

RFRA V. ENDA: RELIGIOUS FREEDOM AND EMPLOYMENT  
DISCRIMINATION

Alex Reed

## INTRODUCTION

JUNE 30, 2014 has been depicted as a dark day in the struggle for lesbian, gay, bisexual, and transgender (“LGBT”) equality. On that date, the Supreme Court issued its decision in *Burwell v. Hobby Lobby Stores, Inc.*, opining that for-profit corporations are capable of exercising religion within the meaning of the Religious Freedom Restoration Act of 1993 (“RFRA”)<sup>1</sup> and must, therefore, be granted exemptions from generally applicable laws if compliance with those laws would substantially burden the corporations’ religious freedom.<sup>2</sup> LGBT advocates have expressed concern that otherwise secular, for-profit corporations would invoke this new, more expansive interpretation of RFRA to demand exemptions from federal measures prohibiting LGBT-related discrimination.<sup>3</sup>

The Employment Non-Discrimination Act (“ENDA”)<sup>4</sup> – a bill seeking to ban employment discrimination on the basis of an individual’s sexual orientation or gender identity – appeared particularly vulnerable to a RFRA challenge post-*Hobby Lobby*. ENDA had been introduced in every session of Congress since 1994 and had always included a robust exemption for religious employers, but the scope of the exemption had broadened significantly over time.<sup>5</sup> Indeed, several of the nation’s leading civil rights organizations had openly criticized ENDA in the months preceding *Hobby Lobby* on the grounds that the bill, if enacted, would provide an overly broad religious exemption unprecedented under U.S. law.<sup>6</sup> These groups feared that the sweeping nature of ENDA’s religious exemption may lead courts to infer that LGBT-related discrimination is

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<sup>1</sup> Pub. L. No. 103-141, 107 Stat. 1488 (codified at 42 U.S.C. §§ 2000bb-2000bb-4 (2012)), invalidated in part by *City of Boerne v. Flores*, 521 U.S. 507 (1997).

<sup>2</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

<sup>3</sup> E.g., Lucas Grindley, *Why LGBT Americans are Leery of Supreme Court’s Hobby Lobby Ruling*, THE ADVOCATE (June 30, 2014), <http://www.advocate.com/politics/2014/06/30/why-lgbt-americans-are-leery-supreme-courts-hobby-lobby-ruling>.

<sup>4</sup> S. 815, 113th Cong. (2013); H.R. 1755, 113th Cong. (2013).

<sup>5</sup> Alex Reed, *Abandoning ENDA*, 51 HARV. J. ON LEGIS. 277, 310–11 (2014).

<sup>6</sup> Press Release, American Civil Liberties Union et al., Employment Non-Discrimination Act Statement (Apr. 25, 2013), <http://www.aclu.org/lgbt-rights/employment-non-discrimination-act-statement>; Chris Geidner, *ACLU, LGBT Groups Raise “Grave Concerns” About Job Bill Religious Exemption*, BUZZFEED (Apr. 25, 2013), <http://www.buzzfeed.com/chrisgeidner/aclu-lgbt-groups-raise-grave-concerns-about-job-bill-religio> (noting that the current religious exemption “would be setting up a two-tiered system saying that race, color, sex, and national origin discrimination cannot be engaged in by [religious employers], but sexual orientation and gender identity discrimination can”).

somehow less pernicious than other forms of unlawful discrimination.<sup>7</sup> A majority of the LGBT community, nevertheless, continued to support ENDA as it progressed through the 113th Congress with the expectation that only houses of worship and religious nonprofit organizations stood to be exempt from ENDA's coverage.<sup>8</sup>

That support evaporated on July 1, 2014 when several prominent religious leaders asked President Obama to include an ENDA-style religious exemption in his forthcoming executive order banning LGBT-related employment discrimination by federal contractors.<sup>9</sup> Within a week, every major LGBT advocacy organization in the United States had withdrawn its support for ENDA.<sup>10</sup> These groups explained that:

“[T]he calls for greater permission to discriminate on religious grounds that followed immediately upon the Supreme Court’s [*Hobby Lobby*] decision . . . [have made] clear that the inclusion of [a broad religious exemption in ENDA] is no longer tenable.”<sup>11</sup>

The organizations recognized that by withdrawing their support, they were effectively dooming ENDA's prospects in the current Congress, while at the same time launching a protracted, potentially decades-long debate over the scope of the bill's religious exemption. Despite this, these prominent advocacy organizations indicated that such an outcome was necessary to ensure that in winning the battle over ENDA they did not lose the larger war for LGBT equality.<sup>12</sup>

ENDA is not the LGBT community's only hope of securing federal employment protections, and the bill's demise is actually likely to benefit LGBT Americans in the long run. Federal courts and the U.S. Equal Employment Opportunity Commission (“EEOC”) are increasingly likely to regard LGBT-related employment discrimination as actionable gender discrimination under Title VII.<sup>13</sup> The last decade, in particular, has seen a small, but marked, shift in favor of allowing LGBT persons to state cog-

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<sup>7</sup> Press Release, *supra* note 6.

<sup>8</sup> See Chris Johnson, *Historic: Senate Passes ENDA*, WASH. BLADE (Nov. 7, 2013), <http://www.washingtonblade.com/2013/11/07/senate-passes-trans-inclusive-enda/> (collecting LGBT advocacy organizations' reactions to Senate passage of ENDA).

<sup>9</sup> Rebecca Juro, *After Hobby Lobby, Faith Leaders Want Right to LGBT Discrimination*, THE ADVOCATE (July 3, 2014), <http://www.advocate.com/politics/2014/07/03/after-hobby-lobby-faith-leaders-want-right-lgbt-discrimination>.

<sup>10</sup> Chris Johnson, *Support for ENDA Crumbles*, WASH. BLADE (July 9, 2014), <http://www.washingtonblade.com/2014/07/09/endas-fate-dismal-religious-exemption-splits-lgbt-advocates/>.

<sup>11</sup> See *infra* pp. 15–16 and note 93.

<sup>12</sup> Tierney Sneed, *Why LGBT Groups Turned on ENDA*, U.S. NEWS & WORLD REPORT (July 9, 2014), <http://www.usnews.com/news/articles/2014/07/09/why-lgbt-groups-turned-on-enda>.

<sup>13</sup> Reed, *supra* note 5, at 286–94.

nizable gender discrimination claims.<sup>14</sup> This development provides three distinct advantages vis-à-vis ENDA: Title VII is already the law of the land; Title VII offers more robust substantive protections than would be available under ENDA;<sup>15</sup> and, most importantly, Title VII stands to be impervious to a RFRA challenge.<sup>16</sup>

This article, therefore, rejects the notion that *Hobby Lobby* constitutes a significant setback for the LGBT community and instead contends that by rendering ENDA politically untenable for the foreseeable future, *Hobby Lobby* actually stands to aid LGBT Americans in their decades'-long quest to gain meaningful protections against employment discrimination. Part I provides a brief overview of prior legislative efforts to prohibit LGBT-related discrimination, with a focus on developments in the 113th Congress. Part II discusses the Supreme Court's ruling in *Burwell v. Hobby Lobby Stores, Inc.* and its implications for ENDA. Part III analyzes the *Hobby Lobby* decision's effect on President Obama's executive order prohibiting LGBT-related employment discrimination by federal contractors and reveals that disagreement over whether the order should include an exemption for religious employers ultimately led the LGBT community to abandon ENDA. Part IV demonstrates that ENDA, unlike Title VII, would be susceptible to widespread RFRA challenges post-*Hobby Lobby* such that allowing Title VII to continue on its LGBT-inclusive evolution represents LGBT Americans' best hope of attaining federal employment protections.

## I. THE EMPLOYMENT NON-DISCRIMINATION ACT OF 2013

The Employment Non-Discrimination Act has received a floor vote in either chamber of Congress on only three occasions in the last twenty years. The first instance was in 1996 when the Senate failed to pass ENDA by a single vote.<sup>17</sup> The second instance was in 2007 when the House passed ENDA by a vote of 235 to 184,<sup>18</sup> despite a veto threat.<sup>19</sup>

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<sup>14</sup> *Id.* at 287–89, 292–94. See also Chris Geidner, *The Growing Effort to Protect LGBT People from Discrimination under the Civil Rights Act of 1964*, BUZZFEED (Feb. 18, 2015), <http://www.buzzfeed.com/chrisgeidner/the-growing-effort-to-protect-lgbt-people-from-discriminatio#.nrVN0KjkY> (announcing that the EEOC would begin processing sexual orientation discrimination claims as instances of sex discrimination under Title VII).

<sup>15</sup> Reed, *supra* note 5, at 281 (recognizing that LGBT Americans “would benefit from the availability of disparate impact claims, voluntary affirmative action plans, and limited exemptions for religious organizations, all of which are available under Title VII but stand to be precluded by ENDA”).

<sup>16</sup> See discussion *infra* Part IV(C)(4).

<sup>17</sup> 142 CONG. REC. S10138–39 (1996). See also Alex Reed, *A Pro-Trans Argument for a Transexclusive Employment Non-Discrimination Act*, 50 AM. BUS. L.J. 835, 840–41 (2013) (noting that ENDA's proponents calculated they had 50 votes in support of the bill but one of ENDA's supporters had to miss the vote due to a family medical emergency).

<sup>18</sup> 153 CONG. REC. H13252–53 (2007).

The third instance was on November 7, 2013 when the Senate passed ENDA by a vote of 64 to 32,<sup>20</sup> notwithstanding the fact that the bill almost failed a crucial procedural vote just three days earlier.

Believing he had the sixty votes necessary to overcome a Republican-led filibuster, Senate Majority Leader Harry Reid scheduled a cloture vote on ENDA for November 4, 2013.<sup>21</sup> On the day of the vote, however, the “ayes” in favor of cloture stalled at fifty-eight, requiring Reid to hold open what was originally scheduled to be a fifteen minute vote for more than half an hour, as the bill’s supporters attempted to persuade a trio of Republicans to back cloture.<sup>22</sup>

Senator Susan Collins, a Republican cosponsor of ENDA, asked her three undecided colleagues—Senators Kelly Ayotte, Pat Toomey, and Rob Portman—to join her in the Senate cloakroom in the midst of the vote for an impromptu meeting with Democratic Senators Chuck Schumer, Jeff Merkley, and Majority Leader Reid.<sup>23</sup> During that meeting, the Democratic leadership agreed to allow votes on two Republican-backed amendments seeking to strengthen ENDA’s religious protections in return for the three Republican senators’ cloture votes.<sup>24</sup> The Senate thereafter adopted cloture by a vote of 61 to 30.<sup>25</sup>

The first amendment, introduced by Senator Portman, sought to confirm that government agencies would not be allowed to withhold “licenses, permits, certifications, accreditation, contracts, grants, guarantees, tax-exempt status, or any benefits or exemptions from” employers qualifying for ENDA’s religious exemption.<sup>26</sup> The Portman Amendment also aimed to revise the bill’s “purposes” section to include “reinforc[ing] the Nation’s commitment to fairness and equal opportunity in the workplace consistent with the fundamental right of religious freedom” as one of ENDA’s primary objectives.<sup>27</sup>

The second amendment, introduced by Senator Toomey, sought to “clarify that ENDA’s religious exemption [would] appl[y] to religious hospitals, schools, charities, and other organizations that are owned by,

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<sup>19</sup> Kate B. Rhodes, *Defending ENDA: The Ramifications of Omitting the BFOQ Defense in the Employment Non-Discrimination Act*, 19 L. & SEXUALITY 1, 3–4 (2010).

<sup>20</sup> 159 CONG. REC. S7907 (2013).

<sup>21</sup> Chris Johnson, *Reid Sets Up Senate Vote Monday for ENDA*, WASH. BLADE (Oct. 31, 2013), <http://www.washingtonblade.com/2013/10/31/reid-sets-senate-vote-monday-enda/>.

<sup>22</sup> Seung Min Kim, *Gay Rights Measure Advances in Senate*, POLITICO (Nov. 4, 2013), <http://www.politico.com/story/2013/11/dean-heller-enda-legislation-99309.html>.

<sup>23</sup> Paul Schindler, *After Religious Exemption Cloakroom Sidebar, ENDA Clears Key Senate Procedural Hurdle*, GAY CITY NEWS (Nov. 4, 2013), [http://gaycitynews.nyc/enda\\_clears\\_senate\\_hurdle/](http://gaycitynews.nyc/enda_clears_senate_hurdle/).

<sup>24</sup> Jeremy W. Peters, *Bill Advances to Outlaw Discrimination against Gays*, N.Y. TIMES, Nov. 5, 2013, at A10.

<sup>25</sup> Laura Meckler, *Gay-Rights Job Bill Clears Key Senate Hurdle*, WALL ST. J., Nov. 4, 2013, at A8.

<sup>26</sup> 159 CONG. REC. S7881 (2013).

<sup>27</sup> 159 CONG. REC. S7880 (2013).

controlled by, or officially affiliated with a church or religious group covered by ENDA's [religious] exemption."<sup>28</sup> Although ENDA's supporters had elected not to oppose the Portman Amendment,<sup>29</sup> they launched a coordinated campaign to defeat the Toomey Amendment.<sup>30</sup> Senator Tom Harkin, for example, contended that the Toomey Amendment threatened to undermine the entire bill:

In determining what organizations should qualify for [Title VII's] religious exemption, most courts have . . . said that where the primary activity of the organization is commerce or profit . . . the organization may not discriminate [notwithstanding the sincerely held religious beliefs of the organization's owners]. That is what this amendment, I believe, seeks to change. This amendment would allow entities that are "officially affiliated" with a religious society to discriminate on the basis of sexual orientation and gender identity. This is a new term that is undefined in the text of the amendment and could lead to thousands of for-profit businesses being allowed to discriminate.

Our Nation's civil rights laws require those who participate in commercial activity adhere to the broad principles of fairness and equal treatment. In potentially allowing secular commercial businesses to discriminate in hiring and other employment practices on the basis of sexual orientation or gender identity, this amendment threatens to gut the fundamental premise of ENDA that all workers should be treated equally and fairly.<sup>31</sup>

The Toomey Amendment was subsequently defeated 43 to 55, whereas the Portman Amendment was agreed to on a voice vote.<sup>32</sup> Thereafter, ten Republicans joined all fifty-four Democrats to pass ENDA and send the measure on to the House.<sup>33</sup>

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<sup>28</sup> 159 CONG. REC. S7901 (2013) (statement of Sen. Toomey).

<sup>29</sup> See Chris Geidner, *LGBT Advocates Won't Oppose Amendment on Impact of Job Bias Bill's Religious Exemption*, BUZZFEED (Nov. 5, 2013), <http://www.buzzfeed.com/chrisgeidner/religious-exemption-to-lgbt-rights-bill-is-key-to> ("Officials with the Human Rights Campaign, American Civil Liberties Union and Freedom to Work all said they believed it was an unnecessary provision, but none said they were actively opposing it.").

<sup>30</sup> See *id.* (noting the ACLU warned that the amendment would "broaden an already broad religious exemption and could create a dangerous precedent that could allow for-profit corporations to be eligible" for the religious exemption).

<sup>31</sup> 159 CONG. REC. S7901 (2013) (statement of Sen. Harkin).

<sup>32</sup> Chris Johnson, *Historic: Senate Passes ENDA*, WASH. BLADE (Nov. 7, 2013), <http://www.washingtonblade.com/2013/11/07/senate-passes-trans-inclusive-enda/>.

<sup>33</sup> 159 CONG. REC. S7907 (2013).

However, even before the Senate cloture vote, Speaker John Boehner announced that he would not under any circumstances permit ENDA to receive a vote in the House of Representatives.<sup>34</sup> Speaker Boehner has long opposed extending employment protections to LGBT persons on the ground that such legislation threatens to engender frivolous litigation, weaken religious freedom, and undermine heterosexual marriage.<sup>35</sup>

Although supportive House members tried to attach ENDA as an amendment to the 2015 defense authorization bill—a piece of “must-pass” legislation—these efforts were ultimately unsuccessful<sup>36</sup> as was an attempt to force a floor vote on ENDA via the discharge process.<sup>37</sup> Consequently, the Employment Non-Discrimination Act of 2013 died with the adjournment of the 113th Congress.

## II. THE HOBBY LOBBY DECISION

As ENDA was working its way through the 113th Congress, several civil rights groups expressed growing concern about the breadth of the bill’s exemption for religious organizations.<sup>38</sup> On April 30, 2013, the American Civil Liberties Union (“ACLU”) became the first major civil rights group to demand that ENDA’s religious exemption be narrowed.<sup>39</sup> The ACLU observed that unlike Title VII, which permits religious organizations to discriminate on the basis of religion but not race, color, sex, or national origin, ENDA stood to grant religious organizations an absolute right to discriminate against LGBT persons.<sup>40</sup> The ACLU noted that this was not the first time a wholesale exemption from federal civil rights legislation had been proposed in Congress: “In both 1964 and 1972, there were attempts to create a blanket exemption in [Title VII] for religious organizations to allow them to discriminate . . . not only on the basis of religion, but also race, sex, and national origin.”<sup>41</sup> Both times, however, “Congress limited the exemption provided to [religious] organ-

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<sup>34</sup> Peters, *supra* note 24.

<sup>35</sup> Press Release, Rep. John Boehner, Majority’s ENDA Bill Will Be Boon to Trial Lawyers, Weaken State and Federal Marriage Laws (Nov. 6, 2007), <http://www.speaker.gov/press-release/boehner-majority%E2%80%99s-enda-bill-will-be-boon-trial-lawyers-weaken-state-and-federal>.

<sup>36</sup> Chris Johnson, *House Panel Rejects Last-Ditch Effort to Pass ENDA*, WASH. BLADE (Dec. 3, 2014), <http://www.washingtonblade.com/2014/12/03/house-panel-rejects-last-ditch-panel-pass-enda/>.

<sup>37</sup> *Bill Summary & Status: H.RES. 678*, LIBRARY OF CONG., <http://thomas.loc.gov/cgi-bin/bdquery/D?d113:29:./temp/~bdIU18:./home/LegislativeData.php?n=BSS;c=113> (last visited Jan. 26, 2015).

<sup>38</sup> Press Release, *supra* note 6.

<sup>39</sup> Ian S. Thompson & Dena Sher, Am. Civil Liberties Union, *Why ENDA’s Religious Exemption Must be Narrowed* (Apr. 30, 2013), <https://www.aclu.org/blog/lgbt-rights-religion-belief-womens-rights/why-endas-religious-exemption-must-be-narrowed>.

<sup>40</sup> *See id.* (noting that “ENDA’s religious exemption could provide . . . religiously affiliated organizations . . . with a blank check to engage in employment discrimination against LGBT people”).

<sup>41</sup> *Id.*

izations to an ability to prefer members of their own faith, and rejected the kind of blank check to discriminate that ENDA would give these organizations with respect to sexual orientation and gender identity.”<sup>42</sup>

These sentiments were echoed by Tobias Wolff, a law professor at the University of Pennsylvania and advisor to President Obama on LGBT policy matters. On June 20, 2014, Wolff published an essay describing ENDA’s religious exemption as “an anomaly left over from an earlier time when our society was still clawing its way toward the understanding that equal means equal.”<sup>43</sup> He cautioned that if the current exemption were allowed to remain in the bill, “ENDA would stand for the intolerable idea that equal treatment of LGBT people is inherently incompatible with religious belief.”<sup>44</sup> Wolff argued that the existing exemption must be stricken in favor of a Title VII-type exemption acknowledging that houses of worship and religious nonprofit organizations may discriminate on the basis of religion, but not sexual orientation or gender identity.<sup>45</sup>

Thus, ENDA was already the subject of intense criticism in the months preceding the Supreme Court’s decision in *Burwell v. Hobby Lobby Stores, Inc.* The robust exemption for religious organizations, which had been critical in lessening opposition to—and winning additional support for—the bill, was now being assailed as undermining the very principles of equality ENDA purported to advance. The *Hobby Lobby* ruling, moreover, ensured that opposition to ENDA’s religious exemption became a litmus test for mainstream LGBT activism.<sup>46</sup> Indeed, in finding that for-profit corporations are capable of exercising religion within the meaning of RFRA, the *Hobby Lobby* decision gave renewed urgency to Senator Harkin’s warning that “[i]n potentially allowing secular commercial businesses to discriminate in hiring and other employment practices on the basis of sexual orientation or gender identity, [the Toomey Amendment] threatens to gut the fundamental premise of ENDA that all workers should be treated equally and fairly.”<sup>47</sup>

#### A. Question Presented, Facts, and Procedural Posture

The issue confronting the Court in *Hobby Lobby* was “whether the Religious Freedom Restoration Act of 1993 . . . permits the United States Department of Health and Human Services . . . to demand that three closely held corporations provide health-insurance coverage for methods

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<sup>42</sup> *Id.*

<sup>43</sup> Tobias B. Wolff, *How ENDA Still Allows Discrimination against LGBT Workers*, THE NATION (June 20, 2014), <http://www.thenation.com/article/180358/how-enda-still-allows-discrimination-against-lgbt-workers>.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> Jennifer Bendery & Amanda Terkel, *Gay Rights Groups Pull Support for ENDA Over Sweeping Religious Exemption*, HUFFINGTON POST (Aug. 5, 2014), [http://www.huffingtonpost.com/2014/07/08/enda-religious-exemption\\_n\\_5568736.html](http://www.huffingtonpost.com/2014/07/08/enda-religious-exemption_n_5568736.html).

<sup>47</sup> 159 CONG. REC. S7901 (2013) (statement of Sen. Harkin).

of contraception that violate the sincerely held religious beliefs of the companies' owners."<sup>48</sup> RFRA prohibits the "[g]overnment [from] substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest."<sup>49</sup>

The case centered on a provision of the Patient Protection and Affordable Care Act of 2010 ("ACA") requiring that employers' group health plans furnish preventative care and screenings for women.<sup>50</sup> As part of the ACA, Congress authorized the Health Resources and Services Administration ("HRSA"), a division of the Department of Health and Human Services ("HHS"), to specify which preventative services fell within the ACA mandate, and the HRSA subsequently determined that health plans must provide coverage for "[a]ll Food and Drug Administration approved contraceptive methods."<sup>51</sup> While sixteen of the twenty FDA-approved contraceptive methods acted to inhibit pregnancy pre-fertilization, four of the methods acted post-fertilization to prevent an embryo from developing into a viable fetus.<sup>52</sup>

Three closely-held corporations and their owners thereafter sued HHS and various federal officials in two separate lawsuits seeking to enjoin application of the ACA's contraceptive mandate insofar as it required the plaintiffs to provide health insurance coverage for the latter four contraceptive methods.<sup>53</sup> The plaintiffs argued that establishing an ACA-compliant health insurance plan would make them complicit to murder, such that providing access to these four contraceptive methods would violate their sincerely held religious beliefs.<sup>54</sup> Following the emergence of a circuit split, the Supreme Court granted certiorari and consolidated the cases for review.<sup>55</sup>

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<sup>48</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2759 (2014).

<sup>49</sup> *Id.* at 2767.

<sup>50</sup> 42 U.S.C. § 300gg-13(a)(4) (2012).

<sup>51</sup> *Hobby Lobby*, 134 S. Ct. at 2762. The FDA-approved contraceptive methods include "oral contraceptive pills, diaphragms, injections and implants, emergency contraceptive drugs, and intrauterine devices." Brief for the Petitioners at 6, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354) [hereinafter Brief for HHS].

<sup>52</sup> *Hobby Lobby*, 134 S. Ct. at 2762–63.

<sup>53</sup> *Id.* at 2765. The challenged methods consisted of two types of intrauterine devices and two forms of emergency contraception. Brief for HHS, *supra* note 51, at 9.

<sup>54</sup> *Hobby Lobby*, 134 S. Ct. at 2765. Hobby Lobby Stores and its owners "believe that human beings deserve protection from the moment of conception," and the company's health plan excludes drugs that can terminate a pregnancy as well as drugs that may prevent an embryo from implanting in the womb. Brief for Respondents at 9, *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) (No. 13-354) [hereinafter Brief for Hobby Lobby].

<sup>55</sup> *Sebelius v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 678 (2013); *Conestoga Wood Specialties Corp. v. Sebelius*, 134 S. Ct. 678 (2013).



*B. The Majority Decision*

The defendants argued that the plaintiffs had failed to state a cognizable RFRA claim, and so accordingly the Court need not examine whether the contraceptive mandate represented the least restrictive means of furthering a compelling governmental interest.<sup>56</sup> Although the defendants initially contended that for-profit corporations such as plaintiffs were not “persons” within the meaning of RFRA, the Court observed that the Dictionary Act defines the word “person” to include corporations, and noted that nothing in the statutory text of RFRA indicated a congressional intent to depart from that definition.<sup>57</sup> The defendants next asserted that only natural persons are capable of religious exercise, so that for-profit corporations such as plaintiffs lacked standing to pursue a RFRA claim, but the Court found that neither the corporate form nor the profit-making objective were sufficient to render corporations a-religious under RFRA.<sup>58</sup> Having determined that the plaintiff corporations had standing to bring a RFRA claim, the Court proceeded to consider whether the ACA’s contraceptive mandate imposed a substantial burden on the plaintiffs’ religious exercise.

Writing for the majority, Justice Alito noted that the plaintiffs were confronted with a Hobson’s choice—either provide health insurance coverage which violates their sincerely-held religious beliefs or remain true to their faith and be forced to pay millions of dollars in taxes and fines.<sup>59</sup> The defendants argued “that the connection between what the objecting parties must do (provide health insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated” to constitute a substantial burden. However, the Court found the defendants’ logic unpersuasive, opining:

“This argument dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is [objectively] reasonable).”<sup>60</sup>

Justice Alito observed that “it is not for us to say that [the plaintiffs’] religious beliefs are mistaken or insubstantial” but rather “to determine whether [the plaintiffs’] opposition to providing the relevant contracep-

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<sup>56</sup> Brief for HHS, *supra* note 51, at 15–26.

<sup>57</sup> *Hobby Lobby*, 134 S. Ct. at 2768.

<sup>58</sup> *Id.* at 2769–72.

<sup>59</sup> *Id.* at 2775–76.

<sup>60</sup> *Id.* at 2777–78.

tive methods] reflects ‘an honest conviction.’”<sup>61</sup> Answering in the affirmative, the Court held that the contraceptive mandate substantially burdened plaintiffs’ religious exercise so as to trigger RFRA’s compelling interest and least-restrictive-means tests.<sup>62</sup>

Whereas the defendants asserted that the contraceptive mandate furthered a variety of compelling government interests,<sup>63</sup> the Court found these contentions dubious in light of the ACA’s many exemptions. Specifically, Justice Alito noted that employers providing “grandfathered health plans” were not required to comply with the contraceptive mandate, and that employers having forty-nine or fewer employees were not obligated to provide any health insurance coverage whatsoever.<sup>64</sup> Also exempt from the contraceptive mandate were “religious employers,” defined as “churches, their integrated auxiliaries, and conventions or associations of churches,”<sup>65</sup> as well as any religious nonprofit organization “oppose[d] [to] providing coverage for some . . . contraceptive services required to be covered . . . on account of religious objections.”<sup>66</sup> Justice Alito recognized that “all told, the [contraceptive] mandate does not apply to tens of millions of people,” thereby permitting an inference that the government’s dual goals of promoting public health and fostering gender equality did not rise to the level of compelling government interests.<sup>67</sup>

In response, the defendants asserted that the presence of exemptions “does not in itself indicate that the principal interest served by a law is not compelling,” and suggested that “[e]ven a compelling interest may be outweighed in some circumstances by another even weightier consideration,” such as religious liberty.<sup>68</sup> Although the defendants’ argument regarding the exemption for religious employers seemed to resonate with the Court, Justice Alito contrasted the Act’s religious exemption with its exemptions for grandfathered health plans and small businesses, which were not necessary to accommodate any constitutional concerns.<sup>69</sup> Ulti-

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<sup>61</sup> *Id.* at 2779.

<sup>62</sup> *Id.*

<sup>63</sup> These interests included the “protection of rights of [the plaintiffs’] employees in a comprehensive insurance system,” “public health,” and “equal access for women to health-care services.” Brief for HHS, *supra* note 51, at 37–51.

<sup>64</sup> *Hobby Lobby*, 134 S. Ct. at 2780.

<sup>65</sup> 45 C.F.R. § 147.131(a) (2012); 26 U.S.C. § 6033(a)(3)(A)(i) (2012).

<sup>66</sup> 45 C.F.R. § 147.131(b) (2012).

<sup>67</sup> *Hobby Lobby*, 134 S. Ct. at 2764, 2780.

<sup>68</sup> *Id.* Indeed, the defendants asserted that “[i]t would be perverse to hold that the government’s provision of a targeted religious exemption for churches and houses of worship eliminates the compelling interests in the underlying regulations, thus effectively extending the same exemption, through RFRA, to anyone else who wants it.” Brief for HHS, *supra* note 51, at 52. Defendants went on to argue that “[s]uch a reading of RFRA would [actually] discourage the government from accommodating religion, the opposite of what Congress intended in enacting the statute.” *Id.*

<sup>69</sup> *Hobby Lobby*, 134 S. Ct. at 2780. In their brief, the defendants contended that the exemption for grandfathered plans “has the effect of allowing a transition period for compliance with a number of the Act’s requirements” and asserted that “[t]he compelling

mately, the Court declined to determine whether facilitating access to the relevant contraceptive methods constituted a compelling government interest, and instead simply assumed so for the purpose of appeal.<sup>70</sup> The case's outcome, therefore, hinged on whether the contraceptive mandate represented the least restrictive means of furthering the relevant interest.

After acknowledging that the least-restrictive-means test is "exceptionally demanding," Justice Alito held that the defendants had not shown they lacked an alternative, equally effective means of achieving their stated goal that was also capable of respecting plaintiffs' religious exercise.<sup>71</sup> The Court noted that an existing HHS accommodation permitted certain nonprofit organizations to inform their issuer that they opposed providing coverage for particular contraceptive services on religious grounds.<sup>72</sup> Upon receiving such notification, an insurance issuer was required to "exclude contraceptive coverage from the group health insurance coverage provided in connection with the group health plan" and "provide separate payments for any contraceptive services required to be covered" without imposing "any cost-sharing requirements on the eligible organization, the group health plan, or plan participants or beneficiaries."<sup>73</sup> Justice Alito reasoned that extending the HHS accommodation beyond nonprofit organizations to include commercial corporations would respect the plaintiffs' religious beliefs while at the same time ensuring that the plaintiffs' employees enjoyed cost-free access to all FDA-approved contraceptive methods.<sup>74</sup> The Court thereafter enjoined application of the ACA's contraceptive mandate insofar as it required plaintiffs to provide coverage for the four contested contraceptive methods.

### C. Justice Ginsburg's Dissent

Although Justice Ginsburg offered persuasive rejoinders to each of the majority's findings, she spent the bulk of her dissent repudiating the notion that otherwise secular, for-profit corporations are capable of religious exercise. She began by observing that "[u]ntil this litigation, no decision of this Court recognized a for-profit corporation's qualification for a religious exemption from a generally applicable law, whether under

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nature of an interest is not diminished merely because the government phases in a regulation advancing it in order to avoid undue disruption." Brief for HHS, *supra* note 51, at 53–54. Separately, the defendants noted that many federal statutes include exemptions for small employers and argued that "such provisions have never been held to undermine the interests served by those statutes." *Id.* at 55. The defendants cited Title VII's exemption for employers with fewer than fifteen employees as one such example and asserted that the exemption "does not call into question the government's compelling interests in eradicating employment discrimination." *Id.*

<sup>70</sup> *Hobby Lobby*, 134 S. Ct. at 2780.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 2763, 2782.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 2782.

the Free Exercise Clause or RFRA.”<sup>75</sup> This was to be expected, according to Justice Ginsburg, because only natural persons are capable of religious exercise.<sup>76</sup> She distinguished the free exercise protections traditionally accorded houses of worship and religious nonprofit organizations on the grounds that such entities serve to perpetuate the shared religious values of an underlying community of human believers, such that “furtherance of the autonomy of religious organizations often furthers individual religious freedom as well.”<sup>77</sup> Commercial corporations, on the other hand, tend to be comprised of persons of varying faiths and belief systems who come together for the purpose of generating a profit rather than engaging in communal worship.<sup>78</sup> Justice Ginsburg regarded this as a critical distinction justifying protections for religious organizations while at the same time counseling against the extension of such protections to commercial corporations.<sup>79</sup> Justice Ginsburg concluded her analysis with an assertion that “RFRA claims will proliferate [after *Hobby Lobby*], for the Court’s expansive notion of corporate personhood—combined with its other errors in construing RFRA—invites for-profit entities to seek religion-based exemptions from regulations they deem offensive to their faith.”<sup>80</sup>

### III. THE DEMISE OF ENDA

Two weeks before the Supreme Court handed down its decision in *Hobby Lobby*, President Obama announced that he planned to sign an executive order barring federal contractors from engaging in LGBT-related employment discrimination and indicated that he would issue the order sometime before the 2014 midterm elections.<sup>81</sup> On July 1, 2014—the day after the *Hobby Lobby* ruling—several of President Obama’s closest religious advisors published a letter asking the President to include an ENDA-style religious exemption in his forthcoming executive order.<sup>82</sup> Without a robust religious exemption, the letter warned, “this

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<sup>75</sup> *Id.* at 2794 (Ginsburg, J., dissenting). In response to the majority’s assertion that *Gallagher v. Crown Kosher Super Market of Mass., Inc.*, 366 U.S. 617 (1961), stood for the proposition that for-profit corporations possess free exercise rights under the First Amendment, Justice Ginsburg found that “[t]he suggestion is barely there.” *Id.* at 2794 n.13. While acknowledging that one of the five challengers to the Sunday closing law assailed in *Gallagher* was a corporation owned by four Orthodox Jews, Justice Ginsburg observed that the four remaining challengers “were human individuals, not artificial, law-created entities” so that the *Gallagher* Court did not have cause to determine whether the corporation could have instituted the litigation in its own right. *Id.*

<sup>76</sup> *Id.* at 2794.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 2795.

<sup>79</sup> *Id.* at 2796.

<sup>80</sup> *Id.* at 2797.

<sup>81</sup> Carol E. Lee, *Obama to Bar Gay Discrimination by Federal Contractors*, WALL ST. J., June 16, 2014, at A3.

<sup>82</sup> Julie H. Davis & Erik Eckholm, *Faith Groups Seek Exclusion from Bias Rule*, N.Y. TIMES, July 9, 2014, at A1.

expansion of hiring rights [for LGBT Americans] will come at an unreasonable cost to the common good, national unity and religious freedom.”<sup>83</sup> The letter was organized by Michael Wear, who served in the White House faith-based initiative during President Obama’s first term and later went on to direct faith outreach for the President’s 2012 reelection campaign.<sup>84</sup> In a subsequent interview, Wear indicated that the inclusion of an ENDA-style exemption in the federal contracting order was intended to preserve faith-based organizations’ existing religious freedoms, rather than provide these groups additional leeway to discriminate, stating “[w]e’re not trying to support crazy claims of religious privilege.”<sup>85</sup>

Wear’s comments failed to alleviate a growing sense of alarm within the LGBT community that some religious organizations were seeking to draw a false equivalence between ENDA and the pending executive order. Whereas employers qualifying for ENDA’s religious exemption would be permitted to discriminate against LGBT persons, the federal government would not have a role in supporting or otherwise subsidizing these organizations’ operations.<sup>86</sup> Conversely, employers qualifying for an ENDA-style religious exemption from the pending executive order would, in effect, be permitted to use federal tax dollars to discriminate against LGBT Americans.<sup>87</sup> Civil rights advocates, acutely aware of this distinction, became convinced that they could not continue to oppose the inclusion of a broad religious exemption in the President’s executive order while at the same time touting ENDA’s robust religious exemption as a model of bipartisan compromise in their discussions with House leadership.

Approximately one week after *Hobby Lobby*, the executive director of the National Gay and Lesbian Task Force Action Fund (“NGLTF AF”) announced that her organization was withdrawing its support for ENDA.<sup>88</sup> She expressed concern that opponents of LGBT equality would continue to cite her organization’s support for ENDA as justification for the inclusion of a similarly robust religious exemption in the federal contracting order:

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<sup>83</sup> Letter from Joel C. Hunter, Senior Pastor, Northland Church, to Barack Obama, U.S. President (July 1, 2014), <http://apps.washingtonpost.com/g/documents/local/letter-to-obama-from-faith-leaders/1072/>.

<sup>84</sup> Molly Ball, *Hobby Lobby is Already Creating New Religious Demands on Obama*, THE ATLANTIC (July 2, 2014), <http://www.theatlantic.com/politics/archive/2014/07/hobby-lobby-is-already-creating-new-religious-demands-on-obama/373853/>.

<sup>85</sup> Davis & Eckholm, *supra* note 82.

<sup>86</sup> Chris Johnson, *Will Obama’s Job Bias Order Include a Religious Exemption?*, WASH. BLADE (June 19, 2014), <http://www.washingtonblade.com/2014/06/19/will-obamas-anti-lgbt-job-bias-order-include-a-religious-exemption/>.

<sup>87</sup> *Id.*

<sup>88</sup> Rea Carey, Op-Ed., *Why One of the Biggest LGBT Orgs Has Stopped Supporting ENDA*, THE ADVOCATE (July 8, 2014), <http://www.advocate.com/commentary/2014/07/08/op-ed-why-one-biggest-lgbt-orgs-has-stopped-supporting-enda>.

After much soul searching, [NGLTFAF] has decided to withdraw its support for the current version of the Employment Non-Discrimination Act. As one of the lead advocates on this bill for 20 years, we do not take this move lightly but we do take it unequivocally – we now oppose this version of ENDA because of its too-broad religious exemption.

Frankly, it is becoming harder and harder for me, for us, to tolerate our own moral and political inconsistencies by protesting the *Hobby Lobby* decision, then advocating for the current ENDA with its broad religious exemption, and then insisting that the president not include a broad exemption in the upcoming [contracting order banning LGBT employment discrimination].

Not 48 hours after the [*Hobby Lobby*] decision, Pastor Rick Warren joined other faith leaders [including Michael Wear] in a letter to the president asking that he include a broad religious exemption in the contractor executive order. We cannot be complicit in writing such exemptions into federal law.<sup>89</sup>

The press release concluded by asserting that “there is nothing inherently inconsistent between religion and living our lives freely as LGBT people,” and indicated that the current version of ENDA must be abandoned in favor of nondiscrimination legislation providing a limited exemption for religious organizations on par with Title VII of the Civil Rights Act of 1964.<sup>90</sup>

Later that same day, five other civil rights groups followed NGLTFAF’s lead and withdrew their support for ENDA.<sup>91</sup> One of those organizations, the American Civil Liberties Union, had been critical of ENDA’s religious exemption as far back as April 2013, but had nonetheless continued to support the bill on the expectation that only houses of worship and religious nonprofit organizations stood to be exempt from ENDA’s coverage.<sup>92</sup> After *Hobby Lobby*, however, the ACLU determined that ENDA no longer represented a viable legislative vehicle for securing LGBT employment protections and joined with its sister organizations in denouncing the bill:

[By permitting religious organizations to discriminate against LGBT persons without having to justify their actions on religious precepts, ENDA’s religious exemption] essentially says that anti-LGBT discrimination is differ-

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> Johnson, *supra* note 10.

<sup>92</sup> Thompson & Sher, *supra* note 39.

ent – more acceptable and legitimate – than discrimination against individuals based on their race or sex. If ENDA were to pass and be signed into law with this provision, the most important federal law for the LGBT community in American history would leave too many jobs, and too many LGBT workers, without protection.

The Supreme Court's decision in *Hobby Lobby* has made it all the more important that we not accept this inappropriate provision. Because opponents of LGBT equality are already misreading that decision as having broadly endorsed rights to discriminate against others, we cannot accept a bill that sanctions discrimination and declares that discrimination against LGBT people is more acceptable than other kinds of discrimination.

[T]he American people oppose efforts to misuse religious liberty as an excuse to discriminate against LGBT people. It is time for ENDA (and the LGBT nondiscrimination order for federal contractors) to reflect this reality.<sup>93</sup>

Whereas NGLTFAF demanded that President Obama veto the Senate-passed version of ENDA should it manage to reach his desk, the ACLU and its counterparts adopted a more nuanced stance, asserting that ENDA should not be permitted to advance any further in Congress until the religious exemption had been brought into conformity with other federal nondiscrimination statutes.<sup>94</sup>

Because the existing religious exemption represents a series of bipartisan compromises calculated to win the support of some of ENDA's staunchest opponents, any attempt to narrow the exemption going forward will likely have dire consequences for the bill.<sup>95</sup> Indeed, Senators John McCain and Orrin Hatch—both of whom opposed ENDA in 1996<sup>96</sup>—cited the bill's new, more expansive religious exemption as the reason they felt comfortable supporting ENDA in 2013.<sup>97</sup> The only rea-

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<sup>93</sup> Press Release, Am. Civil Liberties Union et al., Joint Statement on Withdrawal of Support for ENDA and Call for Equal Workplace Protections for LGBT People (July 8, 2014), [https://www.aclu.org/sites/default/files/assets/joint\\_statement\\_on\\_enda.pdf](https://www.aclu.org/sites/default/files/assets/joint_statement_on_enda.pdf). The other organizations were Gay & Lesbian Advocates & Defenders, Lambda Legal, the National Center for Lesbian Rights, and the Transgender Law Center. *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> See William C. Sung, *Taking the Fight Back to Title VII: A Case for Redefining "Because of Sex" to Include Gender Stereotypes, Sexual Orientation, and Gender Identity*, 84 S. CAL. L. REV. 487, 508–09 (2011) (noting that ENDA's religious exemption has become broader with each rewriting of the bill).

<sup>96</sup> 142 CONG. REC. S10138-39 (1996).

<sup>97</sup> Press Release, Statement by Senator John McCain on ENDA (Nov. 7, 2013), <http://www.mccain.senate.gov/public/index.cfm/press-releases?ID=22ba5a3d-75df-4dea>

son Senators Hatch and McCain were able to cast a vote in favor of ENDA, moreover, was because three of their Republican colleagues had agreed to support cloture in exchange for the Democratic leadership's promise to consider two amendments further strengthening the bill's already robust religious protections.<sup>98</sup> Even the two most ardent Republican supporters of ENDA in the Senate have indicated that they would not vote for a bill containing a weakened religious exemption.<sup>99</sup> Collectively, these seven senators appear unlikely to support any version of ENDA that would seek to abandon twenty years' worth of compromises vis-à-vis the religious exemption.<sup>100</sup>

The U.S. House would be even less inclined to support a modified ENDA. When the current religious exemption was first proposed as a floor amendment in 2007, the House approved the measure by a vote of 402 to 25.<sup>101</sup> House Speaker John Boehner and House Majority Leader Kevin McCarthy both voted in favor of the strengthened religious exemption only to then oppose the bill on final passage.<sup>102</sup> Consequently, if ENDA's proponents could not persuade House Republicans to support the bill when it included a religious exemption backed by ninety-one percent of the Republican caucus,<sup>103</sup> the chances that Speaker Boehner, Majority Leader McCarthy, or any of the rank-and-file House Republicans would support an ENDA containing a weakened religious exemption are nonexistent. This fact has been confirmed by Representative Barney Frank—the lead sponsor of ENDA in the 110th, 111th, and 112th Congresses—who has dismissed speculation that House Republicans might one day be inclined to support a bill containing a narrower religious exemption as “ridiculous.”<sup>104</sup> ENDA, therefore, appears destined to become a legislative pariah, opposed by liberal legislators as long as it

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950e-e681b23b6224; Matt Canham, *Hatch backs Anti-Discrimination Bill for Gay Employees*, SALT LAKE TRIB., July 10, 2013, at A1.

<sup>98</sup> Peters, *supra* note 24.

<sup>99</sup> See Justin Snow, *As ENDA Support Falters, Republican Backers Dig In*, METRO WEEKLY (July 11, 2014), <http://www.metroweekly.com/2014/07/as-enda-support-falters-republican-backers-dig-in/> (reporting that Mark Kirk of Illinois and Susan Collins of Maine had recently “reaffirmed their support for the version of ENDA that passed the Senate,” but “declined to address questions regarding the religious exemption”).

<sup>100</sup> Further complicating matters is the fact that Mitch McConnell, the new Senate Majority Leader, is a longtime opponent of ENDA who—like his counterpart in the House—is unlikely to permit even a committee hearing on the bill much less allow a floor vote on final passage. See Crosby Burns & Jeff Krehely, *Small businesses support LGBT workplace fairness*, THE HILL, Nov. 1, 2011, at A6 (noting Senator McConnell believes that ENDA “would impose significant regulatory burdens and costs on small businesses”).

<sup>101</sup> 153 CONG. REC. H13249 (2007).

<sup>102</sup> 153 CONG. REC. H13252-53 (2007).

<sup>103</sup> 153 CONG. REC. H13249 (2007).

<sup>104</sup> Amanda Terkel, *Barney Frank Sharply Criticizes Gay Rights Groups' Flip on ENDA*, HUFFINGTON POST (Aug. 6, 2014), [http://www.huffingtonpost.com/2014/08/05/barney-frank-enda\\_n\\_5650751.html](http://www.huffingtonpost.com/2014/08/05/barney-frank-enda_n_5650751.html).



contains a robust religious exemption, yet certain to draw the ire of conservative lawmakers should the exemption in any way be weakened.

#### IV. THE IMPLICIT VICTORY FOR LGBT EQUALITY

Had ENDA become law, secular, for-profit businesses harboring anti-LGBT religious beliefs would have been permitted to discriminate against LGBT persons consistent with *Hobby Lobby*. Similar to the ACA's contraceptive mandate, ENDA's ban on LGBT-related employment discrimination would have been found to substantially burden corporations' religious exercise by forcing them to choose between adherence to their faith and compliance with the law. Unlike the ACA, however, ENDA would not have been found to further a compelling government interest sufficient to defeat an employer's RFRA claim. Conversely, in jurisdictions perceiving LGBT-related discrimination as a form of gender discrimination actionable under Title VII, employers harboring anti-LGBT religious beliefs must not permit such prejudice to influence their personnel decisions as the government has a compelling interest in eliminating gender discrimination. Thus, by rendering ENDA politically untenable for the foreseeable future, *Hobby Lobby* actually stands to aid LGBT Americans in their decades-long quest to gain federal employment protections by allowing LGBT persons to contest discrimination under the more robust provisions of Title VII which, unlike ENDA, stands to be impervious to a RFRA challenge.

##### A. Exercise of Religion

The first question to confront a judge adjudicating a RFRA claim would have been whether ENDA's nondiscrimination mandate implicated otherwise secular, for-profit businesses' exercise of religion. RFRA defines "exercise of religion" to include any religious expression or observance, "whether or not compelled by, or central to, a system of religious belief."<sup>105</sup> Consequently, an employer wishing to discriminate on the basis of sexual orientation or gender identity would not be required to show that the tenets of its faith explicitly forbid interaction with or employment of LGBT individuals but would instead need only allege that the discrimination was motivated by its religious beliefs.<sup>106</sup> Although these beliefs must be sincere to qualify for protection, the sincerity of an employer's religious beliefs often will not be in dispute,<sup>107</sup> as was the case in *Hobby Lobby*.<sup>108</sup>

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<sup>105</sup> 42 U.S.C. § 2000bb-2(4) (2012) (citing 42 U.S.C. § 2000cc-5 (2012)).

<sup>106</sup> Christopher E. Anders & Rose A. Saxe, *Effect of a Statutory Religious Freedom Strict Scrutiny Standard on the Enforcement of State and Local Civil Rights Laws*, 21 CARDOZO L. REV. 663, 668 (1999).

<sup>107</sup> Alvin C. Lin, *Sexual Orientation Antidiscrimination Laws and the Religious Liberty Protection Act: The Pitfalls of the Compelling State Interest Inquiry*, 89 GEO. L.J. 719, 733 (2001).

<sup>108</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2774 (2014).

The Supreme Court, moreover, has demonstrated a willingness to accept “claimants’ assertions regarding what they sincerely believe to be the exercise of religion, even when the conduct in dispute is not commonly viewed as a religious ritual.”<sup>109</sup> Businesses wishing to discriminate against LGBT Americans post-ENDA, therefore, would have had little difficulty demonstrating that the law implicated their “exercise of religion” such that the focus would have then shifted to whether and to what extent ENDA ostensibly burdened these employers’ religious exercise.

### B. Substantial Burden

Once a desire to engage in LGBT-related employment discrimination had been deemed an “exercise of religion” for the purposes of RFRA, any law purporting to prohibit or restrict that right would have been found to substantially burden employers’ religious exercise. While RFRA does not define the term “substantial burden,” and the Supreme Court has not identified the factors it considers in assessing any particular burden’s severity, several circuit courts have elected to construe the term broadly.<sup>110</sup> Moreover, “even those courts that have adopted a narrow definition of substantial burden . . . have held that imposing liability on an employer for non-compliance with employment antidiscrimination laws constitutes a substantial burden when compliance would contradict religious belief or doctrine.”<sup>111</sup> Thus, ENDA would have been found to substantially burden anti-LGBT corporations’ religious exercise by forcing these businesses, under threat of liability, to make employment decisions in a manner contradictory to their faith.<sup>112</sup>

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<sup>109</sup> Anders & Saxe, *supra* note 106, at 668.

<sup>110</sup> *Id.* at 669. *See, e.g.,* Mack v. O’Leary, 80 F.3d 1175, 1179 (7th Cir. 1996) (holding that “a substantial burden on the free exercise of religion, within the meaning of [RFRA], is one that forces adherents of a religion to refrain from religiously motivated conduct, inhibits or constrains conduct or expression that manifests a central tenet of a person’s religious beliefs, or compels conduct or expression that is contrary to those beliefs”).

<sup>111</sup> Anders & Saxe, *supra* note 106, at 669–70.

<sup>112</sup> The Supreme Court, moreover, has demonstrated a willingness to presume the substantiality of a claimed burden. *See Hobby Lobby*, 134 S. Ct. at 2798 (Ginsburg, J., dissenting) (“The Court barely pauses to inquire whether any burden imposed by the contraceptive coverage requirement is substantial.”). In *Hobby Lobby*, the Court’s analysis was limited to a recitation of the various fines and penalties that plaintiffs stood to incur should they fail to provide an ACA-compliant health plan followed by an assertion that “[t]hese sums are surely substantial.” *Id.* at 2775–76.

Additionally, one of the more persuasive arguments as to why ENDA should not be found to impose a substantial burden on employers’ religious exercise was effectively foreclosed by *Hobby Lobby*. In defending the ACA’s contraceptive mandate, the defendants argued that “the connection between what the [plaintiffs] must do (provide health-insurance coverage for four methods of contraception that may operate after the fertilization of an egg) and the end that they find to be morally wrong (destruction of an embryo) is simply too attenuated” to rise to the level of a substantial burden given that “the coverage would not itself result in the destruction of an embryo; that would only occur if an

*C. Compelling Government Interest*

Once a ban on LGBT-related discrimination had been found to substantially burden employers' religious exercise, the burden of proof would have shifted to the EEOC to demonstrate that ENDA represented the least restrictive means of furthering a compelling government interest. Whether ENDA would have been able to satisfy RFRA's least-restrictive-means test is uncertain. Individuals "using a religious liberty defense to a civil rights claim have [successfully argued] that uniform application of civil rights laws cannot be the least restrictive means if the civil rights statute in question contains exemptions for religious organizations" and small employers,<sup>113</sup> both of which stood to be available under ENDA.<sup>114</sup> A least-restrictive-means analysis is only necessary, however, if the law is found to further a compelling government interest.<sup>115</sup> Because the Supreme Court has declined to recognize such an interest vis-à-vis the elimination of LGBT-related discrimination, LGBT Americans would have remained susceptible to employment discrimination under ENDA.<sup>116</sup>

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employee chose to take advantage of the coverage and to use one of the four methods at issue." *Id.* at 2777.

Similarly, in defending ENDA's nondiscrimination mandate the EEOC might have argued that the connection between what employers must do under ENDA (make employment decisions without regard to individuals' sexual orientation or gender identity) and the end that they find to be morally wrong (facilitate non-heterosexual or non-cisgender conduct or create the appearance of endorsing or supporting such conduct) was simply too attenuated to impose a substantial burden on employers' religious exercise. Specifically, the Commission might have asserted that abstaining from LGBT-related employment discrimination would not serve to encourage or in any way promote non-heterosexual or non-cisgender conduct otherwise incompatible with an employer's religious beliefs; that would occur only if individuals somehow perceived an employer's efforts to achieve legal compliance as signaling support for the law's underlying goals and objectives. Because an employer might choose to obey a given law for any number of reasons, there is no reason to suspect that an employer's compliance with ENDA would be perceived as an implicit or explicit endorsement of homosexuality, bisexuality, or transgenderism so as to substantially burden the employer's religious exercise.

Such an argument would not have been tenable post-*Hobby Lobby*, however, as Justice Alito held that the government's position "dodges the question that RFRA presents (whether the HHS mandate imposes a substantial burden on the ability of the objecting parties to conduct business in accordance with their religious beliefs) and instead addresses a very different question that the federal courts have no business addressing (whether the religious belief asserted in a RFRA case is reasonable). *Id.* at 2778. Any suggestion that the correlation between ENDA's nondiscrimination mandate and the burden imposed on employers' religious exercise was too attenuated to support a RFRA claim, thus, would have been dismissed under Justice Alito's reasoning in *Hobby Lobby*.

<sup>113</sup> Anders & Saxe, *supra* note 106, at 674.

<sup>114</sup> S. 815, 113th Cong. §§ 3(a)(5)(A), 6 (2013); H.R. 1755, 113th Cong. §§ 3(a)(4)(A), 6 (2013).

<sup>115</sup> James D. Nelson, *Incarceration, Accommodation, and Strict Scrutiny*, 95 VA. L. REV. 2053, 2071 (2009).

<sup>116</sup> Michael K. Curtis, *A Unique Religious Exemption from Antidiscrimination Laws in the Case of Gays? Putting the Call for Exemptions for Those Who Discriminate Against Married or Marrying Gays in Context*, 47 WAKE FOREST L. REV. 173, 206

The Supreme Court “has not provided clear guidance on what constitutes a compelling interest,”<sup>117</sup> preferring instead to utilize “a kind of ‘know it when I see it approach.’”<sup>118</sup> The ad hoc nature of the Court’s compelling interest analysis has caused considerable consternation among the individual justices, with Justice Blackmun lamenting, “I have never been able to fully appreciate just what a ‘compelling state interest’ is.”<sup>119</sup> Scholars contend that the Court has only added to the confusion by utilizing inconsistent terminology in its decisions, having at times referred to the requisite interests as “interests of the highest order,” “overriding state interest[s],” and “unusually important interest[s].”<sup>120</sup> Perhaps not surprisingly, commentators have derided the compelling interest test as “rudderless”<sup>121</sup> and “unprincipled.”<sup>122</sup>

Notwithstanding this general uncertainty, the one area in which the Supreme Court’s compelling interest analysis has been relatively coherent is the Free Exercise Clause of the First Amendment. The Court has found a compelling government interest sufficient to justify burdening an individual’s religious exercise in only three situations: promoting racial equality in education, ensuring the efficient collection of tax revenue, and providing for the national defense.<sup>123</sup> In each case, “strong reasons of self-interest or prejudice threatened unmanageable numbers of false claims to exemption, and the laws at issue were essential to express constitutional norms or to national survival.”<sup>124</sup> Although ENDA’s enactment likely would have engendered an unworkable number of false ex-

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(2012); Sara A. Gelsinger, *Right to Exclude or Forced to Include? Creating a Better Balancing Test for Sexual Orientation Discrimination Cases*, 116 PENN ST. L. REV. 1155, 1167 (2012). *Contra* Gay Rights Coal. of Georgetown Univ. Law Ctr. v. Georgetown Univ., 536 A.2d 1, 31–38 (1987).

<sup>117</sup> Inimai M. Chettiar, *Contraceptive Coverage Laws: Eliminating Gender Discrimination or Infringing on Religious Liberties?*, 69 U. CHI. L. REV. 1867, 1888–89 (2002). See also Matthew D. Bunker et al., *Strict in Theory, but Feeble in Fact? First Amendment Strict Scrutiny and the Protection of Speech*, 16 COMM. L. & POL’Y 349, 364 (2011) (“Case law actually suggests there is no bright-line standard for resolving what a compelling state interest looks like—no definitive criterion, no operational definition.”).

<sup>118</sup> Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. REV. 917, 937 (1988).

<sup>119</sup> Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173, 188 (1979) (Blackmun, J., concurring). Justice Blackmun went on to assert that if the term “compelling state interest” means “‘convincingly controlling,’ or ‘incapable of being overcome’ upon any balancing process, then, of course, the test merely announces an inevitable result, and the [compelling state interest] test is no test at all.” *Id.*

<sup>120</sup> Lucien J. Dhooge, *The First Amendment and Disclosure Regulations: Compelled Speech or Corporate Opportunism?*, 51 AM. BUS. L.J. 599, 613 n.66 (2014).

<sup>121</sup> Bunker et al., *supra* note 117, at 365.

<sup>122</sup> Gottlieb, *supra* note 118, at 937. For a history of the compelling interest test, see generally, Stephen A. Siegel, *The Origin of the Compelling State Interest Test and Strict Scrutiny*, 48 AM. J. LEGAL HIST. 355 (2006) (noting that the compelling interest test has its origins in First Amendment litigation dating from the late 1950s and early 1960s).

<sup>123</sup> Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 226 (1994).

<sup>124</sup> *Id.*

emption claims given that anti-LGBT prejudice continues to be rampant in the United States,<sup>125</sup> the Supreme Court has never found LGBT-related discrimination to be unconstitutional,<sup>126</sup> nor can the eradication of such discrimination be deemed imperative for the nation's survival. The Court's free exercise jurisprudence, therefore, indicates that ENDA would have been vulnerable to a RFRA challenge given that it could not be said to further a compelling government interest.

Indeed, the lone free exercise case to find a compelling government interest in eliminating private discrimination confirms that otherwise secular, for-profit employers would have been permitted to discriminate against LGBT persons consistent with RFRA notwithstanding ENDA's enactment.<sup>127</sup> In *Bob Jones University v. United States*, two private schools brought suit against the Internal Revenue Service ("IRS") after their applications for tax-exempt status were denied on account of their racially discriminatory admissions policies.<sup>128</sup> The schools argued that the policies were motivated by sincerely held religious beliefs such that the IRS's actions violated their free exercise rights.<sup>129</sup> The Supreme Court, however, found that the government's interest in promoting racial equality was sufficiently compelling to justify burdening the schools' religious liberty, noting that "over the past century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education."<sup>130</sup>

Chief Justice Burger, writing for the majority, then proceeded to elaborate upon each of the three branches' efforts to combat racial inequality. With respect to the federal judiciary, the Court observed that "an unbroken line of cases following *Brown v. Board of Education* establishes beyond doubt this Court's view that racial discrimination in education violates a most fundamental national public policy, as well as rights of individuals."<sup>131</sup> In regard to Congress, the Chief Justice found that Titles

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<sup>125</sup> SARAH MCBRIDE ET AL., CTR. FOR AM. PROGRESS, WE THE PEOPLE: WHY CONGRESS AND U.S. STATES MUST PASS COMPREHENSIVE LGBT NONDISCRIMINATION PROTECTIONS (2014), <https://www.americanprogress.org/issues/lgbt/report/2014/12/10/102804/we-the-people/>. See also S. REP. NO. 113-105, at 14-18 (2013) (referencing various studies conducted between 2008 and 2013 documenting instances of sexual orientation or gender identity discrimination).

<sup>126</sup> See Martha A. Field, *Compensated Surrogacy*, 89 WASH. L. REV. 1155, 1181-82 (2014) (noting that unlike discrimination on the basis of race, religion, or gender, the Supreme Court has not held that "discrimination according to sexual orientation . . . violates the Equal Protection clause").

<sup>127</sup> *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). See also *Swanner v. Anchorage Equal Rights Comm'n*, 513 U.S. 979, 981 (1994) (Thomas, J., dissenting) ("Our decision in *Bob Jones Univ. v. United States* . . . is instructive in the context of asserted governmental interests in preventing private 'discrimination.'").

<sup>128</sup> *Bob Jones*, 461 U.S. at 579.

<sup>129</sup> *Id.* at 602-03.

<sup>130</sup> *Id.* at 593, 604.

<sup>131</sup> *Id.* at 593.

IV and VI of the Civil Rights Act of 1964 confirmed that racial discrimination in education violates a critical public policy.<sup>132</sup> The Court went on to acknowledge that “other sections of [the Civil Rights Act], and numerous [legislative] enactments since then, testify to the public policy against racial discrimination” not just in education but all areas of civil society.<sup>133</sup> Finally, the Chief Justice noted that the executive branch had consistently placed its support behind the eradication of racial discrimination for more than three decades, having endorsed the concept of racial equality several years before the Supreme Court issued its ruling in *Brown* and more than a decade before Congress passed the Civil Rights Act.<sup>134</sup>

Conversely, there is no firm national policy against sexual orientation or gender identity discrimination, such that the government’s interest in eliminating LGBT-related employment discrimination ostensibly does not qualify as compelling.<sup>135</sup> The Supreme Court has not recognized LGBT persons as a suspect or quasi-suspect class for equal protection purposes, thus laws discriminating on the basis of sexual orientation or gender identity are generally upheld on rational basis review.<sup>136</sup> Congress, moreover, has not passed legislation prohibiting LGBT-related discrimination in housing, employment, education, public accommodations, federal programs, financial transactions, or jury service, even though bills seeking to secure one or more of these protections have been introduced in every session of Congress since 1974.<sup>137</sup> Finally, whereas

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<sup>132</sup> *Id.* at 594.

<sup>133</sup> *Id.* (citing the Voting Rights Act of 1965, Title VIII of the Civil Rights Act of 1968, the Emergency School Aid Act of 1972, and the Emergency School Aid Act of 1978).

<sup>134</sup> *Id.* at 594–95.

<sup>135</sup> See Kristin B. Gerdy, *The Irresistible Force Meets the Immovable Object: When Antidiscrimination Standards and Religious Belief Collide in ABA-Accredited Law Schools*, 85 OR. L. REV. 943, 989 (2006) (“[A]n interest in eliminating discrimination based on sexual orientation and homosexual conduct has not yet reached the compelling level that the elimination of racial discrimination had reached at the time of the Bob Jones University decision.”).

<sup>136</sup> See Alex Reed, *Pro-Business or Anti-Gay? Disguising LGBT Animus as Economic Legislation*, 9 STAN. J. C.R. & C.L. 153, 158 (2013) (noting the Court has demonstrated a willingness to apply a more searching form of rational basis review to strike down laws discriminating against LGBT persons where there is evidence the laws were motivated by anti-LGBT animus). See also *Swanner v. Anchorage Equal Rights Comm’n*, 513 U.S. 979, 981 (1994) (Thomas, J., dissenting) (asserting there “is surely no ‘firm national policy’ against marital status discrimination in housing decisions” given that “marital status classifications have never been accorded any heightened scrutiny under the Equal Protection Clause”); *Anders & Saxe*, *supra* note 106, at 671 (“Because sexual orientation, marital status, disability, and other newly protected classes currently do not receive the same level of judicial scrutiny as do race and sex, it may be more difficult to persuade all courts that the governmental interest in preventing discrimination on those grounds is compelling.”).

<sup>137</sup> Chai R. Feldblum, *The Federal Gay Rights Bill: From Bella to ENDA*, in *CREATING CHANGE: SEXUALITY, PUBLIC POLICY, AND CIVIL RIGHTS* 149–50 (John D’Emilio, William B. Turner & Urvashi Vaid eds., 2000); Reed, *supra* note 17, at

the executive branch has demonstrated a commitment to combating LGBT-related discrimination under certain presidents,<sup>138</sup> other presidents have sought to establish an explicit right to discriminate against LGBT Americans.<sup>139</sup> Thus, although each of the three branches of the federal government has taken steps to protect LGBT persons against certain forms of discrimination, the absence of a firm national commitment to LGBT equality in all areas of civil society suggests that eliminating discrimination on the basis of sexual orientation and gender identity does not constitute a compelling government interest.<sup>140</sup>

Indeed, on two separate occasions the Supreme Court has declined to recognize the eradication of sexual orientation discrimination as a compelling government interest.<sup>141</sup> In each case, the Court held that the defendant organizations' rights of free speech and expressive association trumped the homosexual plaintiffs' right of access under state public accommodations laws without explicitly holding that the state's interest in combating sexual orientation discrimination did not qualify as compelling.<sup>142</sup> The Court's opacity in this area has engendered extensive scholarly criticism, with one commentator observing that "[i]t was almost as if an earlier draft of [the Supreme Court's decision in *Boy Scouts of America v. Dale*] had stated the government's interest in this case was not compelling, but this sentence was [accidentally omitted from] the

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837–38. Congress, however, has acted to permit openly gay, lesbian, and bisexual persons to serve in the U.S. military and has also enacted LGBT-inclusive hate crimes legislation. Don't Ask, Don't Tell Repeal Act, Pub. L. No. 111-321, 124 Stat. 3515 (2010); Matthew Shepard & James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, 123 Stat. 2835 (2009) (codified as amended in scattered sections of 18, 28, and 42 U.S.C.).

<sup>138</sup> See Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014) (prohibiting gender identity-based employment discrimination within the federal government and barring federal contractors from engaging in any form of LGBT-related employment discrimination); Exec. Order No. 13,087, 63 Fed. Reg. 30,097 (May 28, 1998) (prohibiting sexual orientation-based employment discrimination within the federal government).

<sup>139</sup> See Exec. Order No. 13,279, 67 Fed. Reg. 77,141 (Dec. 12, 2002) (allowing religious organizations to discriminate on the basis of religion while remaining eligible to receive federal contracts). See also Editorial, *Using Tax Dollars for Churches*, N.Y. TIMES, Dec. 30, 2002, at A14 (contending that President George W. Bush's December 12, 2002 executive order permits religious organizations receiving federal contracts, "[to] refuse to hire gay men and lesbians").

<sup>140</sup> See *Swanner*, 513 U.S. at 981 (Thomas, J., dissenting) (noting that the Supreme Court, in *Bob Jones University v. United States*, determined that the government has a compelling interest in eradicating racial discrimination in education "only because [the Court] had found that 'over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination in public education'").

<sup>141</sup> *Boy Scouts of Am. v. Dale*, 530 U.S. 640 (2000); *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston, Inc.*, 515 U.S. 557 (1995).

<sup>142</sup> *Dale*, 530 U.S. at 659; *Hurley*, 515 U.S. at 581.

final version.”<sup>143</sup> This uncertainty has only increased in the wake of *Hobby Lobby*.

### 1. Hobby Lobby

In *Hobby Lobby*, the Supreme Court signaled that it continues to perceive LGBT-related discrimination as less pernicious than other forms of discrimination, the eradication of which has been deemed compelling. Justice Alito, seeking to emphasize the ostensibly limited scope of the majority’s holding, stressed that “our decision in these cases is concerned solely with the contraceptive mandate.”<sup>144</sup> In her dissent, however, Justice Ginsburg rejected the notion that the ruling could be limited to the ACA and predicted that commercial employers would seek to obtain RFRA-based exemptions from a wide variety of civil rights laws.<sup>145</sup> Specifically, Justice Ginsburg argued that *Hobby Lobby* stands to permit instances of race and sexual orientation discrimination in public accommodations as well as instances of sex discrimination in employment so long as otherwise secular, for-profit corporations are careful to couch their bigotry in terms of religion.<sup>146</sup>

Justice Alito responded to these allegations by stating, “[t]he principal dissent raises the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as religious practice to escape legal sanction,” yet “[o]ur decision today provides no such shield.”<sup>147</sup> He then declared that “[t]he government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.”<sup>148</sup> Thus, by not responding to Justice Ginsburg’s comments regarding sexual orientation discrimination, the Court once again declined to address whether the advancement of LGBT equality constitutes a compelling government interest.

A number of scholars have suggested that Justice Alito declined to address sexual orientation discrimination in *Hobby Lobby* so that the matter would remain unresolved and facilitate future RFRA challenges to LGBT-related civil rights legislation. Kent Greenfield, for example,

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<sup>143</sup> Neal Troum, *Expressive Association and the Right to Exclude: Reading Between the Lines in Boy Scouts of America v. Dale*, 35 CREIGHTON L. REV. 641, 686 (2002). See also Ivan E. Bodensteiner, *Review of David E. Bernstein’s You Can’t Say That!—The Growing Threat to Civil Liberties from Antidiscrimination Laws*, 31 J.C. & U.L. 437, 438 n.6 (2005) (recognizing that the Supreme Court “apparently conclud[ed] that New Jersey’s interest in banning discrimination by the Boy Scouts based on sexual orientation is not compelling”).

<sup>144</sup> *Hobby Lobby*, 134 S. Ct. at 2783.

<sup>145</sup> *Id.* at 2804–05 (Ginsburg, J., dissenting).

<sup>146</sup> See *id.* (inquiring if RFRA would permit discrimination on these bases “[a]nd if not, how does the Court divine which religious beliefs are worthy of accommodation, and which are not”).

<sup>147</sup> *Id.* at 2783.

<sup>148</sup> *Id.*



believes that Justice Alito sought to downplay the true breadth of the *Hobby Lobby* ruling by emphasizing the decision's supposed narrowness while at the same time laying the foundation for significantly broader RFRA rulings in the coming years and decades.<sup>149</sup> Greenfield contends that *Hobby Lobby's* silence regarding discrimination on the basis of sex or sexual orientation represents a “pregnant negative, the implication of which is that [Justice Alito] doesn't want to imply that [RFRA challenges to laws banning discrimination on the basis of sex or sexual orientation] would fail.”<sup>150</sup> Greenfield asserts that “[y]ou can't write that paragraph about race in answer to [Justice] Ginsburg's dissent about race and sex and sexual orientation discrimination and it not occur to you that you're leaving the others out. [Justice Alito] did that on purpose.”<sup>151</sup>

Similarly, Elizabeth Deutsch has noted that while reasonable persons might conclude that “Justice Alito could not possibly have listed every claim that *Hobby Lobby* doesn't sanction . . . so that his failure to mention other forms of discrimination [besides race] . . . might mean nothing, . . . the majority's failure to name sexual orientation or gender identity discrimination might well not be an entirely accidental omission” either. This failure suggests that Justice Alito meant to imply a distinction between race discrimination and sexual orientation and gender identity discrimination.<sup>152</sup> The most pointed criticism has come from Carl Esbeck, who faulted Justice Alito for “choos[ing] to talk about race instead of the 800-pound gorilla in the room: LGBT rights,” thereby providing continued uncertainty as to whether the elimination of LGBT-related discrimination qualifies as a compelling government interest.<sup>153</sup>

## 2. ENDA

Although some commentators have suggested that ENDA's enactment would have been sufficient by itself to establish LGBT equality as a compelling government interest,<sup>154</sup> employers would have been able to

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<sup>149</sup> Pema Levy, *Does the Hobby Lobby Decision Threaten Gay Rights?*, NEWSWEEK (July 9, 2014), <http://www.newsweek.com/does-hobby-lobby-decision-threaten-gay-rights-258098>.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> Jos Truit, *hat Does Hobby Lobby Mean for Employment Discrimination?* FEMINISTING (July 3, 2014), <http://feministing.com/2014/07/03/what-does-hobby-lobby-mean-for-lgbt-employment-discrimination/>.

<sup>153</sup> Claire Zillman, *Hobby Lobby Supreme Court Ruling: Paving the Way for Gay Rights Losses?*, FORTUNE (June 30, 2014), <http://fortune.com/2014/06/30/hobby-lobby-religious-freedom-corporations/>. See also Josh Gerstein & David Nather, *Hobby Lobby decision: 5 takeaways*, POLITICO (June 30, 2014), <http://www.politico.com/story/2014/06/hobby-lobby-supreme-court-decision-5-takeaways-108467.html> (noting that LGBT advocates “saw Alito's silence as [ominously] deliberate”).

<sup>154</sup> See Recent Proposed Legislation, *Employment Discrimination—Congress Considers Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation and Gender Identity—Employment Nondiscrimination Act of 2009*, 123 HARV. L. REV. 1803, 1810 (2010) (contending that “if it becomes law, ENDA should weigh in favor of

cite the law's various exemptions and substantive concessions as proof that Congress was prepared to tolerate a significant amount of LGBT-related discrimination post-ENDA, so that the law could not be said to further a compelling government interest. The Supreme Court has held that "a law cannot be regarded as protecting an interest 'of the highest order' [i.e., a compelling interest] . . . when it leaves appreciable damage to that supposedly vital interest unprotected."<sup>155</sup> Thus, the inclusion of an extensive exemption regime within a particular statute indicates that the interest underlying that law cannot be considered compelling.<sup>156</sup> Similarly, a statute providing considerably weaker substantive protections than comparable laws regulating analogous activity suggests that the interest furthered by that law does not qualify as compelling.<sup>157</sup> Because ENDA would have afforded LGBT persons relatively modest legal protections compared to the more robust provisions of Title VII, while providing a blanket exemption to religious organizations unprecedented under federal law, the EEOC would not have been able to rely solely on ENDA's enactment as proof that LGBT equality constitutes a compelling government interest.

The protections afforded by Title VII are far more robust than those that would have been available under ENDA. First, Title VII allows plaintiffs to contest intentional discrimination on a disparate treatment theory and inadvertent discrimination on a disparate impact theory.<sup>158</sup> ENDA, in contrast, would have permitted only disparate treatment claims such that facially neutral employment practices having a disproportionately adverse effect on LGBT persons would not have been actionable.<sup>159</sup> Second, Title VII permits employers to adopt voluntary affirmative action plans for the purpose of eliminating manifest imbalances in traditionally segregated job categories.<sup>160</sup> ENDA, on the other hand, would have prohibited employers from adopting quotas or granting preferential treatment on the basis of sexual orientation or gender identity, even if LGBT persons were significantly underrepre-

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finding that sexual orientation and gender identity are suspect classifications" and that the elimination of LGBT-related discrimination represents a compelling government interest).

<sup>155</sup> *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 547 (1993).

<sup>156</sup> *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 433–34 (2006). *See also* Brief for Hobby Lobby, *supra* note 54, at 48–53 ("These numerous exceptions belie the government's claim that the mandate is strictly necessary to further compelling interests in public health, gender equality, or anything else.").

<sup>157</sup> *See Lukumi*, 508 U.S. at 546–547 (holding that when government restricts only some forms of conduct "and fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling").

<sup>158</sup> *Ricci v. DeStefano*, 557 U.S. 557, 577–78 (2009).

<sup>159</sup> S. 815, 113th Cong. § 4(g) (2013); H.R. 1755, 113th Cong. § 4(g) (2013).

<sup>160</sup> *United Steelworkers of Am. v. Weber*, 443 U.S. 193, 208–09 (1979).

sented in a particular workforce.<sup>161</sup> Third, Title VII authorizes the EEOC to collect data regarding the race, ethnicity, and gender composition of employers' workforces<sup>162</sup> so that the Commission may identify and investigate significant statistical disparities as possible Title VII violations.<sup>163</sup> ENDA, conversely, would have ensured that employers could not be forced to provide data to the EEOC regarding their workers' sexual orientation or gender identity,<sup>164</sup> thereby undermining the Commission's ability to supplement private enforcement proceedings through targeted administrative action.

Besides conferring weaker substantive protections than Title VII, ENDA would have granted religious organizations a categorical right to discriminate. Whereas Title VII contains a relatively narrow religious exemption permitting faith-based organizations to discriminate on religious grounds while requiring that they refrain from discriminating on the basis of race, color, sex, or national origin, ENDA's religious exemption stood to be absolute: "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."<sup>165</sup> Consequently, ENDA would have permitted religious organizations to discriminate against LGBT individuals without having to justify the discrimination on religious precepts.<sup>166</sup> The sheer breadth of the exemption led LGBT advocacy groups opposing ENDA to declare, "[o]ur ask is a simple one: [d]o not give religiously affiliated employers a license to discriminate against LGBT people when they have no such right to discriminate based on race, sex, national origin, age, disability, or genetic information."<sup>167</sup>

LGBT plaintiffs, therefore, would not have been able to rely on ENDA's enactment to show that the elimination of LGBT-based employment discrimination constituted a compelling government interest.

### 3. The Portman Amendment

Even assuming that ENDA's enactment otherwise would have been sufficient to establish LGBT equality as a compelling government interest, the Portman Amendment would have ensured that ENDA remained vulnerable to a RFRA challenge. The Portman Amendment's substantive

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<sup>161</sup> S. 815, 113th Cong. § 4(f) (2013); H.R. 1755, 113th Cong. § 4(f) (2013).

<sup>162</sup> EEOC, Standard Form 100, Rev. Jan. 2006, Employer Information Report EEO-1: Instruction Booklet (2006), <http://www.eeoc.gov/employers/eeo1survey/index.cfm> (follow PDF version of "EEO-1 Instruction Booklet, with Sample Form" hyperlink).

<sup>163</sup> EEOC, EEO-1 Frequently Asked Questions and Answers, <http://www.eeoc.gov/employers/eeo1survey/faq.cfm> (last visited Jan. 17, 2015).

<sup>164</sup> S. 815, 113th Cong. § 9 (2013); H.R. 1755, 113th Cong. § 9 (2013).

<sup>165</sup> S. 815, 113th Cong. § 6(a) (2013); H.R. 1755, 113th Cong. § 6 (2013).

<sup>166</sup> Julie Dabrowski, *The Exception that Doesn't Prove the Rule: Why Congress Should Narrow ENDA's Religious Exemption to Protect the Rights of LGBT Employees*, 63 AM. U. L. REV. 1957, 1971-72 (2014).

<sup>167</sup> Joint Press Release, *supra* note 93.

provisions were first proposed in a September 2010 whitepaper<sup>168</sup> co-authored by the president of the Institutional Religious Freedom Alliance (“IRFA”)<sup>169</sup> and the senior legal counsel for the Alliance Defense Fund (“ADF”).<sup>170</sup> The whitepaper’s authors observed that the Employment Non-Discrimination Act of 2009 was likely to become law now that the Democrats controlled both chambers of Congress, as well as the White House, such that there was little hope of defeating ENDA outright.<sup>171</sup> The authors, therefore, sought to identify areas in which the bill could be amended to provide additional religious protections while being careful to note that “nothing herein should be construed as an endorsement of ENDA by the authors or the organizations with which they are associated.”<sup>172</sup>

The whitepaper conceded that the religious exemption found in Title VII and incorporated by reference into ENDA “has been quite broadly construed by the courts” such that if “the courts and regulators continue to interpret the exemption broadly to include faith-based nonprofits . . . as well as houses of worship and denominational entities . . . then the current ENDA religious exemption . . . is a strong one.”<sup>173</sup> The paper, nevertheless, identified two areas of concern vis-à-vis ENDA’s religious protections:

The first might be called the “*Bob Jones*” issue: the creation of a compelling governmental interest that is held to overbalance religious freedom claims. With regard to ENDA the concern is the possibility that a court, notwithstanding ENDA’s religious exemption, would regard the enactment of ENDA to have created a compel-

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<sup>168</sup> Steven H. Aden & Stanley W. Carlson-Thies, *Catch or Release? The Employment Non-Discrimination Act’s Exemption for Religious Organizations*, 11 ENGAGE 4 (2010) [hereinafter Whitepaper].

<sup>169</sup> IRFA is opposed to treating gender identity-based employment discrimination as a form of sex discrimination actionable under Title VII, believes that anti-LGBT religious organizations should be eligible to receive federal grants for the purpose of working with homeless LGBT youth, and opposes any legislation explicitly prohibiting LGBT-based discrimination. Institutional Religious Freedom Alliance, *The 114th Congress and Institutional Religious Freedom*, <http://www.irfalliance.org/the-114th-congress-and-institutional-religious-freedom/> (last visited Jan. 28, 2015).

<sup>170</sup> ADF co-authored Arizona’s Senate Bill 1062, the first state-level RFRA bill in the nation to be perceived as condoning LGBT-related discrimination. Michael Paulson & Fernanda Santos, *Religious Right in Arizona Cheers Bill Allowing Businesses to Refuse to Serve Gays*, N.Y. TIMES, Feb. 22, 2014, at A1. ADF also filed an amicus brief in support of the Texas statute criminalizing same-sex sodomy in *Lawrence v. Texas*, defended California’s same-sex marriage ban in *Hollingsworth v. Perry*, opposed LGBT-inclusive anti-bullying initiatives in the nation’s public school systems, and lobbied against the Boy Scouts of America’s decision to permit openly gay scouts. Equality Matters, *Meet Alliance Defending Freedom, Fox’s Favorite Anti-LGBT Legal Organization*, Dec. 4, 2013, <http://equalitymatters.org/blog/201312040001>.

<sup>171</sup> Whitepaper, *supra* note 168, at 4.

<sup>172</sup> *Id.* at 4 n.4.

<sup>173</sup> *Id.* at 5–6.

ling governmental interest in suppressing certain forms of employment discrimination, undermining ENDA's supposed acknowledgment of the freedom for religious organizations to engage in those forms of employment decisionmaking. [I]n the current environment of heightened [judicial] activism, some may say that by adopting ENDA Congress has implicitly announced that the federal government has a "compelling interest" *not* to accommodate the employment practices of religious organizations even though compliance with ENDA would substantially burden their religious exercise.

This problem might be addressed by adding a statement in the "purposes" section of ENDA that announces the congressional intention not to inadvertently undermine religious freedom in the course of enhancing employment nondiscrimination provisions. Using language like that in RFRA, the statement might read that one of the purposes [of ENDA] is "to strike a sensible balance between employment nondiscrimination requirements and religious freedom."

The second area of concern about how practically efficacious the religious exemption might be in our current era of [judicial] activism might be labeled the "*Boy Scouts*" problem: the courts hold that some action is constitutionally protected but governmental entities retaliate against organizations that engage in that action by withdrawing from them various benefits. In response to [the Supreme Court's decision in *Boy Scouts of America v. Dale* wherein the Court held that the Boy Scouts' First Amendment right of expressive association permitted the organization to exclude open homosexuals from their membership notwithstanding the existence of LGBT-inclusive state public accommodations laws to the contrary], state and municipal governments have retaliated against the Boy Scouts, refusing the organization access to public facilities and revoking other privileges.

New ENDA language could provide that religious organizations are not to be subject to retaliation by governmental entities, such as the loss of licenses, permits, grants, tax-exempt status, etc., on the grounds that the religious organization is entitled to the religious exemption or because it has utilized the exemption and engaged in otherwise prohibited employment decisions. A new clause could be added to the present Religious Exemption section, such as: "A religious employer's ex-

emption from this Act shall not result in any action by any federal, state, or local government agency, which receives federal funds, to penalize or withhold licenses, permits, grants, tax-exempt status, or any other benefits from that employer, or prohibit the employer's participation in programs sponsored by that federal, state, or local government agency."<sup>174</sup>

Senator Portman sought to address both the *Bob Jones* and *Boy Scouts* issues in his amendment. First, the Portman Amendment sought to guard against the possibility that federal courts might interpret ENDA's enactment as establishing a compelling government interest in LGBT equality sufficient to overcome religious organizations' statutorily-conferred right to discriminate. The amendment addressed this issue by adding a statement to the "purposes" section of the bill, noting that one of ENDA's objectives is "to reinforce the Nation's commitment to fairness and equal opportunity in the workplace consistent with the fundamental right of religious freedom."<sup>175</sup> Second, the Portman Amendment sought to ensure that government agencies would not be permitted to retaliate against religious organizations exempt from ENDA's nondiscrimination mandate. The amendment addressed this issue by incorporating, almost verbatim, the model language proposed in the September 2010 whitepaper.<sup>176</sup>

IRFA subsequently hailed the Portman Amendment as a victory for religious liberty.<sup>177</sup> The organization observed that "[a]ctivists (the ACLU, the Secular Coalition, and others) had been pressing the Senate to treat sexual orientation and gender identity the same as race, age, and sex in the employment context, [which would have] drastically narrow[ed] the ENDA bill's religious organization exemption."<sup>178</sup> Instead, IRFA noted, the Senate actually voted to strengthen ENDA's religious protections by adopting the Portman Amendment. According to IRFA, the revised "purposes" section of the bill established that "in protecting gay rights, Congress is not intending to create a compelling government interest that should trump religious freedom."<sup>179</sup>

Separately, the anti-retaliation provision ostensibly confirmed that the government's interest in eliminating LGBT-related discrimination is less significant than its interest in eradicating race discrimination as evidenced by the fact the government, pursuant to *Bob Jones University v. United States*, may withhold benefits from organizations engaging in

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<sup>174</sup> *Id.* at 6 n.42, 50.

<sup>175</sup> 159 CONG. REC. S7880 (2013).

<sup>176</sup> 159 CONG. REC. S7881 (2013).

<sup>177</sup> Institutional Religious Freedom Alliance, *Vital FBO Protections Amended into Senate ENDA Bill*, <http://www.irfalliance.org/vital-fbo-protections-amended-into-senate-bill/> (last visited Jan. 29, 2015).

<sup>178</sup> *Id.*

<sup>179</sup> *Id.*

race discrimination whereas organizations discriminating on the basis of sexual orientation or gender identity would have continued to be eligible for government benefits under ENDA.<sup>180</sup> Collectively, these two provisions “ma[d]e it clear that LGBT rights are not the same as race, sex, and national origin discrimination claims,” a fact that stood to be significant “not only for religious employers exempt from ENDA but also for [otherwise secular] organizations that might want to make a [RFRA] claim.”<sup>181</sup> The Portman Amendment, therefore, would have ensured that ENDA remained vulnerable to a RFRA challenge even if the bill’s enactment might otherwise have been found to establish LGBT equality as a compelling government interest.

#### 4. Title VII

Ironically, by the time Congress is finally prepared to enact ENDA, there likely will no longer be a need for LGBT-oriented employment legislation. Courts<sup>182</sup> and the EEOC<sup>183</sup> are increasingly likely to regard LGBT-related employment discrimination as actionable gender discrimination under Title VII,<sup>184</sup> with the protections afforded by Title VII being far more robust than those available under ENDA.<sup>185</sup> The Employment Non-Discrimination Act’s relegation to legislative purgatory, therefore, constitutes an implicit victory for LGBT equality by allowing Title VII to continue on its LGBT-inclusive evolution.

The EEOC, in particular, has identified various evidentiary routes by which LGBT persons may state a cognizable claim of sex discrimination. With regard to sexual orientation-based employment discrimination, for example, the EEOC has stated that

[A]llegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex. An employee could show that the sexual orientation discrimination he or she experienced was sex discrimination [1] because it involved treatment that would not have occurred but for the individual’s sex; [2] because it was based on the sex of the person(s) the individual associates with; and/or [3] because it was premised on the fundamental sex stereotype, norm, or ex-

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<sup>180</sup> *Id.*

<sup>181</sup> *Id.*

<sup>182</sup> *E.g.*, Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011); Kastl v. Maricopa Cty. Comm. Coll. Dist., 325 Fed. Appx. 492 (9th Cir. 2009); Prowel v. Wise Business Forms, Inc., 579 F.3d 285 (3d Cir. 2009); Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061 (9th Cir. 2002).

<sup>183</sup> Baldwin v. Foxx, No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 15, 2015); Macy v. Holder, No. 0120120821, 2012 WL 1435995 (E.E.O.C. Apr. 20, 2012).

<sup>184</sup> Reed, *supra* note 5, at 286–94.

<sup>185</sup> *Id.* at 294–314.

pectation that individuals should be attracted only to those of the opposite sex.<sup>186</sup>

The EEOC acknowledged that “[t]here may be other theories for establishing sexual orientation discrimination as sex discrimination, on which we express no opinion.”<sup>187</sup> To date, a number of federal courts have utilized the first<sup>188</sup> and third<sup>189</sup> theories to extend Title VII protections to lesbian, gay, and bisexual persons, whereas the associational theory of sex discrimination has yet to be embraced by the federal judiciary.

In the context of gender identity-based employment discrimination, moreover, the EEOC has taken the position that

When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment “related to the sex of the victim.” This is true regardless of whether an employer discriminates against an employee [1] because the individual has expressed his or her gender in a non-stereotypical fashion, [2] because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or [3] because the employer simply does not like that the person is identifying as a transgender person.<sup>190</sup>

The EEOC stressed that “[t]hese different formulations are not . . . different claims of discrimination . . . . Rather, they are simply different ways of describing sex discrimination.”<sup>191</sup> Within the past few years, numerous federal courts have relied on one or more of these theories to extend Title VII protections to transgender individuals.<sup>192</sup> Thus, between the EEOC and federal courts, LGBT persons are increasingly able to invoke the protections of Title VII to contest instances of LGBT-related employment discrimination, suggesting that ENDA will become moot before it becomes law.<sup>193</sup>

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<sup>186</sup> *Baldwin*, 2015 WL 4397641, at \*10.

<sup>187</sup> *Id.* at n.16.

<sup>188</sup> *E.g.*, *Hall v. BNSF Ry. Co.*, No. C13-2160, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014); *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212 (D. Or. 2002).

<sup>189</sup> *E.g.*, *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002); *Roadcloud v. City of Philadelphia*, No. 13-00777, 2014 WL 43759 (E.D. Pa. Jan. 6, 2014); *Centola v. Potter*, 183 F. Supp. 2d 403 (D. Mass. 2002).

<sup>190</sup> *Macy*, 2012 WL 1435995, at \*7.

<sup>191</sup> *Id.* at \*10.

<sup>192</sup> *E.g.*, *Brumby*, 663 F.3d 1312; *Kastl* 325 Fed. Appx. 492; *Smith*, 378 F.3d 566; *Hart v. Lew*, 973 F. Supp. 2d 561 (D. Md. 2013); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008); *Lopez v. River Oaks Imaging & Diagnostic Group*, 542 F. Supp. 2d 653 (S.D. Tex. 2008).

<sup>193</sup> *Reed*, *supra* note 5, at 286.



Title VII provides three distinct advantages relative to ENDA: Title VII is already the law of the land; Title VII permits disparate impact claims, voluntary affirmative action plans, and workforce data collection;<sup>194</sup> and, most importantly, Title VII stands to be impervious to a RFRA challenge as the elimination of gender discrimination ostensibly represents a compelling government interest. Indeed, just as the federal government's commitment to racial equality led the Supreme Court to recognize a compelling interest in the elimination of race discrimination,<sup>195</sup> so too numerous pronouncements of the Supreme Court and myriad executive orders and acts of Congress attest a firm national policy to prohibit gender discrimination. In regard to the federal judiciary, an established line of cases following *Frontiero v. Richardson*<sup>196</sup> reflect the Supreme Court's view that gender discrimination violates important national policy interests, as well as the rights of individuals.<sup>197</sup> With respect to the legislature, Congress' passage of the Equal Pay Act of 1963,<sup>198</sup> Title VII of the Civil Rights Act of 1964,<sup>199</sup> the Pregnancy Discrimination Act of 1978,<sup>200</sup> the Lilly Ledbetter Fair Pay Act of 2009,<sup>201</sup> and numerous other bills suggests a legislative determination that sex-based discrimination contravenes a significant national policy. Finally, in terms of the executive branch, a series of executive orders spanning more than four decades demonstrates the White House's steadfast commitment to combating gender discrimination in a manner consistent with established national policy interests.<sup>202</sup> Because actions taken by each of the three

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<sup>194</sup> *Id.* at 281.

<sup>195</sup> *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983).

<sup>196</sup> 411 U.S. 677 (1973) (holding that gender-based classifications are subject to heightened scrutiny under the Equal Protection clause).

<sup>197</sup> *See, e.g., J.E.B. v. Alabama*, 511 U.S. 127 (1994) (holding that peremptory challenges based on gender are unconstitutional); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (finding that discrimination based on a person's gender-nonconforming appearance or behavior constitutes actionable sex discrimination under Title VII); *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986) (concluding that economic injury is not required to state a cognizable sexual harassment claim). *But see, e.g., Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2006) (determining that each gender-based paycheck disparity is a separate discriminatory act subject to applicable limitations periods); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (holding that classifications based on pregnancy do not qualify as gender-based classifications warranting heightened scrutiny).

<sup>198</sup> Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d) (2012)).

<sup>199</sup> 42 U.S.C. §§ 2000e to 2000e-17 (2012).

<sup>200</sup> Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k) (2012)).

<sup>201</sup> Pub. L. No. 111-2, 123 Stat. 5 (codified at 42 U.S.C. § 2000e-5 (2012)).

<sup>202</sup> *See, e.g., Exec. Order No. 13,665*, 79 Fed. Reg. 20,749 (Apr. 8, 2014) (prohibiting federal contractors from retaliating against employees who choose to discuss their compensation with co-workers); *Exec. Order No. 13,160*, 65 Fed. Reg. 39,775 (June 23, 2000) (prohibiting sex-based discrimination in federally conducted education and training programs); *Exec. Order No. 12,336*, 46 Fed. Reg. 62,239 (Dec. 21, 1981) (establishing Task Force on Legal Equity for Women); *Exec. Order No. 12,259*, 46 Fed. Reg. 1,253 (Dec. 31, 1980) (prohibiting sex-based housing discrimination); *Exec. Order No. 11,478*, 34 Fed. Reg. 12,985 (Aug. 8, 1969) (prohibiting sex-based employment discrimination within the federal government); *Exec. Order No. 11,375*, 32 Fed. Reg. 14,303

branches of the federal government confirm the existence of a firm national policy to prohibit gender discrimination, the promotion of gender equality ostensibly represents a compelling government interest under the rationale of *Bob Jones University v. United States*.

The Supreme Court, moreover, has held that the elimination of gender discrimination constitutes a compelling government interest sufficient to justify the burdening of private organizations' freedom of association and expression under the First Amendment, such that the Court presumably would be inclined to extend this finding to private employers' religious exercise under RFRA. The issue confronting the Court in *Roberts v. United States Jaycees* was whether a state law prohibiting gender discrimination in public accommodations violated an all-male organization's associational freedoms by requiring that they admit women members.<sup>203</sup> The Court began by observing "[t]here can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire" for the "[f]reedom of association . . . plainly presupposes a freedom not to associate."<sup>204</sup> The Court recognized, however, that the right to associate for expressive purposes is not absolute and that "infringements on that right may be justified by regulations adopted to serve compelling state interests."<sup>205</sup> Because the law's goal of eliminating gender discrimination and assuring equal access to publicly available goods and services was found to further "compelling state interests of the highest order," the Supreme Court determined that the infringement of the organization's First Amendment associational freedoms was constitutionally permissible.<sup>206</sup>

If confronted with a RFRA challenge, courts perceiving LGBT-related employment discrimination as a form of gender discrimination actionable under Title VII would be able to cite *Jaycees* for the proposition that the government's interest in eliminating gender discrimination is sufficiently compelling to justify the burdening of anti-LGBT employers' religious exercise. Indeed, Inimai Chettiar has observed that "eradicating gender discrimination should be considered a compelling interest [in the free exercise and RFRA contexts] sufficient to overcome a religious liberty claim."<sup>207</sup> Similarly, Mary Anne Case has recognized that courts are likely to regard the promotion of gender equality as a compelling government interest for the purposes of RFRA.<sup>208</sup> Thus, unlike

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(Oct. 13, 1967) (prohibiting sex-based employment discrimination by federal contractors).

<sup>203</sup> 468 U.S. 609 (1984).

<sup>204</sup> *Id.* at 623.

<sup>205</sup> *Id.*

<sup>206</sup> *Id.* at 624.

<sup>207</sup> Chettiar, *supra* note 117, at 1892.

<sup>208</sup> Mary Anne Case, *Legal Protections for the "Personal Best" of Each Employee: Title VII's Prohibition on Sex Discrimination, the Legacy of Price Waterhouse v. Hopkins, and the Prospect of ENDA*, 66 STAN. L. REV. 1333, 1376-77 (2014).

ENDA, Title VII stands to be impervious to a RFRA challenge such that otherwise secular, for-profit employers must comply with Title VII's LGBT-inclusive ban on gender discrimination even if doing so will substantially burden their religious exercise.

#### CONCLUSION

Following the Supreme Court's ruling in *Burwell v. Hobby Lobby Stores, Inc.*, ENDA appears destined to become a legislative pariah—opposed by liberal legislators as long as it contains a robust religious exemption, yet certain to incite resistance from conservative lawmakers should the exemption in any way be narrowed. This apparent Catch-22 has not escaped the notice of ENDA's lead sponsor in the 113th Congress, Senator Jeff Merkley. Indeed, rather than reintroduce ENDA, Senator Merkley is sponsoring a comprehensive LGBT civil rights bill in the 114th Congress.<sup>209</sup> Known as the Equality Act, the legislation seeks to prohibit LGBT-related discrimination not only in employment but also in housing, credit, education, jury service, public accommodations, and federal programs.<sup>210</sup>

Senator Merkley has acknowledged that the Equality Act is unlikely to become law anytime in the foreseeable future, however, particularly now that Republicans control both chambers of Congress, but he believes that a comprehensive bill is appropriate given that there does not appear to be a way forward for ENDA.<sup>211</sup> The president of the nation's largest LGBT advocacy group expressed similar sentiments when asked about the Equality Act's prospects for passage: "I think in the coming months—and years—because this is going to take a long time . . . there will be ups and there will be downs . . . but it's important for all of us to have [a] bill that is ultimately what all citizens in this country deserve: Full federal equality under the law."<sup>212</sup>

Aspirational rhetoric aside, neither ENDA nor the Equality Act stands to become law anytime soon, such that the prevailing consensus among policy makers, advocates, and academics seems to be that continued susceptibility to discrimination in the short-run is the price LGBT Americans must pay to gain explicit, status-based protections in the long-run, whether via ENDA, the Equality Act, or some as yet unnamed piece of legislation. However, this approach fails to recognize that any stand-alone LGBT civil rights legislation would be vulnerable to widespread RFRA challenges post-*Hobby Lobby*. This article, therefore, re-

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<sup>209</sup> See S. 1858, 114th Cong. (2015); H.R. 3185, 114th Cong. (2015).

<sup>210</sup> *Id.*

<sup>211</sup> Katy Steinmetz, *A Comprehensive LGBT Nondiscrimination Bill is Coming*, TIME (Dec. 10, 2014), <http://time.com/3626346/lgbt-nondiscrimination-merkley-center-for-american-progress/>.

<sup>212</sup> Chris Johnson, *Merkley to Introduce Comprehensive LGBT Non-Discrimination Bill*, WASH. BLADE (Dec. 10, 2014), <http://www.washingtonblade.com/2014/12/10/merkley-lays-vision-comprehensive-lgbt-non-discrimination-bill/>.

jects the notion that *Hobby Lobby* constituted a significant setback for the LGBT community and instead contends that, by rendering ENDA politically untenable for the foreseeable future, *Hobby Lobby* actually stands to aid LGBT Americans in their decades' long quest to gain meaningful federal employment protections by allowing Title VII to continue on its LGBT-inclusive evolution.

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