

BACKGROUND

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ENDA Threatens Fundamental Civil Liberties

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Abstract

All citizens should oppose unjust discrimination, but the Employment Non-Discrimination Act of 2013 is not the way to achieve that goal. ENDA threatens fundamental First Amendment rights. It creates new, subjective protected classes that will expose employers to unimaginable liability. Furthermore, ENDA would increase government interference in labor markets in ways that could harm the economy. Yet ENDA's damage is not only economic: It would further weaken the marriage culture and the freedom of citizens and their associations to affirm their religious or moral convictions, such as that marriage is the union of one man and one woman and that maleness and femaleness are not arbitrary constructs but objective ways of being human. ENDA would treat expressing these beliefs in an employment context as actionable discrimination.

America is dedicated to protecting First Amendment freedoms while respecting citizens' equality before the law. None of these freedoms is absolute: Strong governmental interests can at times trump fundamental civil liberties. But the Employment Non-Discrimination Act of 2013 (ENDA) does not satisfy any such interest; rather, it tramples First Amendment rights and unnecessarily impinges on citizens' right to run their businesses the way they choose. The proposed legislation does not protect equality before the law; instead it would create special privileges that are enforceable against private actors.

KEY POINTS

- The Employment Non-Discrimination Act of 2013 (ENDA) creates new, subjective protected classes that will expose employers to unimaginable liability.
- ENDA would further weaken the marriage culture and the freedom of citizens and their associations to affirm their religious or moral convictions.
- ENDA also would limit the ability of private employers to run their own businesses and is an unjust assault on the consciences and liberties of people of goodwill who happen not to share the government's opinions about issues of marriage and sexuality.
- Employers should respect the intrinsic dignity of all of their employees, but ENDA is not the right policy to realize that goal.

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ENDA could also have serious unintended consequences. It would impose liability on employers for alleged “discrimination” based not on objective employee traits, but on subjective and unverifiable identities. ENDA would further increase government interference in labor markets, potentially discouraging job creation. It does not provide adequate protections for religious liberty or freedom of speech. Finally, especially related to issues surrounding “gender identity” and “transgender” employees, this law could require employment policies that, with regard to a number of workplace conditions, undermine common sense.

In short, ENDA seeks to regulate employment decisions that are best handled by private actors without federal government interference. ENDA disregards the consciences and liberties of people of goodwill who happen not to share the government’s opinions about issues of marriage and sexuality.

Of course employers should respect the intrinsic dignity of all of their employees, but ENDA is bad public policy. Its threats to our freedoms unite civil libertarians concerned about free speech and religious liberty, free marketers concerned about freedom of contract and government interference in the marketplace, and social conservatives concerned about marriage and culture:

ENDA 2013: A Primer

ENDA creates special privileges based on sexual orientation and gender identity. Specifically, it would make it illegal for organizations with 15 or more employees to “fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment of the individual, because of such individual’s actual or perceived sexual orientation or gender identity.”¹

ENDA defines “sexual orientation” as “homosexuality, heterosexuality, or bisexuality” but offers no definition of those terms or what principle limits “orientation” to those three. Likewise, ENDA defines “gender identity” as “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.”² In other words, unlike previous versions of the bill, ENDA’s current incarnation now creates special rights for transgendered individuals—males who dress and act as females and females who dress and act as males—and forbids employers from considering the consequences of such behavior at the workplace.

ENDA does not contain a Bona Fide Occupational Qualification (BFOQ) exemption. BFOQs, which some other employment laws contain, allow employers to make employment decisions that could otherwise constitute discrimination so long as those decisions are honestly related to job qualifications. For example, Title VII of the Civil Rights Act contains a BFOQ that allows employers to take sex into account: hiring a female camp counselor at an all-girls sleep-away summer camp, for example, or hiring men or women at jobs that would be particularly dangerous or difficult for members of one or another sex. ENDA has no provision that would protect those jobs where one’s sexual orientation or gender identity is a bona fide occupational qualification that is reasonably connected to the mission of the business and the responsibilities of the job.

Fundamental Civil Liberties

Part of the genius of the American system of government is its commitment to protecting the liberty of all citizens. For example, the government protects the freedom of citizens to seek the truth about God and worship according to their conscience and to live out their convictions in public life every day of the week. As Michelle Obama put it, religious faith “isn’t just about showing up on Sunday for a good sermon and good music and a good meal. It’s about what we do Monday through Saturday as well.”³ Likewise, citizens are free to form contracts and other associations according to their own values, subject only to those restraints that are necessary and compliant with the Constitution.

1. The Employment Nondiscrimination Act, S. 815, Section 4(a)(1).

2. The Employment Nondiscrimination Act, S. Rep. No. 113-105, 113th Cong., 1st Sess., September 12, 2013, p. 23, <http://beta.congress.gov/congressional-report/113th-congress/senate-report/105/1> (accessed October 30, 2013).

3. First Lady Michelle Obama, “Remarks by the First Lady at the African Methodist Episcopal Church Conference,” Nashville, Tennessee, June 28, 2012, <http://www.whitehouse.gov/the-press-office/2012/06/28/remarks-first-lady-african-methodist-episcopal-church-conference> (accessed October 30, 2013).

While the government must respect equality before the law, private actors should be free to make reasonable judgments and distinctions—including reasonable moral judgments and distinctions—in their economic activities. Citizens should be free to live their professional lives according to their moral and religious beliefs.

Competing interests in employment can be secured through bargaining with various employers who hold a variety of moral or religious beliefs. With respect to sexual orientation and gender identity, many companies have their own policies prohibiting consideration of such factors in employment. For example, the Human Rights Campaign reports that 88 percent of *Fortune* 500 companies voluntarily do not consider sexual orientation in employment decisions.⁴ Other employers, though, should be free to make different policies about employment and contracts, especially when it conflicts with their moral and religious beliefs.

As Hans Bader, a legal scholar at the Competitive Enterprise Institute, points out, “Since American business seldom discriminates based on sexual orientation, the potential benefits of ENDA are limited, at best. But ENDA would impose real and substantial costs on business, and it could trigger conflicts with free speech and religious freedom.”⁵

Those who make decisions based on moral and religious views may well pay a price in the market, perhaps losing customers and qualified employees; however, such choices should remain lawful. Bader reports that the Center for American Progress admitted that market forces are at work: “Businesses that discriminate based on a host of job-irrelevant characteristics, including sexual orientation ... put themselves at a competitive disadvantage compared to businesses that evaluate individuals based solely on their qualifications and capacity to contribute.”⁶ The decision as to what qualifies as “job-relevant” should generally be left to employers and the market.

Sexual Orientation and Gender Identity Unlike Other Classes

Some argue that the market is not able to protect the interests of employees sufficiently and that the government must therefore intervene, as it did with issues of race and sex, but the argument that prohibiting so-called discrimination on the basis of sexual orientation and gender identity is akin to prohibiting actual discrimination on the basis of sex or race is misguided. Sexual orientation and gender identity differ in several important respects from race or sex.

For example, before the Civil War, a dehumanizing regime of race-based chattel slavery existed in many states. After abolition, the law enforced race-based segregation, and even after the Supreme Court struck down Jim Crow laws, integration did not come easily or willingly. What made race susceptible to systematic and lasting oppression was, in part, its obviousness and immutability; in most cases, one can readily identify race from appearance, and these characteristics do not change over time.

America has no similar history of society-wide legal prohibitions on employment based on sexual orientation or gender identity. While racial integration might not have been forthcoming, in the case of sexual orientation, voluntary actions and market forces have emerged that undermine the clamor for federal action. As noted, 88 percent of *Fortune* 500 companies prohibit employment decisions based on sexual orientation.

What is more, while race is usually readily apparent, the groups seeking special status in ENDA are not defined by objective characteristics. Sexual orientation and gender identity are commonly understood to be subjective, self-disclosed, and self-defined. And unlike race, sexual orientation and gender identity are usually understood to include behaviors. An employer’s decisions reasonably taking into account the behavior of employees are core personnel decisions best left to businesses themselves, not to the federal government.

4. Human Rights Campaign, “LGBT Equality at the Fortune 500,” <http://www.hrc.org/resources/entry/lgbt-equality-at-the-fortune-500> (accessed October 30, 2013).

5. Hans Bader, “Employment Non-Discrimination Act Makes as Little Sense as Chemotherapy for a Cold,” Competitive Enterprise Institute, OpenMarket.org, June 13, 2012, <http://www.openmarket.org/2012/06/13/employment-non-discrimination-act-makes-as-little-sense-as-chemotherapy-for-a-cold/> (accessed October 30, 2013).

6. *Ibid.*

Paul McHugh, MD, University Distinguished Service Professor of Psychiatry at the Johns Hopkins University School of Medicine, and Gerard V. Bradley, Professor of Law at the University of Notre Dame, explain:

[S]ocial science research continues to show that sexual orientation, unlike race, color, and ethnicity, is neither a clearly defined concept nor an immutable characteristic of human beings. Basing federal employment law on a vaguely defined concept such as sexual orientation, especially when our courts have a wise precedent of limiting suspect classes to groups that have a clearly-defined shared characteristic, would undoubtedly cause problems for many well-meaning employers.⁷

McHugh and Bradley caution against elevating sexual orientation and gender identity to the status of protected characteristics because of the lack of clear definition:

“Sexual orientation” should not be recognized as a newly protected characteristic of individuals under federal law. And neither should “gender identity” or any cognate concept. In contrast with other characteristics, it is neither discrete nor immutable. There is no scientific consensus on how to define sexual orientation, and the various definitions proposed by experts produce substantially different groups of people.⁸

Indeed, there is no clear scientific evidence that sexual orientation and gender identity are biologically determined. McHugh and Bradley summarize the relevant scholarly scientific research on sexual orientation and gender identity:

Nor is there any convincing evidence that sexual orientation is biologically determined; rather, research tends to show that for some persons and

perhaps for a great many, “sexual orientation” is plastic and fluid; that is, it changes over time. What we do know with certainty about sexual orientation is that it is affective and behavioral—a matter of desire and/or behavior. And “gender identity” is even more fluid and erratic, so much so that in limited cases an individual could claim to “identify” with a different gender on successive days at work. Employers should not be obliged by dint of civil and possibly criminal penalties to adjust their workplaces to suit felt needs such as these.⁹

Because sexual orientation and gender identity are subjective concepts that may change over time, a law invoking them to define a protected class would be especially ripe for abuse. For instance, employees who are dismissed for legitimate reasons might afterward claim that their employer fired them because its perceptions of their sexual orientation or gender identity changed.

Economic Consequences

ENDA would create serious problems for employers seeking to manage their businesses while complying with the law.¹⁰ A fundamental premise of American labor law is the doctrine of “at-will” employment. According to that doctrine, businesses have no legal obligation to keep employing any given worker; employers remain free to replace employees at any time.

In other countries, such as France and Italy, because of the thicket of laws and regulations that companies face, most companies have very limited legal rights to terminate a contract with an employee. Businesses do not want to get stuck employing unproductive or superfluous workers. If they cannot lay off employees, they become much less willing to take the risk of hiring them in the first place.

Studies find that restrictions on layoffs significantly reduce hiring and job creation. The most severe French prohibitions on layoffs apply to businesses with 50 or more employees. One recent

7. Paul McHugh and Gerard V. Bradley, “Sexual Orientation, Gender Identity, and Employment Law,” Witherspoon Institute, *Public Discourse*, July 25, 2013, <http://www.thepublicdiscourse.com/2013/07/10636/> (accessed October 30, 2013).

8. *Ibid.*

9. *Ibid.*

10. This section builds on arguments made in Ryan Messmore and James Sherk, “Freedom of Religious Schools and Employers Threatened by ENDA” Heritage Foundation *WebMemo* No. 1677, October 24, 2007, <http://www.heritage.org/research/reports/2007/10/freedom-of-religious-schools-and-employers-threatened-by-enda>.

study found more than twice as many French manufacturers have 49 employees as have 50 workers.¹¹ French businesses seem to curtail hiring deliberately to avoid being unable to remove poor performers.

Limiting the ability to lay off dissuades employers from hiring. ENDA would chip away at the at-will employment doctrine that has made the American labor market so much stronger than European labor markets.

The subjective nature of sexual orientation and gender identity magnifies these problems by giving employees *carte blanche* to threaten a lawsuit against their employer in response to adverse employment actions. Further, under the Supreme Court's interpretation of Title VII, employers must pay plaintiffs' attorney's fees if they lose an anti-discrimination suit, but they may not recover attorney's fees from unsuccessful plaintiffs unless they can prove that the suit was groundless—a high bar to clear.

The legal cost of successfully defending a case at trial typically runs into hundreds of thousands of dollars. This one-way ratchet strongly discourages companies from laying off employees who could file plausible anti-discrimination suits, and it acts as an incentive for disgruntled or former employees to file suits. Consequently, under ENDA, employers could become more reluctant to hire such “protected class” employees in the first place.

Anti-discrimination laws based on race or sex—as opposed to sexual orientation—create far fewer problems because race and sex are objective and do not change. Because sexual orientation and gender identity—and employees' assertions about them—can change, ENDA is wide open to abuse. Congress should protect the labor market flexibility that has allowed America to create far more jobs than European countries that have more restrictive labor laws.

The Meaning of Sexual Orientation and Gender Identity

Compounding these legal problems is the fact that sexual orientation and gender identity are unclear, ambiguous terms. They can refer to voluntary

behaviors as well as thoughts and inclinations, and it is reasonable for employers to make distinctions based on actions. Consequently, ENDA would prohibit reasonable decisions to base employment on behavior. By contrast, “race” and “sex” clearly refer to traits, and in the overwhelming majority of cases, these traits (unlike voluntary behaviors) do not affect fitness for any job.

Professor John Finnis of the University of Oxford explains why most modern legal systems are right to resist adding sexual orientation (let alone gender identity) to anti-discrimination provisions:

[T]he standard modern position deliberately rejects proposals to include in such lists the item “sexual orientation.” For the phrase “sexual orientation” is radically equivocal. Particularly as used by promoters of “gay rights,” it ambiguously assimilates two things which the standard modern position carefully distinguishes: (I) a psychological or psychosomatic disposition inwardly orienting one towards homosexual activity; (II) the deliberate decision so to orient one's public behavior as to express or manifest one's active interest in and endorsement of homosexual conduct and/or forms of life which presumptively involve such conduct.

Indeed, laws or proposed laws outlawing “discrimination based on sexual orientation” are always interpreted by “gay rights” movements as going far beyond discrimination based merely on (i) A's belief that B is sexually attracted to persons of the same sex. Such movements interpret the phrase as extending full legal protection to (ii) public activities intended specifically to promote, procure, and facilitate homosexual conduct.¹²

Rather than merely protecting against unjust discrimination based on involuntary attractions or desires, ENDA appears to forbid citizens from considering the public conduct of employees. As Professor Finnis concludes:

11. Luis Garicano, Claire LeLarge, and John Van Reenen, “Firm Size Distortions and the Productivity Distribution: Evidence from France,” National Bureau of Economic Research *Working Paper* No. 18841, February 2013, <http://ideas.repec.org/p/nbr/nberwo/18841.html> (accessed October 30, 2013).

12. John Finnis, “Law, Morality, and ‘Sexual Orientation,’” *Human Rights and Common Good: The Collected Essays of John Finnis: Volume III* (New York: Oxford: Oxford University Press, 2011), pp. 335–336.

So, while the standard position accepts that discrimination on the basis of type I dispositions is unjust, it judges that there are compelling reasons both to deny that such injustice would be appropriately remedied by laws against “discrimination based on sexual orientation,” and to hold that such a “remedy” would work significant discrimination and injustice against (and would indeed damage) families, associations, and institutions which have organized themselves to live out and transmit ideals of family life that include a high conception of the worth of truly conjugal sexual intercourse.¹³

Finnis’s argument highlights one of ENDA’s most concerning implications: The law would further weaken the marriage culture and the ability of citizens and their associations to affirm that marriage is the union of a man and a woman and that sexual relations are reserved for marriage so understood.¹⁴ ENDA would treat these convictions as if they were bigotry.¹⁵

Furthermore, ENDA would ban decisions based on moral views common to the Abrahamic faith traditions and to great thinkers from Plato to Kant as unjust discrimination.¹⁶ Whether by religion, reason, or experience, many people of goodwill believe that our bodies are an essential part of who we are. On this view, maleness and femaleness are not arbitrary constructs but objective ways of being human to be valued and affirmed, not rejected or altered. Thus, our sexual embodiment as male and female goes to the heart of what marriage is: a union of sexually complementary spouses. Again, however, ENDA would deem such judgments irrational and unlawful.

Silencing Speech

ENDA could also stifle speech in the workplace. For example, as Hans Bader notes, the Supreme

Court found that Title VII “require[s] employers to prohibit employee speech or conduct that creates a ‘hostile or offensive work environment’ for women, blacks, or religious minorities.”¹⁷ Employers may even be on the hook for damages and attorney’s fees if they were negligent in failing to notice, stop, or discipline employees whose speech or conduct creates such an environment. ENDA would extend these restrictions to “actual and perceived sexual orientation or gender identity.”

Consequently, employees or employers who express disapproving religious or political views of same-sex behavior could potentially create enormous legal liabilities. Businesses would likely respond to such potential liability by self-censoring their speech and preventing employees from expressing views such as support for marriage as a union of one man and one woman: In essence, ENDA really would become a “general civility code” far beyond the scope of Title VII.

Bader, who himself supports same-sex marriage, sees the potential violations of liberty that ENDA threatens for those who hold other views:

If ENDA were enacted, such liability would also cover “sexual orientation”-based hostile work environments.... Thus, to avoid liability, an employer might have to silence employees with political opinions that are perceived as anti-gay, and prevent such employees from expressing political views such as opposition to gay marriage or gays in the military that could contribute to a “hostile work environment.” ... While I have supported gay marriage and the inclusion of gays in the military, I do not think employers should be sued because their employees express contrary views.... [S]ome courts have interpreted

13. Ibid., p. 336.

14. Ryan T. Anderson, “Marriage: What It Is, Why It Matters, and the Consequences of Redefining It,” Heritage Foundation *Backgrounder* No. 2775, March 11, 2013, <http://www.heritage.org/research/reports/2013/03/marriage-what-it-is-why-it-matters-and-the-consequences-of-redefining-it>, and Sherif Girgis, Ryan T. Anderson, and Robert P. George, *What Is Marriage? Man and Woman: A Defense* (New York: Encounter Press, 2012) <http://whatismarriagebook.com/> (accessed October 30, 2013).

15. See, for example, Thomas M. Messner, “Same-Sex Marriage and Threats to Religious Freedom: How Nondiscrimination Laws Factor In,” Heritage Foundation *Backgrounder* No. 2589, July 29, 2011, <http://www.heritage.org/research/reports/2011/07/same-sex-marriage-and-threats-to-religious-freedom-how-nondiscrimination-laws-factor-in>, and Thomas M. Messner, “ENDA and the Path to Same-Sex Marriage,” Heritage Foundation *Backgrounder* No. 2317, September 18, 2009, <http://www.heritage.org/research/reports/2009/09/enda-and-the-path-to-same-sex-marriage>.

16. See Finnis, “Law, Morality, and ‘Sexual Orientation.’”

17. Hans Bader, “ENDA vs. Free Speech,” Competitive Enterprise Institute, OpenMarket.org, November 15, 2007, <http://www.openmarket.org/2007/11/15/enda-vs-free-speech/> (accessed October 30, 2013).

“disparate treatment” to include speech or conduct by the complainant’s co-workers that affects the complainant’s work environment, even when the speech is not aimed at the complainant, and is not motivated by the complainant’s sex or minority status....

The possibility that ENDA will be used to silence speech about gay issues is very real. Indeed, some supporters of ENDA openly hope to use it to squelch viewpoints that offend them.¹⁸

Such lawsuits and employer censorship have already happened in the states that have their own versions of ENDA, such as California and Washington State.¹⁹ For instance, Regina Redford and Robin Christy, two employees of the City of Oakland, California, responded to the formation of an association of gay and lesbian employees by seeking to create an association of their own. They formed the “Good News Employee Association” and sought to promote the association with fliers announcing: “Good News Employee Associations is a forum for people of Faith to express their views on the contemporary issues of the day. With respect for the Natural Family, Marriage and Family values.” These fliers contained no reference to homosexuality. Nonetheless their supervisors ordered them removed, sent an all-staff e-mail announcing that they contained “statements of a homophobic nature and were determined to promote sexual orientation based harassment,” and further announced that anyone posting such materials could face “discipline up to and including termination.”²⁰

State versions of ENDA have also chilled employer speech. Seattle’s human rights commission brought charges against employer Bryan Griggs for playing Christian radio stations (on which he advertised) during work and posting a letter from his Congresswoman expressing reservations about

homosexuals in the military. A self-identified homosexual employee had alleged that this created a hostile work environment. Griggs had to spend thousands of dollars on legal fees before the plaintiff dropped the charges, saying he had made his point.²¹

Religious Liberty

ENDA also raises serious religious liberty concerns, especially for morally traditional religious communities and religious citizens who operate in the marketplace. While ENDA provides some religious liberty protections, they are inadequate and vaguely defined.

For example, the United States Senate Committee on Health, Education, Labor, and Pensions submitted a report on ENDA stating that the legislation “exempts from its coverage those religious institutions that are exempt under title VII’s prohibition on discrimination based on religion. Title VII’s language has been in effect since 1921, and thus the committee believes it is simple for organizations to understand who falls under the exemption.”²²

The committee’s conclusion is misguided: Title VII’s religious liberty exemptions have been subject to repeated litigation with conflicting rulings by different courts. As Steven H. Aden and Stanley W. Carlson-Thies explain:

[T]here 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. 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

18. Bader, “Employment Non-Discrimination Act Makes as Little Sense as Chemotherapy for a Cold.”

19. These states are California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin, as well as the District of Columbia.

20. *Good News Employee Association et al. v. Joyce M. Hicks*, No. 05-15467 (9th Circuit Court of Appeals), <http://ww1.prweb.com/prfiles/2007/06/04/531074/GNEARulingsEvidence.pdf> (accessed October 30, 2013).

21. Walter Olson, *The Excuse Factory: How Employment Law Is Paralyzing America* (New York: Free Press, 1997), p. 250.

22. The Employment Nondiscrimination Act, S. Rep No. 113-105, p. 8.

making employment decisions involving sexual status and conduct.²³

While it is unclear which religious organizations would be exempted from ENDA, it is clear that the bill would not exempt those who wish to run their businesses and other organizations in keeping with their moral or religious values.

Additionally, ENDA's religious liberty protections extend only to businesses directly run by a church or religious organizations. As a result, other religious business owners would be exposed to significant liabilities. Consider, for instance, a Christian bookstore not formally incorporated as a religious organization. Such a store could be accused of creating a hostile work environment by selling and promoting books stating that marriage unites one man with one woman.

Clearly, ENDA would create enormous legal risks for businesses that allowed their employees to express traditional religious teachings on sexuality. Anti-discrimination law ought not to silence religious believers.

In truth, it is hard to square ENDA's basic purpose with any robust protection of citizens' rights to speak freely about their religious or moral convictions about marriage and sexuality. Indeed, Americans are paying the price when their state or local governments have passed sexual orientation and gender identity statutes.²⁴

Unintended Detrimental Consequences

The enforcement of ENDA could also have harmful unintended consequences, especially with regard to the inclusion of gender identity. Prohibiting employers from making decisions about transgendered employees, especially when in positions of role-modeling, could be detrimental to children and to workplace morale.

First, it is important to recognize that issues of sex and gender identity are psychologically, morally, and politically fraught, but all should agree that children

should be protected from having to sort through such questions before an age-appropriate introduction. ENDA would prevent employers from protecting children from these adult debates about sex and gender identity by barring employers from making certain decisions about transgendered employees.

Second, ENDA could provide some exemptions for religious education, but it provides no protection for students in other schools who would be prematurely exposed to questions about sex and gender if a male teacher returned to school identifying as a woman.

Finally, whatever the significance of gender identity, society cannot deny the relevance, in many contexts, of biological sex. For example, an employer would be negligent to ignore the concerns of female employees about having to share bathrooms with a biological male who identifies as female. Failing to do so raises a host of concerns about privacy rights. Indeed, state laws are already creating such concerns. As Bader reports:

ENDA also contains "transgender rights" provisions that ban discrimination based on "gender identity." Similar prohibitions in state laws created legal headaches for some businesses. One case pitted a transgender employee with male DNA who sued after being denied permission to use the ladies' restroom, a denial that resulted from complaints filed by female employees. The employer lost in the Minnesota Court of Appeals, but then prevailed in the Minnesota Supreme Court. Another case involved a male-looking person who sued and obtained a substantial settlement after being ejected from the ladies' room in response to complaints by a female customer who thought that a man had just invaded the ladies' room.²⁵

As for ENDA's invocation of "sexual orientation," it is not clear how this category could be prevented from expanding to cover a host of inclinations and behaviors. McHugh and Bradley explain:

23. Steven H. Aden and Stanley W. Carlson-Thies, "Catch or Release? The Employment Non-Discrimination Act's Exemption for Religious Organizations," *Engage*, Vol. 11, Issue 2 (September 2010), p. 5, http://www.fed-soc.org/doclib/20100910_AdenCarlsonThiesEngage11.2.pdf (accessed October 30, 2013).

24. See, for example, Ryan T. Anderson, "Special Protections Shouldn't Trump Basic Liberties," *Heritage Foundation Commentary*, September 27, 2013, <http://www.heritage.org/research/commentary/2013/9/special-protections-shouldnt-trump-basic-liberties>.

25. Bader, "Employment Non-Discrimination Act Makes as Little Sense as Chemotherapy for a Cold."

Despite the effort of ENDA's legislative drafters to confine "sexual orientation" to homosexuality, heterosexuality, and bisexuality, the logic of self-defined "orientation" is not so easily cabined.... Even polyamory, "a preference for having multiple romantic relationships simultaneously," has been defended as "a type of sexual orientation for purposes of anti-discrimination law" in a 2011 law review article.²⁶

There is no limiting principle for what will be classified as a sexual orientation or gender identity in the future.

Ultimately, McHugh and Bradley conclude that ENDA would "lead to insurmountable enforcement difficulties, arbitrary and even whimsical results in many cases, and it would have an unjustified chilling effect upon all too many employers' decisions."²⁷ Allowing employers to make decisions based on their employees' behavior, including their sexual and gender-identity behavior, is good policy, but ENDA would eliminate it.

Conclusion

All citizens should oppose unjust discrimination, but ENDA is not the way to achieve that goal. ENDA threatens fundamental First Amendment rights. It creates new, subjective protected classes that leave employers guessing about how to comply with the law and opens them to unimaginable liability. ENDA

would also increase government interference in the labor markets in ways that could harm the economy.

Additionally, ENDA would further weaken the marriage culture and the freedom of citizens and their associations to affirm their religious or moral convictions, such as that marriage is the union of one man and one woman and that sexual relations are reserved for marriage so understood. ENDA could ban employment decisions based on the moral and religious beliefs of private employers. Many people of goodwill believe that our bodies are an essential part of who we are, that maleness and femaleness are to be valued and affirmed. ENDA would treat expressing these beliefs in an employment context as actionable discrimination.

ENDA would limit the ability of private employers to run their own businesses and is an unjust assault on the consciences and liberties of people of goodwill who happen not to share the government's opinions about issues of marriage and sexuality. Employers should respect the intrinsic dignity of all of their employees, but ENDA is not the right policy to realize that goal. Whether you care about civil liberties, market economies, traditional values, or all three—as this author does—it is important to see that ENDA is bad public policy.

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26. McHugh and Bradley, "Sexual Orientation, Gender Identity, and Employment Law."

27. *Ibid.*