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ORAL STATEMENT

Chairman Miller and Ranking Member Kline, thank you for inviting me to testify.

The proposed Employment Non-Discrimination Act of 2009 (ENDA) would bar sexual orientation and gender identity discrimination in the workplace by federal, state, and private employers. To cover state employees and provide them with damage remedies, ENDA abrogates the states' Eleventh Amendment immunity, pursuant to Congress's authority to enforce the Fourteenth Amendment. The Supreme Court has said that Congress has Fourteenth Amendment authority to create a remedy for state violations of constitutional rights *and* to establish prophylactic rules to head off harder-to-discern constitutional violations.

State and local governments have a long history of discrimination against lesbian, gay, bisexual, and transgendered (LGBT) employees. Such employees have been excluded and harassed because of their sexual orientation or gender identity throughout the twentieth century, which raises equal protection concerns that Congress can remedy. Additionally, state discrimination has repeatedly trampled on the privacy, due process, and free speech rights of sexual and gender minorities.

My written statement provides a detailed history of sexual orientation and gender identity discrimination in government workplaces. In the first period, ending in 1945, lesbians, gay men, bisexuals, and transgendered persons were unwelcome in the workplace because officials believed that they were disgusting people who committed immoral and illegal activities, untrustworthy and treacherous predators, and disruptions of public order. These public views drove most LGBT employees into the closet.

The second period, from 1945 to 1969, saw municipal, state, and federal governments conduct systematic campaigns to open the closet door, to expose LGBT workers, and to purge them from government service. My statement provides a detailed account of the purges in the federal civil service and in the civil service and public schools of California and Florida. LGBT employees were dismissed because of their presumed sexual orientation or gender identity. For example, Thomas Sarac lost his state teaching certificate, and his livelihood, based upon an alleged 1962 admission that we had "homosexual tendencies." Even though Sarac denied making such an admission, the state authorities took that as per se evidence of immorality and predatory proclivities.

These campaigns of exposure and exclusion imposed huge costs on both employees and the state. One of the most successful penologists of the century was Miriam van Waters, the longtime Superintendent of the Massachusetts Reformatory for Women—yet she was dismissed from her position in 1949 because of suspicions that she allowed lesbians to work for the reformatory's rehabilitation programs. The controversy roiled the state and crippled previously successful rehabilitation programs.

Commencing in 1969, the third period saw gay and transgendered Americans come out of their closets and persuade increasing numbers of Americans that their private conduct did not merit public censure and persecution, that LGBT people are trustworthy workers and not predatory, and that their presence is not disruptive. A majority of states have now taken the position, by statute or executive order, that state employees should not be subject to discrimination because of their sexual orientation, and an increasing number of states are reaching the same conclusion with regard to discrimination because of gender identity. There remains a significant amount of government discrimination against sexual and gender minorities, in part because many Americans believe that such persons engage in disgusting and immoral activities, are predatory against vulnerable persons, and are disruptive of public order. Such beliefs were official state policy for most of the twentieth century and do not recede quickly.

For example, Colorado voters in 1992 overrode state and municipal directives prohibiting discrimination because of sexual orientation in state and municipal workplaces. The arguments in favor of the constitutional initiative included the following: so-called "homosexuals" are promiscuous ("[t]heir lifestyle is sex-addicted and tragic") and consumed by venereal disease (according to the official Amendment 2 ballot materials, the average gay man dies at 42 years old, the lesbian at age 45); they are predatory, seeking to invade decent people's houses and schools, take away their jobs, recruit their children, and "destroy the family"; and Coloradans should undo "special rights" given by some communities to "homosexuals and lesbians" that disrupt traditional family values and good institutions such as churches. The sponsors of the initiative believed that these were "moderate" arguments—but in fact they are open appeals to anti-gay prejudice and invoke deeply erroneous stereotypes of LGBT people as diseased, predatory, and disruptive.

Even when they are not so explicitly set forth as they were recently in the Colorado campaign, these anti-gay tropes—immorality, predation, and disruption—still motivate state officials to discriminate against sexual and gender minorities. I shall close my testimony with my own case.

I was denied tenure at the University of Virginia School of Law in 1985 based in part on my sexual orientation. Although I was one of the law school's top teachers, had engaged in first-rate institutional service (including very successful two years as chair of the clerkship committee), and had written several articles, congressional testimony, and two co-authored books, my petition for tenure was rejected, based upon the recommendation of the appointments committee. There is good reason to believe that the committee's recommendation was tainted.

For one thing, the committee chair never provided me a copy of the procedures that apply to tenure cases, including the requirement that I be appraised of a likely negative recommendation so that I could appear before the committee to answer questions. Instead, the chair appeared in my office the morning after the committee's primary meeting and subjected me to a tantrum. With clenched fists and a beet-red face, the chair of the committee threw a tantrum that included a string of accusations, such as "stabbing me in the back" and behaving in the treacherous manner that he and his colleagues ought to have expected of a "faggot." Apparently, the chair thought I had complained to the dean that he had been derelict in following the established law school procedures and that I was sneaking behind his back to discredit him. In fact, I remained utterly clueless as to what those procedures were and was reduced to tears as the chair of the committee spat on me and called me dirty names. During this tirade, the chair of the committee never shared with me his committee's reasons, their recommendation, or the news that I had a right to appear before the committee. Nor did he share this information with me thereafter.

These procedural infractions might have made a difference in my case, because the committee's report to the faculty was filled with misstatements and fabrications about the arguments I made in the articles and books under review. Denying me a right to respond to fabricated arguments, the official violated both explicit law school rules *and* constitutional due process requirements. It is also possible that animus surrounding my tenure case was related to my leadership in the movement to have the law school divest itself of investments in South Africa during the apartheid era, core First Amendment activities.

Affording a federal cause of action, ENDA would offer LGBT public employees more options for discovering the underlying reasons for job discrimination against them. ENDA would also provide incentives for the states to educate supervisors about the facts regarding sexual and gender minorities, as well as the costs of homophobia.

Thank you.