



THE EMPLOYMENT NON-DISCRIMINATION ACT (ENDA): A THREAT TO FREE MARKETS AND FREEDOM OF CONSCIENCE AND RELIGION

The Employment Non-Discrimination Act (ENDA) was re-introduced in the 113th Congress in April 2013 as H.R. 1755 and S. 815. ENDA would prohibit employers from making employment decisions on the basis of actual or perceived sexual orientation or gender identity. It is misleadingly labeled as a logical extension of Title VII of the Civil Rights Act. While the Civil Rights Act was enacted primarily to protect the rights of racial minorities, ENDA is aimed at providing special protections for “sexual orientation” (which includes voluntary homosexual conduct) and “gender identity” (referring not to one’s biological sex, but to “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”).

The “gender identity” provision would protect anyone who is “transgendered,” a broad umbrella term that includes transsexuals (people who have had sex-change surgery), anyone who has changed or is changing their public “gender identity” (regardless of whether they have had surgery or hormone treatments), transvestites (people who dress as the opposite sex on an occasional basis for emotional or sexual gratification), and drag queens and drag kings (people who dress as the opposite sex for the purpose of entertaining others).

ENDA should be opposed by anyone who believes in freedom of speech, freedom of association, freedom of conscience and religion, and a free market economy. Here are some reasons why:

- **ENDA would increase federal government interference in the free market.** It would substitute the judgment of the federal government for that of the employer regarding what qualities or characteristics are most relevant to a particular job.
- **“Sexual orientation” and “gender identity” are unlike most other characteristics protected in civil rights laws.** The Civil Rights Act of 1964 bars discrimination based on “race, color, national origin, sex, and religion.” The first four of these are included largely because they are inborn, involuntary and immutable. (Religion, while voluntary, is explicitly protected by the First Amendment to the U.S. Constitution.) While sexual *attractions* may be involuntary, neither sexual conduct nor transgender behavior meets any of these criteria. Ten federal circuit courts and the U.S. Supreme Court have declined to subject classifications based on “sexual orientation” to the “strict scrutiny” that applies to race.¹

- **ENDA would lead to costly lawsuits against employers.** It would invite disgruntled employees to sue for “discrimination” over a characteristic (in the case of sexual orientation) which is not even visible and of which the employer may have been unaware. In the case of public employers (which are explicitly covered by ENDA), such laws at the local and state level have led to large settlements being paid at taxpayers’ expense.²
- **ENDA would increase sexualization of the workplace.** There is an inherent contradiction in the arguments of the advocates of ENDA, who contend that what they do in private has nothing to do with their work, but then also argue for the right to be “out of the closet” while at work.
- **ENDA’s “gender identity” provisions would undermine the ability of employers to impose reasonable dress and grooming standards.** The bill professes to protect such standards. However, it requires that such standards be consistent with the employee’s chosen and variable “gender identity.” This effectively forbids employers from using the most fundamental standard of all – that people be dressed and groomed in a way that is culturally appropriate for their biological sex.
- **ENDA’s “gender identity” provisions would violate the privacy of others.** Because transgender status is not dependent on having “sex-change surgery,” ENDA would allow some biological males (who claim to be female) to appear nude before females (and vice versa) in bathrooms, locker rooms, and showers. (Previous versions of ENDA included an exemption for “shared shower and dressing facilities in which being seen unclothed is unavoidable.” This exemption has been *removed* from the current version of the bill.)
- **ENDA would mandate the employment of homosexual, bisexual, and “transgendered” individuals in inappropriate occupations.** ENDA disregards the fact that sexual conduct may in fact be relevant to employment. For example, under ENDA, employers in the area of education and childcare would be denied the right to refuse to hire homosexuals or transgendered individuals, even if they consider such persons to be inappropriate role models for children and young people.
- **ENDA would force some employers to violate their moral and religious convictions.** This includes those which provide products, services, or catering for weddings, or groups and businesses providing dating services, which would be forced under penalty of law to hire homosexuals, even though homosexual behavior and same-sex “marriage” are expressly contrary to their religious convictions.
- **ENDA’s “religious exemption” is inadequate to protect people of faith.** ENDA contains an exemption for certain “religious organizations,” such as houses of worship or religious schools. However, the exemption fails to protect individual Christians, Jews, Muslims and others who have objections to certain sexual behaviors from making employment decisions consistent with their faith. In fact, it is questionable whether any profit-making corporations would qualify for the exemption, meaning that Christian

bookstores, religious publishing houses, and religious television and radio stations could all be forced to compromise their principles in mandated hiring practices.

- **ENDA prepares the way for reverse discrimination.** The more open homosexuals become the more people who hold traditional values will be forced to conceal their views. This can happen even if the employee's views are expressed outside of work,³ and when no reference is made to sexual orientation.⁴
- **ENDA would “legislate morality” – the “morality” of the sexual revolution.** Often, social conservatives are accused of trying to “legislate morality.” Yet ENDA itself is fraught with moral significance. From time immemorial human societies have used legal and cultural means to encourage the traditional family because of its unique and far reaching benefits to society.⁵ ENDA, on the other hand, would be an official government declaration that homosexual behavior is the equivalent of heterosexual behavior in every way, and that those who believe otherwise are simply bigoted. A majority of Americans reject this view.⁶
- **ENDA would pave the way for further redefinition of marriage.** State courts which have redefined “marriage” to include homosexual couples in Massachusetts, California, Iowa, and Connecticut cited the existence of “non-discrimination” laws like ENDA at the state level as establishing a principle regarding the legal irrelevance of “sexual orientation,” which they have then applied to the institution of marriage.⁷ Passage of ENDA at the national level could give fuel for a similar decision by the U.S. Supreme Court, forcing the redefinition of marriage in every state in the union, at some time in the future.

¹ Paul McHugh and Gerard V. Bradley, “Sexual Orientation, Gender Identity, and Employment Law,” *Public Discourse* (July 25, 2013) ; online at: <http://www.thepublicdiscourse.com/2013/07/10636/>.

² For examples from Portland, Oregon; Bay City, Michigan; Pacific Grove, California; Santa Barbara, California; and the State of New York, see: Tony Perkins, *Testimony in opposition to H.R. 3017, “Employment Non-Discrimination Act”* (September 29, 2009); online at: <http://www.frc.org/testimony/testimony-in-opposition-to-hr-3017-employment-non-discrimination-act>.

³ This happened to Allstate’s Matt Barber, who was fired: Ron Strom, “Allstate Terminates Manager over Homosexuality Column,” *WorldNetDaily* (June 24, 2005); <http://www.wnd.com/2005/06/30993/>.

⁴ This happened to the City of Oakland’s Good News Employee Association, which was forbidden to speak about “family values:” “US Court Rules it’s OK to Censor the Terms ‘Natural Family,’ ‘Marriage’ and ‘Family Values,’” *LifeSiteNews* (March 8, 2007); online at <http://www.lifesitenews.com/news/archive/ldn/2007/mar/07030805>.

⁵ Patrick Fagan, Henry Potrykus and Anna Shafer, “Family Intactness: Influence on Major State Policy Outcomes,” *Marriage and Religion Research Institute* (July 2012); <http://marri.us/get.cfm?i=OR12G01>.

⁶ A poll taken in September 2012 showed that 52% of Americans believe that “sex between two adults of the same gender” is “morally wrong,” and only 42% say it is “morally acceptable.” See *American Values Survey 2012*, Public Religion Research Institute (September 13-30, 2012); online at <http://publicreligion.org/site/wp-content/uploads/2012/10/AVS-2012-Topline-FINAL.pdf>.

⁷ Iowa Code §216.6 “Unfair Employment Practices” is cited by the Iowa Supreme Court in *Varnum v. Brien* (763 N.W. 2d 862) to justify redefining marriage; online at [http://www.iowacourts.gov/wfData/files/Varnum/07-1499\(1\).pdf](http://www.iowacourts.gov/wfData/files/Varnum/07-1499(1).pdf).