive to religious customers or they may be religious businesses (e.g., a Christian bookstore), which, because they are commercial, are generally treated by the courts as not entitled to the Title VII religious exemption. For such concerns, see, e.g., Letter from the US Conference of Catholic Bishops to Members of Congress concerning ENDA, (May 19, 2010), *available at* http://www.americamagazine.org/blog/entry.cfm?blog_id=2&entry_id=2923; Thomas Messner, Heritage Foundation, ENDA and the Path to Same-Sex Marriage (Sept. 18, 2009), *available at* http://www.heritage.org/Research/Reports/2009/09/ENDA-and-the-Path-to-Same-Sex-Marriage.

5 See the excellent overview, Gregory S. Baylor & Timothy J. Tracey, *Nondiscrimination Rules and Religious Associational Freedom*, Engage, June 2007, 138, *available at* http://www.fed-soc.org/doclib/20080428_ReLibBaylor.pdf.

6 Boy Scouts of America v. Dale, 530 U.S. 640, 647-48 (2000) (upholding the right of Boy Scouts to dismiss a scoutmaster who promoted a homosexual agenda, notwithstanding antidiscrimination law). Many conservative religious organizations believe that all acts of sexual conduct outside traditional marriage are sinful, including heterosexual fornication and adultery as well as homosexual conduct. Arguably, this type of policy is not a form of "sexual orientation" discrimination. *Compare* Christian Legal Soc'y v. Walker, 453 F.3d 853, 860 (7th Cir. 2006) (Christian Legal Society "requires its members and officers to adhere to and conduct themselves in accordance with a belief system regarding standards of sexual conduct, but its membership requirements do not exclude members on the basis of sexual orientation.") *with* Christian Legal Soc'y Chapter of Univ. of Cal. v. Kane, No. C 04-04484 JSW, 2006 WL 997217, at *7 n.2 (N.D. Cal. April 17, 2006) ("Although CLS argues that it does not discriminate on the basis of sexual orientation, but merely excludes students who engage in or advocate homosexual conduct, this is a distinction without a difference.") (citing Lawrence v. Texas, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring)), *aff'd on other grounds*, 2009 WL 693391 (9th Cir. March 17, 2009), *cert. granted and aff'd sub nom.* Christian Legal Soc'y Chapter of Univ. of Cal. v. Martinez, 561 U.S. ___ (2010), slip op., at 2 (Op. of Stevens, J., concurring) ("A person's religion often simultaneously constitutes or informs a status, an identity, a set of beliefs and practices, and much else besides. (So does sexual orientation, for that matter, notwithstanding the dissent's view that a rule excluding those who engage in 'unrepentant homosexual conduct' does not discriminate on the basis of status or identity.")) (citations to op. omitted).

7 Thus, for example, Rabbi David Saperstein, Director of the Religious Action Center of Reform Judaism, has testified in support of ENDA but pointed to the importance of an exemption for religious organizations:

> [T]he government is and should be free to enact legislation that protects values that differ from some of [the beliefs of religious communities]. When that occurs, however, the government also should strive to protect the freedom of religious communities with differing beliefs to practice their faith as they see fit. That is why Section 6 of ENDA, the exemption for religious organizations, is an essential part of this legislation.

Hearing on H.R. 3017, Employment Non-Discrimination Act of 2009 Before the H. Comm. on Education & Labor, 111th Cong. (2009) (statement of Rabbi David Saperstein, Director, Religious Action Center of Reform Judaism), *available at* http://edlabor.house.gov/documents/111/pdf/testimony/20090923DavidSapersteinTestimony.pdf.

8 On the validity of religious exemptions, see Carl H. Esbeck, Statutory Religious Exemptions and the Establishment Clause, 110 W. Va. L. Rev. 359 (2007); on such exemptions in the context of employment law, see Carl H. Esbeck, Stanley W. Carlson-Thies & Ronald J. Sider, Ctr. for Pub. Justice, The Freedom of Faith-Based Organizations to Staff on a Religious Basis 39-42 (2004).

9 *See generally supra* note 2.

10 H.R. 2015 provided, in section 6:

> (a) In General—This Act shall not apply to any of the employment practices of a religious corporation, association, educational institution, or society which has as its primary purpose religious ritual or worship or the teaching or spreading of religious doctrine or belief.
>
> (b) Certain Employees—For any religious corporation, association, educational institution, or society that is not wholly exempt under subsection (a), this Act shall not apply with respect to the employment of individuals whose primary duties consist of teaching or spreading religious doctrine or belief, religious governance, supervision of a religious order, supervision of persons teaching or spreading religious doctrine or belief, or supervision or participation in religious ritual or worship.
>
> (c) Conformity to Religious Tenets—Under this Act, a religious corporation, association, educational institution, or society may require that applicants for, and employees in, similar positions conform to those religious tenets that such corporation, association, institution, or society declares significant. Under this Act, such a declaration by a religious

corporation, association, educational institution or society stating which of its religious tenets are significant shall not be subject to judicial or administrative review. Any such declaration made for purposes of this Act shall be admissible only for proceedings under this act.

11 *See generally, The Employment Non-Discrimination Act of 2007: Hearing on H.R. 2015 Before the Subcomm. on Health, Employment, Labor and Pensions, H. Comm. on Education and Labor*, 110th Cong. (2007) (comments of Alliance Defense Fund, Concerned Women for America, Center for Law and Religious Freedom of the Christian Legal Society, American Center for Law & Justice, General Conference of Seventh-Day Adventists, Union of Orthodox Jewish Congregations, National Conference of Catholic Bishops, American Association of Christian Schools, Traditional Values Coalition, the Ethics and Religious Liberty Commission of the Southern Baptist Convention, Family Research Council, and others), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname= 110_house_hearings&docid=f:37637.pdf.

12 H.R. 3685, 110th Cong. (as reported in House, Sept. 27, 2007), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h3685rh.txt.pdf.

13 *Id.* Sec. 3(8).

14 House Report 110-406 – Part 1 – Employment Non-Discrimination Act of 2007, Section-By-Section Analysis, http://www.thomas.gov/cgi-bin/cpquery/?&dbname=cp110&sid=cp110jUvSC&refer=&r_n=hr406p1.110&item=&sel=TOC_104577& (last visited July 6, 2010).

15 House Report 110-406 – Part 1 – Employment Non-Discrimination Act of 2007, Minority Views, http://www.thomas.gov/cgi-bin/cpquery/?&dbname=cp110&sid=cp110jUvSC&refer=&r_n=hr406p1.110&item=&sel=TOC_129849& (last visited July 6, 2010).

16 House Report 110-406 – Part 1 – Employment Non-Discrimination Act of 2007, Committee Action Including Legislative History and Votes, http://www.thomas.gov/cgi-bin/cpquery/?&dbname=cp110&sid=cp110X5NC4&refer=&r_n=hr406p1.110&item=&sel=TOC_3501& (last visited July 6, 2010).

17 *Id.*

18 *Id.*; Ref. Altman v. Minn. Dept. of Corr., 251 F.3d 1199 (7th Cir. 2001) (holding that conduct of correctional employees in silently reading their Bibles during a mandatory "diversity training" session regarding homosexual activity in the workplace involved First Amendment protected speech on a matter of public interest and concern).

19 *Id.*

20 See the discussion of Wheaton College in the floor debate on H.R. 3685, 153 Cong. Rec. 172, H13243 (2007).

21 H.R. 3685, 110th Cong. § 6 (as passed by House, Nov. 7, 2007), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h3685eh.txt.pdf.

22 *See* Amendments to H.R.3685, http://www.thomas.gov/cgi-bin/bdquery/L?d110:./temp/~bdaueoW:1[1-3]%28Amendments_For_H.R.3685%29&./temp/~bddKua (last visited July 6, 2010).

23 *Id.*

24 *Id.*

25 H.R.3685, Major Actions, http://www.thomas.gov/cgi-bin/bdquery/z?d110:HR03685:@@@R (last visited July 6, 2010).

26 *See generally* H.R. 3017, 111th Cong. (2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h3017ih.txt.pdf; H.R. 2981, 111th Cong. (2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h2981ih.txt.pdf ; S. 1584, 111th Cong. (2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s1584is.txt.pdf.

27 In all three bills, the religious exemption is contained in Section 6, and the provision excluding coverage based on marital status is contained in Section 8(b)(c).

28 *See, e.g.,* EEOC v. Presbyterian Ministries, Inc, 788 F. Supp. 1154 (W.D. Wash. 1992) (denominational retirement home held exempt); Saeemodarae v. Mercy Health Services, 456 F. Supp. 2d 1021 (N.D. Iowa 2006) (Catholic hospital exempt); McClure v. Salvation Army, 323 F. Supp. 1100 (N.D. Ga. 1971), *aff'd*, 460 F.2d 553 (5th Cir. 1972), *cert. denied*, 409 U.S. 896, *reh. denied*, 409 U.S. 1050 (Salvation Army held to be a religious corporation); Spencer v. World Vision, Inc. 570 F. Supp. 2d 1279 (W.D. Wash. 2008) (World Vision held exempt), *on appeal*, No. 08-35532 (9th Cir.); Gosche v. Calvert High School, 997 F. Supp. 867 (N.D. Ohio 1998), *aff'd*, 181 F.3d 101 (1999) (holding that a religious school could dismiss a music teacher for an adulterous relationship because a religious school could make adherence to the moral standards of the church a requirement of continued employment); LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217 (3rd Cir. 2007), *cert. denied*, 128 S. Ct. 2053 (2008) (Jewish community center exempt); Curay-Cramer v. Ursuline Academy, 344 F. Supp. 2d 923 (D. Del. 2004), *aff'd but criticized*, 450 F.3d 130 (3d Cir. 2006).

29 *Compare* Stately v. Indian Cmty. Sch. of Milwaukee, Inc., 351 F. Supp. 2d 858 (E.D. Wis. 2004) (A school based on traditional Indian spiritual and cultural principles raised doubt whether the district court had jurisdiction over a terminated teacher's Title VII claim where the school presented evidence that, although the school supported various religions, Native American religions were non-exclusive.), *with* Fike v. United Methodist Children's Home of Va., Inc., 547 F. Supp. 286 (E.D. Va. 1982), *aff'd on other grounds*, 709 F.2d 284 (4th Cir. 1983) (A Methodist children's home was a secular organization and not exempt; the direction given the day-to-day life for the children at the home was practically devoid of religious content.), Equal Employment Opportunity Comm'n v. Miss. Coll., 626 F.2d 477 (5th Cir. 1980), *cert. denied*, 453 U.S. 912 (1981) (Only the relationship between a church and its minister is exempt; the relationship between a religious educational institution and its faculty is not exempt.), *and* Vigars v. Valley Christian Ctr. of Dublin, 805 F. Supp. 802 (N.D. Cal. 1992) (A librarian's allegation that she was fired from a parochial school because of her out-of-wedlock pregnancy, if proven, would establish a Title VII violation; the fact that the school's dislike of pregnancy outside of marriage stemmed from religious belief did not automatically exempt the termination decision from Title VII scrutiny.).

30 *See Hearing on* "H.R. 3017, Employment Non-Discrimination Act of 2009," *Before the H. Comm. on Education and Labor*, 111th Cong. (2009) (statement of Craig L. Parshall, senior vice-president and general counsel, National Religious Broadcasters) (stressing this uncertainty), *available at* http://edlabor.house.gov/documents/111/pdf/testimony/20090923CraigParshallTestimony.pdf.

31 EEOC v. Kamehameha Schs./Bishop Estate, 990 F.2d 458, 464 (9th Cir. 1993) (amended on denial of rehearing), *cert. denied* 510 U.S. 963 (1993), contains a recitation of the legislative history of Sec. 2000e-2(e)(2).

32 *Compare* Myers v. Chestnut Hill Coll., No. 95-6244, 1996 WL 67612 (E.D. Pa., February 13, 1996) (citing Little v. Wuerl, 929 F.2d 944 (3d Cir. 1991)) (Defendant is a "private Catholic college for women . . . which is operated by the Catholic Order of the Sisters of St. Joseph," and thus, as a Catholic college operated by a particular religion or religious organization, association, or society, it clearly fell within the first part of the exemption.), *with* Siegel v. Truett-McConnell Coll., Inc., 13 F. Supp. 2d 1335 (N.D. Ga. 1994), *aff'd*, 73 F.3d 1108 (1995) ("In determining whether a college or school qualifies for the 2000e-2 exemption, all religious and secular characteristics must be weighed and considered. . . . Only those institutions with extremely close ties to organized religion will be covered."), Hall v. Baptist Mem'l Health Care Corp., 27 F. Supp. 2d 1029 (W.D. Tenn. 1998), *aff'd,* 215 F.3d 618 (2000) (A college of nursing and health science was a "religious educational institution," where it was founded by sectarian organizations, its avowed mission was to provide quality baccalaureate and continuing education in a Christian atmosphere, it hosted various religious functions, it had many ties to Baptist churches, and the purposes and programs of the college were permeated with a conviction to adhere to Christian principles, though the curriculum was primarily secular in nature.), *and* Killinger v. Samford Univ., 917 F. Supp. 773 (N.D. Ala. 1996), *aff'd*, 113 F.3d 196 (1997) (A university with a long history of Baptist connection was exempt despite a professor's contention that he was lured to the faculty by a promise that the university wanted to foster diversity and liberality in theological thought, and that the university committed itself to diversity by accepting a bequest conditioned upon university recruiting and maintaining faculty with diverse points of view in Protestant tradition.).

33 EEOC v. Kamehameha Schs./Bishop Estate, 990 F.2d at 466.

34 The statutory Title VII religious exemption is distinct from the "ministerial exception" that courts have created in response to the First Amendment's religious freedom protections.

35 Corp. of Presiding Bishop v. Amos, 483 U.S. 327, 336 (1987).

36 Title VII as originally enacted had the more limited exemption for ecclesiastical positions or duties, exempting only positions concerned with "religious activities." When Congress considered the Title again in 1972, the exemption was made institution-wide so that the government would not be required to interfere with the internal religious affairs of religious organizations. In the words of Sen. Sam Ervin (D-NC), "[T]his amendment is to take the political hands of Caesar off the institutions of God, where they have no place to be." 118 Cong. Rec. 4503 (Feb. 17, 1972) (*quoted and discussed in* Esbeck, Carlson-Thies & Sider, *supra* note 8, 26-28).

37 The following discussion leaves to the side the important matter of whether the current ENDA exemption does and should exempt for-profit religious organizations such as religious bookstores and retirement homes. The courts have been reluctant to consider for-profit entities as falling within the scope of the "religious organizations" entitled to the Title VII religious exemption, which means that religious businesses are not likely to be exempt from ENDA under the current language. *See* Julie Marie Baworowsky, Note, *From Public Square to Market Square: Theoretical Foundations of First and Fourteenth Amendment Protection of Corporate Religious Speech*, 83 Notre Dame L. Rev. 1713 (2008). The discussion also leaves aside the wisdom of adding to ENDA a bona fide occupational qualification provision ("BFOQ"). Title VII does have a BFOQ to accommodate instances when race or sex can be a bona fide occupational qualification, although the BFOQ is rarely used or upheld by the courts. *See, e.g.,* Int'l Union v. Johnson Controls, 499 U.S. 187, 201 (1991) (holding that an employer implementing a policy that excluded women who were pregnant or capable of bearing children from being placed in jobs involving lead exposure could not establish a bona fide occupational qualification) Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 122 (1985) (holding that a BFOQ defense was not available to the defendant airline under the ADEA when the airline denied only pilots aged sixty years or more the right automatically to train as flight engineers). Arguably there are instances when a homosexual orientation may be a BFOQ and, conversely, in which heterosexual convictions and conduct should be a BFOQ in a secular organization—such as a requirement that a marriage counselor who would serve orthodox Jewish or Muslim families, in order to gain their trust in sensitive marriage issues, should not be a person who engages in or promotes homosexual conduct.

38 *See* Bob Jones Univ. v. United States, 461 U.S. 574 (1983).

39 Similarly, in *Bob Jones*, the Supreme Court held that the IRS' interpretation of the tax code to deny two religious schools tax-exempt status because their religion-based admissions policies were racially discriminatory did not violate the schools' free exercise rights due to the government's compelling interest in "eradicating racial discrimination in education." *Id.* at 604.

40 494 U.S. 872 (1990); *cf.* Carl H. Esbeck, *When Accommodations for Religion Violate the Establishment Clause: Regularizing the Supreme Court's Analysis*, 110 W. Va. L. Rev. 359, 384-386 (2007) (arguing that *Smith* and its progeny should be applied narrowly so that they do not effectively "immunize from constitutional challenge intentional discrimination on account of religion").

41 42 U.S.C. § 2000bb. The Supreme Court struck down the application of the Religious Freedom Restoration Act ("RFRA") to the states in *City of Boerne v. Flores*, 521 U.S. 507 (1997) because it was beyond the scope of Congress' power to enforce Section 5 of the 14th Amendment and thus intruded upon the states' power to regulate the health and welfare of their citizens. However, the Court's decision only encompassed the application of the statute to the states, *id.*; therefore, it continues to apply to the actions of the federal government. Recently, for instance, the Department of Justice issued an opinion concluding that RFRA required a federal agency to exempt World Vision, a religious organization that had received a grant to perform charitable services for "at-risk youth," from the requirement attached to the grant that recipients not discriminate on the basis of religion with respect to its hiring practices. Application of the Religious Freedom Restoration Act to the Award of a Grant Pursuant to the Juvenile Justice and Delinquency Prevention Act, 31 Op. Off. Legal Counsel 1 (2007), *available at* http://www.justice.gov/olc/2007/worldvision.pdf.

42 Using language like that in RFRA, the statement might read that one of the purposes is "to strike a sensible balance between employment nondiscrimination requirements and religious freedom."

43 Possible language would be: "Nothing in this Act shall be construed to establish a compelling government interest relevant to a claim under the First Amendment of the U.S. Constitution or under 42 U.S.C. §2000bb *et. seq.* (the Religious Freedom Restoration Act of 1993)."

44 *See* Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) (holding that a New Jersey law requiring the Boy Scouts to admit openly homosexual members unconstitutionally restricted the Boy Scouts' right of expressive association). In response to this decision, state and municipal governments have retaliated against the Boy Scouts, refusing the organization access to public facilities, *see* Boy Scouts of Am. v. Till, 136 F. Supp. 2d 1295, 1297 (S.D. Fla. 2001) (describing a school board's termination of its agreement with the Boy Scouts allowing it after-hours use of its facilities), and revoking other privileges, *see* Evans v. City of Berkeley, 127 Cal. Rptr. 2d 696, 698 (Cal. Ct. App. 2002) (discussing Berkeley's revocation of the Boy Scouts' rent-free use of a public marina).

45 20 U.S.C. § 7905.

46 Discussed in Robin Fretwell Wilson, *Matters of Conscience: Lessons for Same-Sex Marriage from the Healthcare Context*, *in* Same-Sex Marriage and Religious Liberty: Emerging Conflicts 77, 85 (2008).

47 *Id*. at 86.

48 N.H. Rev. Stat. Ann. § 457:37 (2010).

49 Civil Marriage Act, 2005 S.C., ch. 33 (Can.).

50 A new clause could be added to the present Religious Exemption section, such as: "A religious employer's exemption from this Act shall not result in any action by any federal, state, or local government agency, which receives federal funds, to penalize or withhold licenses, permits, grants, tax-exempt status, or any other benefits from that employer, or prohibit the employer's participation in programs sponsored by that federal, state, or local government agency."