

Testimony on ENDA and the Religious Exemption

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Thank you for inviting me to be here this morning. My name is Rabbi David Saperstein and I represent the national Reform Jewish Movement, the largest segment of American Jewry. I am also an attorney who teaches Jewish law and Church-State law at the Georgetown University Law Center and have addressed free exercise, establishment clause and civil rights legal issues in a number of books and articles.<sup>1</sup>

On behalf of the 900 congregations of the Union for Reform Judaism (with 1.5 million members across North America), and the Central Conference of American Rabbis, with a membership of 1,800 rabbis, I appreciate the opportunity to express our strong support for the Employment Non-Discrimination Act.

Our belief in ENDA's importance stems from a core teaching shared by an array of faith traditions, Jewish and non-Jewish alike. In the words of Genesis, (1:27), "And God created humans in God's own image, in the image of God, God created them; male and female God created them." We oppose discrimination against all individuals, including

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<sup>1</sup> See e.g. HLR pp 1389-1394

gay, lesbian, bisexual, and transgender men and women, for the stamp of the divine is imprinted on the souls of each and every one of us.

We Jews have historical sensitivities raised by the effort to ban job discrimination for we have been among the quintessential victims of group hatred, persecution, and discrimination in western civilization. We know all too well the impact of discrimination and second class citizenship, of what it is like to be denied opportunities for jobs or other benefits because of who we are. Even after the Enlightenment began and the promise of equality existed without laws to enforce it, we often were forced to hide our identity, keeping our Judaism in our private lives while remaining ambiguous about who we were in our public lives if we wished to find employment or advancement in the educational, social, political, or business arenas of our societies. So we feel a keen empathy for those who can still be victimized because of who they are, deprived of opportunities, jobs, or advancement because of their identity.

Of course, support for ENDA rooted in biblical text alone is insufficient justification for public policy that applies to Americans of all faiths and no faith. We also believe this legislation to be a wise and measured civil rights bill that addresses the scourge of employment discrimination and upholds the values on which our nation was founded, equality and justice chief among them. Indeed, the struggle for equality is a defining narrative of our nation. From the abolition movement, to the suffrage movement to the civil rights movement to the gay rights movement, women and minorities in this nation

have worked tirelessly to achieve equal rights as guaranteed them in the founding visions of the United States. It is this vision too that compels us to support ENDA.

It is clear that within our nation's diversity of faith traditions, there are, however, differing views about homosexuality. Every faith is entitled to its own interpretation of its holy texts, and every individual is entitled to believe in a way of his or her own choosing. At the same time, the government is and should be free to enact legislation that protects values that differ from some of these beliefs. 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. A bill that did not permit houses of worship, seminaries, religious schools and other religious organizations to be guided by the tenets and teachings that embody the essence of their faith would break with our country's long-standing tradition of religious freedom and provoke widespread opposition. This legislation is not an endorsement of any particular religious viewpoint and it does not interfere with religious beliefs about gay, lesbian, bisexual and transgender people. ENDA simply ensures that workers are judged and rewarded based on their qualifications and performance, rather than on irrelevant and prejudicial factors. At the same time, it protects the right of religious communities to make their own employment decisions in this sensitive area.

Advantages of Using the Title VII Religious Exemption

This legislation creates a religious exemption that mirrors that found in Title VII of the 1964 Civil Rights Act. This approach holds three key advantages.

### 1. Consistency and Reliability

Since 1964 there has been a religious exemption in Title VII. Since 1972, it has contained the current language of the exemption. ENDA uses Title VII's definition of a religious organization, so that if an organization is exempt from Title VII's religious discrimination prohibitions, it will be exempt from ENDA's prohibitions. Claims by some that this exemption goes beyond Title VII are simply erroneous. Since ENDA creates no new tests for determining which religious institutions are exempt from its provisions and instead adopts the longstanding exemption of Title VII, it will greatly reduce confusion among employers, employees, policy makers, and judges.

### 2. Broad Based Support in Religious Communities

The decision to use the Title VII religious exemption in ENDA is also supported by a wide range of religious groups. The U.S. Conference of Catholic Bishops, the General Conference of Seventh Day Adventists, and the Union of Orthodox Jewish Congregations issued a joint statement supporting the exemption the last time this exemption was voted on in 2007, although they did not take a position on ENDA itself. Yet in their endorsement of Section 6, they wrote that they "believe this language provides an indispensable protection of the free exercise rights of religious organizations and strongly

support its inclusion in ENDA.”<sup>2</sup> Similarly, a wide range of national denominations and faith groups support ENDA itself - including this exemption. The endorsement of so many of our nation’s major religious bodies across religious and ideological lines, all in agreement that ENDA’s religious exemption properly protects religious institutions, should weigh heavily with this committee. Amendments, including “carve outs” or other forms of broadening the exemption, could likely break apart the broad-based consensus and should be rejected. Further, it might well lead to conflicting interpretations of the Title VII exemption itself.

### 3. Broad-Based Political Support

This carefully crafted compromise enjoys widespread support from the civil rights community, the legal community and from Congress. This exact language has been considered by this body before. In 2007, 402 members of this House – Republican and Democrat alike – voted for the religious exemption language that Chairman Miller proposed in an amendment to ENDA on the floor of the House. The current version of ENDA, H.R. 3017, contains the religious exemption that passed on the floor two years ago with the support of Minority Leader Boehner and other leadership of the Republican Party including Reps. Cantor, Blunt, Pence and the Ranking Member on this Committee, John Kline, among members of the leadership on both sides of the aisle.

### Claims of Hostile Work Environment

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<sup>2</sup> Joint letter to Hon. George Miller (chairman), Howard “Buck” McKeon (ranking member), House Committee on Education and Labor, U.S. House of Representatives, October 18, 2007

There are still some who argue that including the Title VII exemption in ENDA would not go far enough. Most commonly, the reason given is that reasonable expressions of faith in the workplace will result in an onslaught of lawsuits by gay and lesbian employees who will claim that since the Bible condemns sexual relations between men, other employees who display Bibles or religious verses in their own work area will create a “hostile workplace.”

The argument is deeply troubling on several grounds. First, as a rabbi, I can affirm that faith is not the express domain of straight Americans. There exists in the faith community many gay and lesbian people of devout belief, who attend church or synagogue or mosque each week, and who rely on their faith for purpose and meaning in their lives. To suggest that such individuals will be offended by seeing a Bible on a co-worker’s desk, for example, is absurd.

Second, as an attorney, I note that the Supreme Court has made clear that the threshold of what constitutes a hostile workplace is high – it requires the plaintiff to prove that the workplace was “permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim’s employment and create an abusive working environment”.<sup>3</sup> Again, because this exemption’s language mirrors that in existing law, discreet actions such as carrying a Bible to work or wearing a cross or another religious symbol in the workplace clearly would not meet the Court’s established standard. In the nearly quarter century of state ENDAs, I know of not a

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<sup>3</sup> Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993)

single case in which a hostile work environment claim was upheld for the display of a Bible or religious symbol—and certainly none that were upheld on appeal.

We are long past the point when our laws should permit discrimination against any individual because of their sexual orientation. Just as we do not tolerate behavior that discriminates based on race, gender, national origin or religion, so should we be clear about discrimination based on the characteristic of being gay or lesbian. For many of America's faith traditions, this is a religious value. It is a moral value. And for all of us, it is of great social and economic value, as evidenced by the nearly 90% of Fortune 500 companies that already have policies consistent with ENDA. They have concluded that we cannot send the message that gays, lesbians, bisexuals, and transgender individuals are second-class citizens, undeserving of legal protections, benefits and equal rights. It is time for our laws to reflect these values and allow members of the gay, lesbian, bisexual, and transgender community to live their professional lives without fear of discrimination or the pressure to hide their true identity. Thank you.