Testimony of Helen Norton
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on the Employment Non-Discrimination Act of 2009 (S.1584)

before the United States Senate
Committee on Health, Education, Labor, and Pensions

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Thank you for the opportunity to join you today. My testimony here draws from my work as a law professor teaching and writing about employment discrimination issues, as well as my experience as a Deputy Assistant Attorney General for Civil Rights in the Department of Justice during the Clinton Administration, where my duties included supervising the Civil Rights Division's Title VII enforcement efforts.

Current federal law prohibits job discrimination on the basis of race, color, sex, national origin, religion, age, and disability.[1] While these statutes provide many valuable safeguards for American workers, federal law currently fails to protect gay, lesbian, bisexual, and transgender ("GLBT") employees from discrimination on the basis of sexual orientation and gender identity. Indeed, the case law is replete with cases in which federal judges have characterized egregious acts of discrimination targeted at GLBT workers as morally reprehensible -- yet entirely beyond the law's reach. Consider just a few examples:

Sidney Taylor alleged that his co-workers repeatedly subjected him to a wide range of abusive behaviors that included groping his genitals, simulating sexual acts, assaulting him, and otherwise touching him inappropriately.[2] Another co-worker further testified that Mr. Taylor was verbally harassed on a weekly basis and subjected to a work environment that was "abusive" and "intolerable,"[3] and the employer's own internal investigations confirmed Mr. Taylor's reports.[4] Although the federal district court found "the actions of Taylor's co-workers to be deplorable and unacceptable in today's workforce," it ruled against him last year on the grounds that current law does not

[1] 42 U.S.C. §§ 2000e-2000e-17 (Title VII of the Civil Rights Act of 1964); 29 U.S.C. §§ 621-634 (Age Discrimination in Employment Act); 42 U.S.C. §§ 12101-12102, 12111-12117, 12201-12213 (Americans with Disabilities Act). The Genetic Information Nondiscrimination Act, which becomes effective on November 21, 2009, prohibits job discrimination on the basis of genetic information. Pub. L. No. 110-233, 122 Stat. 881.

[2] Taylor v. H.B. Fuller Co., 2008 WL 4647690 *1-3 (S.D. Ohio 2008). The many acts of abuse alleged by Mr. Taylor also included being "shown inappropriate or pornographic images by his co-workers" and witnessing co-workers "repeatedly watching the male-on-male rape scene from *Deliverance*," being approached by a co-worker "holding a diaper filled with what appeared to be blood [who] asked Taylor if it was his or it if belonged to 'some chick,'" and having a bloody tampon placed on his desk. *Id.* at 2.

[3] *Id.* at *2.

[4] *Id.* at *1-2.

prohibit harassment was based on perceived homosexuality: "Unfortunately, 'Congress has not yet seen fit . . . to provide protection against such harassment.'"[5]

David Martin, a gay male employed by the New York State Department of Corrections, reported that co-workers subjected him for years to a constant stream of offensive and degrading sexual comments, lewd conduct, the posting of profane graffiti and pictures, and other forms of harassment.[6] The federal district court dismissed his claims because "the torment endured by Martin, as reprehensible as it is, relates to his sexual orientation" and is thus unremedied by current law.[7]

Michael Vickers, a private police officer employed by a Kentucky medical center, alleged that his co-workers subjected him to harassment on a daily basis for nearly a year after learning that he had befriended a gay colleague.[8] According to Mr. Vickers, they repeatedly directed sexual slurs and other derogatory remarks at him, placed irritants and chemicals in his food and personal property, and engaged in physical misconduct that included a co-worker who handcuffed Mr. Vickers and then simulated sex with him – all because of Mr. Vickers' perceived sexual orientation.[9] The Sixth Circuit Court of Appeals dismissed his claim in 2006, concluding: "While the harassment alleged by Vickers reflects conduct that is socially unacceptable and repugnant to workplace standards of proper treatment and civility, Vickers' claim does not fit within the prohibitions of the law."[10]

Postal worker Dwayne Simonton reported that co-workers targeted him for ongoing abuse because of his sexual orientation by directing obscene and derogatory sexual slurs at him and by placing pornographic and other sexually explicit materials in his worksite.[11] The alleged harassment was so severe that Mr. Simonton ultimately suffered a heart attack.[12] The Second Circuit Court of Appeals stated: "There can be no doubt that the conduct allegedly engaged in by Simonton's co-workers is morally reprehensible whenever and in whatever context it occurs, particularly in the modern workplace."[13] The court went on, however, to reject his claim, concluding that "[t]he law is well-settled in this circuit and in all others to have reached the question that Simonton has no cause of action under Title VII because Title VII does not prohibit harassment or discrimination because of sexual orientation."[14]

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[5] *Id. at* *6-7 (quoting Bibby v. Philadelphia Coca-Cola Bottling Co., 260 F.3d 257, 265 (3rd Cir. 2001)).
[6] Martin v. N.Y. Dep't of Correctional Servs., 224 F. Supp. 2d 434, 441 (N.D.N.Y. 2002).
[7] *Id.* at 447. For an extensive discussion of widespread, persistent, and irrational discrimination by state government employers based on sexual orientation and gender identity, *see* THE WILLIAMS INSTITUTE, DOCUMENTING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN STATE EMPLOYMENT (2009).
[8] Vickers v. Fairfield Medical Center, 453 F.3d 757, 759 (6th Cir. 2006), *cert. denied*, 127 S.Ct. 2910 (2007).
[9] *Id.* at 759-60.
[10] *Id. at* 764-65.
[11] Simonton v. Runyon, 232 F.3d 33, 34-35 (2nd Cir. 2000).
[12] *Id.* at 34.
[13] *Id.* at 35.
[14] *Id.*

Robert Higgins brought a Title VII challenge to a workplace environment that the First Circuit Court of Appeals characterized as "wretchedly hostile."[15] Mr. Higgins alleged that his co-workers targeted him for both verbal and physical harassment because of his sexual orientation: he reported not only that they directed threats, sexual epithets, and other obscene remarks at him, but also that they poured hot cement on him and assaulted him by grabbing him from behind and shaking him violently.[16] The court nonetheless affirmed summary judgment against Mr. Higgins:

> We hold no brief for harassment because of sexual orientation; it is a noxious practice, deserving of censure and opprobrium. But we are called upon here to construe a statute as glossed by the Supreme Court, not to make a moral judgment – and we regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation.[17]

To be sure, some courts have interpreted Title VII's prohibitions on sex discrimination to bar certain misconduct targeted at GLBT workers, such as employment decisions that punish workers who are perceived as failing to conform to certain gender stereotypes.[18] But even those federal courts that have acknowledged the availability of these theories have noted Title VII's substantial limits in addressing discrimination experienced by GLBT Americans in the workforce.[19]

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[15] Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 258 (1st Cir. 1999).
[16] *Id.* at 257.
[17] *Id.* at 259. For a sampling of additional cases in this vein, *see* King v. Super Service, Inc., 68 Fed. Appx. 659, 664 (6th Cir. 2003) (observing that "[t]he individuals who harassed King were cruel and vile, and their conduct would not be tolerated by any respectable employer," but concluding that the reported physical and verbal harassment was based on actual or perceived sexual orientation and thus not actionable under Title VII); Bibby v. Philadelphia Coca-Cola Bottling Co., 260 F.3d 257, 265 (3rd Cir. 2001) ("Harassment on the basis of sexual orientation has no place in our society. Congress has not yet seen fit, however, to provide protection against such harassment.") (citations omitted); Silva v. Sliffard, 215 F.3d 1312 (1st Cir. 2000) ("Although we do not condone harassment on the basis of perceived sexual orientation, it is not, without more, actionable under Title VII."); Ulane v. Eastern Airlines, Inc., 742 F.2d 1081, 1084 (7th Cir. 1984); *cert. denied*, 471 U.S. 1017 (1985) ("While we do not condone discrimination in any form, we are constrained to hold that Title VII does not protect transsexuals."); *see also* Medina v. Income Support Div., New Mexico, 413 F.3d 1131, 1135 (10th Cir. 2005) ("We construe Ms. Medina's argument as alleging that she was discriminated against because she is a heterosexual. Title VII's protections, however, do not extend to harassment due to a person's sexuality.").
[18] *E.g.*, Smith v. City of Salem, Ohio, 378 F.3d 566, 572 (6th Cir. 2004) (holding that transgender employee sufficiently alleged Title VII cause of action for sex discrimination with his claim that he suffered adverse employment actions based on "his failure to conform to sex stereotypes concerning how a man should look and behave"); Schroer v. Billington, 577 F. Supp. 2d 293 (D.D.C. 2008) (concluding that Library of Congress's withdrawal of job offer to plaintiff once it learned of her transgender status constituted sex stereotyping and sex discrimination in violation of Title VII).
[19] *See, e.g.*, Dawson v. Bumble & Bumble, 398 F.3d 211, 218 (2nd Cir. 2005) (rejecting lesbian plaintiff's claim of Title VII discrimination: "Like other courts, we have therefore recognized that a gender stereotyping claim should not be used to 'bootstrap protection for sexual orientation into Title VII.'") (quoting Simonton v. Runyon, 232 F.3d 33, 38 (2nd Cir. 2000); Schroer v. Billington, 525 F. Supp. 2d 58, 63 (D.D.C. 2007) (stating that a Title VII sex stereotyping claim "could not be supported by facts showing that [an adverse employment action] resulted *solely* from [the plaintiff's] disclosure of her gender dysphoria").

To fill these significant gaps, some states have enacted important antidiscrimination protections for GLBT workers: indeed, 12 states and the District of Columbia have enacted statutes that bar job discrimination on the basis of sexual orientation as well as gender identity,[20] while another nine states prohibit job discrimination on the basis of sexual orientation alone.[21] But employers in the majority of states remain free to fire, refuse to hire, harass, or otherwise discriminate against individuals because of their sexual orientation and/or gender identity. (Moreover, even in the most egregious cases, state tort remedies such as assault and battery are of little, if any, practical value to victims: not only do courts generally decline to find employers vicariously liable for such torts as beyond the scope of employment, the individual assailants themselves are often judgment-proof. Indeed, none of the decisions discussed above included any disposition of a tort claim in the plaintiff's favor.)

As a result, current law – both federal and state -- leaves unremedied a wide range of injuries and injustices suffered by GLBT workers. S. 1584 would fill these gaps by clearly articulating, for the first time, a national commitment to equal employment opportunity regardless of sexual orientation and gender identity. More specifically, it forbids such discrimination in decisions about hiring, firing, compensation, and other terms and conditions of employment.[22] S. 1584 also incorporates the remedies and enforcement mechanisms available under Title VII.[23]

S. 1584 thus accomplishes antidiscrimination law's twin purposes of compensating victims of discrimination for their injuries and deterring future acts of bias. It does so while accommodating concerns that it would interfere with religious institutions' ability to make employment decisions consistent with their religious beliefs. More specifically, S. 1584 completely exempts from its coverage those religious institutions already exempt from Title VII's prohibition on discrimination based on religion.[24]

At the time of its debate in 1964, Title VII faced similar objections from those who feared that its ban on religious discrimination would intrude upon religious institutions' ability to hire members of their own faith. Congress addressed this issue by protecting the ability of "a religious corporation, association, educational institution, or society" to make employment decisions on the basis of religion.[25] Over the last forty-five years, courts have interpreted this provision to exempt not only houses of worship,

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[20] Along with the District of Columbia, those states are: California, Colorado, Illinois, Iowa, Maine, Minnesota, New Jersey, New Mexico, Oregon, Rhode Island, Vermont, and Washington.
[21] Those states are Connecticut, Delaware, Hawaii, Maryland, Massachusetts, Nevada, New Hampshire, New York, and Wisconsin.
[22] S. 1584 at § 4.
[23] *Id.* at § 10.
[24] *Id.* at § 6 ("This Act shall not apply to a corporation, association, educational institution or institution of learning, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Act of 1964 pursuant to section 702(a) or 703(e)(2) of such Act (42 U.S.C. 2000e-1(a); 2000e-2(e)(2)).").
[25] 42 U.S.C. §2000e-1(a).

parochial schools, and religious missions, but also other organizations found to be primarily religious in purpose and character.[26]

As originally enacted in 1964, this provision exempted only employment decisions concerning jobs related to such organizations' "religious" activities.[27] In 1972, however, Congress broadened the exemption to its current scope by exempting such organizations from Title VII's ban on religious discrimination with respect to employment decisions about jobs related to *any* of their activities, non-religious as well as religious.[28] Also exempt from Title VII's prohibition on religious discrimination are schools, colleges, universities, or other educational institutions or institutions of learning that are "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

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[26] *See, e.g.*, Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987) (applying exemption to nonprofit gymnasium operated by the LDS Church); Leboon v. Lancaster Jewish Community Center Ass'n, 503 F.3d 217, 226 (3rd Cir. 2007), *cert. denied* 128 S.Ct. 2053 (2008) (holding that a Jewish Community Center was exempt from Title VII's religious discrimination provisions because its purpose and character were primarily religious); Hall v. Baptist Memorial Health Care Corp., 215 F.3d 618 (6th Cir. 2000) (applying exemption to college of health sciences directly related to the Baptist church); Killinger v. Samford University, 113 F.3d 196 (11th Cir. 1997) (applying exemption to university because of its close relationship with the state Baptist Convention); Little v. Wuerl, 929 F.2d 944 (3rd Cir. 1991) (applying exemption to Catholic parish school); Spencer v. World Vision, Inc., 570 F. Supp. 2d 1279 (W.D. Wash. 2008) (holding a nonprofit Christian humanitarian aid organization to be an exempt religious institution); Saeemodarae v. Mercy Health Services, 456 F. Supp. 2d 1021 (N.D. Iowa 2006) (applying exemption to hospital affiliated with Catholic church); Lown v. Salvation Army, 393 F. Supp. 2d 223 (S.D.N.Y. 2005) (applying exemption to Salvation Army); Wirth v. College of the Ozarks, 26 F. Supp. 2d 1185 (W.D. Mo. 1998) (applying exemption to college affiliated with Presbyterian church); Feldstein v. Christian Science Monitor, 555 F. Supp. 974 (D. Mass. 1983) (applying exemption to Christian Science Monitor). On the other hand, courts have held that the exemption does not apply to organizations that are primarily secular in purpose and character. *See, e.g.*, EEOC v. Townley Engineering & Mfg. Co., 859 F.2d 610, 618 (9th Cir. 1988), *cert. denied*, 489 U.S. 1077 (1989) (holding that a for-profit manufacturer of mining equipment owned by religious individuals who operated the company pursuant to their religious principles was not an exempt religious institution because its nature was primarily secular).

[27] Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, Section 702, 78 Stat. 241, 255.

[28] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, Section 702, 86 Stat. 103, 104 (now codified at 42 U.S.C. §2000e-1(a)). Such religious institutions are not, however, generally exempt from Title VII's prohibitions on discrimination on the basis of race, color, sex, or national origin. *See id.* In recognition of the significant constitutional and other interests at stake, however, courts have long interpreted the First Amendment to preclude the application of Title VII and other employment laws to religious institutions' decisions about their spiritual leaders. *See, e.g.*, Alicea-Hernandez v. Catholic Bishop of Chicago, 320 F.3d 698 (7th Cir. 2003) (declining to consider plaintiff's Title VII race and national origin claims by holding that Title VII does not apply to religious institutions' employment decisions about ministers and other spiritual leaders); EEOC v. Catholic University of America, 83 F.3d 455 (D.C. Cir. 1996) (rejecting plaintiff's claim of sex discrimination by holding that the ministerial exception exempts decisions involving teachers of religious canon law from Title VII); Scharon v. St. Luke's Episcopal Presbyterian Hospital, 929 F.2d 360 (8th Cir. 1991) (precluding chaplain's discrimination claims under the ministerial exception); Rayburn v. General Conference of Seventh-Day Adventists, 772 F.2d 1164 (4th Cir. 1985) (holding that ministerial exception exempts employment decisions about pastoral advisors from Title VII scrutiny); McClure v. Salvation Army, 460 F.2d 553 (5th Cir.), *cert. denied*, 409 U.S. 896 (1972) (rejecting minister's claim of sex discrimination by holding that Title VII does not apply to religious institutions' employment decisions regarding ministers and similar spiritual leaders).

curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion."[29]

S. 1584 incorporates the longstanding statutory definitions of religious institutions exempt from Title VII's ban on religious discrimination and specifically exempts those same institutions from its prohibition on sexual orientation and gender identity discrimination: "This Act shall not apply to a corporation, association, educational institution or institution of learning, or society that is exempt from the religious discrimination provisions of title VII of the Civil Rights Act of 1964 pursuant to section 702(a) or 703(e)(2) of such Act (42 U.S.C. 2000e-1(a); 2000e-2(e)(2))."[30]

S. 1584 addresses other concerns as well. For example, it provides no disparate impact cause of action,[31] and it prohibits employers from granting preferential treatment to an individual because of the individual's actual or perceived sexual orientation or gender identity.[32] It does not prohibit an employer from enforcing rules or policies that do not intentionally circumvent the Act's purposes,[33] nor does it require the collection of statistics on actual or perceived sexual orientation or gender identity.[34] S.1584 does not apply to the armed services.[35] Finally, it does not require an employer to treat an unmarried couple in the same manner as a married couple for employee benefits purposes,[36] with the definition of the term "married" drawn from that in the Defense of Marriage Act.[37]

In sum, S. 1584 proposes to fill significant gaps in existing law by clearly articulating, for the first time, a national commitment to equal employment opportunity regardless of sexual orientation and gender identity while addressing concerns raised by religious institutions and other employers. Again, thank you for the opportunity to testify here today, and I look forward to your questions.

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[29] 42 U.S.C. § 2000e-2(e)(2). This provision was added in 1964 through an amendment offered by Representative Purcell, who expressed concern that some church-affiliated educational institutions would not be exempt under 42 U.S.C. §2000e-1(a): "Almost without exception, the term 'religious corporation' would not include church-affiliated schools unless this definition should receive the most liberal possible interpretation by the courts. Actually most church-related schools are chartered under the general corporation statutes as nonprofit institutions for the purpose of education." 110 CONG. REC. 2585-2593 (1964). Nevertheless, there remains a significant amount of overlap between these two exemptions. *See, e.g.*, Hall v. Baptist Memorial Health Care Corp., 215 F.3d 618 (6th Cir. 2000) (concluding that college of health sciences was exempt from Title VII's prohibition on religious discrimination under both 42 U.S.C. §2000e-1(a) and 42 U.S.C. § 2000e-2(e)(2) because of its direct relationship to the Baptist church); Killinger v. Samford University, 113 F.3d 196 (11th Cir. 1997) (concluding that Samford University satisfied both of Title VII's religious exemptions because of its close relationship with the state Baptist Convention); Little v. Wuerl, 929 F.2d 944 (3rd Cir. 1991) (concluding that Catholic parish school satisfied both exemptions).

[30] S. 1584 at § 6.

[31] S. 1584 at § 4(g).

[32] *Id.* at § 4(f)(1).

[33] *Id.* at § 8(a)(1).

[34] *Id.* at § 9.

[35] *Id.* at § 7.

[36] *Id.* at § 8(b).

[37] *Id.* at § 8(c).