MEMORANDUM

TO: **Senator Al Franken c/o Senate Committee on Health, Education, Labor and Pensions**
FROM: **Craig Parshall, Sr. V.P & General Counsel National Religious Broadcasters (NRB)**
DATE: **July 24, 2012**
RE: **Hearing on S. 811, June 12, 2012 "Equality at Work – the Employment Non-Discrimination Act (ENDA)" – Senator Franken Question for the Record to Craig Parshall**

Following my testimony on June 12, 2012, before the Senate "HELP" Committee regarding the above, Senator Al Franken submitted a written question to me, for the record. I appreciate Senator Franken's interest in my testimony, and I will attempt to address his question in this Memorandum. As Senator Franken's question actually consists of several queries, I have divided them into their logical components and have set them forth below in italics, and will address each of them.

> *In your testimony, you assert that the religious exemption in ENDA will require that courts will be forced to determine whether sexual orientation and gender identity claims are more like claims of sex discrimination or religious discrimination. This seems to ignore the fact that the legislative language of ENDA states that the "Act shall not apply to [entities] exempt from the religious discrimination provisions of title VII," which means that if an entity cannot be sued for religious discrimination under Title VII, it cannot be sued for sexual orientation or gender identity discrimination under ENDA.*

RESPONSE: In my testimony I pointed out that currently, Title VII law, as uniformly interpreted by the courts, does not exempt religious employers from discrimination based on "sex." This is so, regardless of the religious exemption in Title VII, which enables those employers to apply religious criteria regarding the "religion" of the employee, as courts have ruled that: "Title VII '*does not* confer upon religious organizations the right to make those same decisions on the basis of … sex …" *Id*., citing *Rayburn v. Gen'l Conf. of Seventh Day Adventists*, 772 F.2d 1164, 1166 (4th Cir. 1985). [1]

Recent court decisions have also expanded the reach of the meaning of discrimination based on "sex" to include adverse employment decisions based on the "gender-identity" of the employee. *Smith v. City of Salem, OH*, 378 F.3d 566 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *Rosa v. Park W. Bank & Trust Co*., 214 F.3d 213, 215-16 (1st Cir. 2000); *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011). Further, on April 20, 2012, the Equal Employment Opportunity Commission (EEOC) rendered its

[1] The sole exception is alleged sex discrimination in choosing or firing pastors, priests, rabbis, and other heads of religious organizations under the "ministerial exception." *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission et al.*, ___ U.S. ___, 132 S. Ct. 694, 710 (2012).

decision in *Macy v. Holder*, Appeal No. 0120120821, officially recognizing "gender identity" discrimination claims by "transgender" individuals to qualify as "sex" discrimination under Title VII. Added to these kinds of claims that can supersede the religious exemption of Title VII are also claims based on sexual orientation. See: *Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009): "Wise [the employer] cannot persuasively argue that because Prowel is homosexual, he is precluded from bringing a gender stereotyping claim" (the court submitting the claim of a homosexual for employment discrimination to a jury trial under existing Title VII law based on "sex" discrimination).

Thus, if ENDA intends to fully incorporate the existing religious exemption under Title VII, courts will invariably have to grapple with the fact that the language chosen appears to create an inherent *Catch-22*: religious employers are presumably exempted under ENDA from employee claims based on sexual orientation and gender identity, by utilizing the very religious exemption scheme under Title VII, which has in essence been held <u>not</u> to provide protection for religious employers against sexual orientation and gender identity claims under existing law.

The only way for a future court to extricate itself from this dilemma is to recognize that ENDA's religious exemption creates a statutory ambiguity (if not an anomaly), forcing the court to attempt to harmonize conflicting precedent and perhaps to decipher congressional intent, a journey that invariably involves imprecise, and sometimes damaging forms of judicial creativity.

The supporters of ENDA counter, as you have, Senator, by suggesting that ENDA's religious exemption is "much broader" than that in Title VII. This leads to your next point below, and my response.

> *In fact, the ENDA religious exemption is much broader than the exemption granted under Title VII, in which courts have historically conducted an inquiry that examines the religious nature of the institution, and whether their mission and teachings conflict with the requirements of the law. Even if one were to accept your reading of the religious exemption, can you explain why the court's inquiry into whether an entity were exempt from ENDA would be so different from the inquiries that they've been making for decades in enforcing Title VII?*

RESPONSE: In my testimony, I indicated that Title VII contains two basic components, both of which must be met in order for a religious organization to qualify for exemption: (1) The first has to do with the religious structure of the employer as a "religious corporation …" etc. (2) The second has to do with the employer's objections to the religion of the employee and the employer's decision to make an adverse employment decision based on that factor. I testified that, in my opinion, ENDA's religious exemption, by incorporating Title VII's religious exemption, has incorporated both (1) and (2), thus creating, at a minimum, a lack of critical clarity, if not dangerous ambiguity when applied to sexual orientation and gender identity claims.

In the same hearing, Samuel Bagenstos, Professor of Law, University of Michigan Law School, called as a witness in support of ENDA, indicated his agreement with my analysis of the two elements necessary for *any religious organization* to obtain an exemption under Title VII. However, Professor Bagenstos went on to disagree with my statement that ENDA's religious exemption incorporates both elements (1) and (2) of Title VII; he concluded, to the contrary, that ENDA's religious exemption only incorporates factor (1) relating to the religious identity of the employer. However, the sole basis for such an argument is an inference that this result is commanded by a fair reading of the language of ENDA's Section 6, which states that the Act would not apply to a religious "corporation …" etc. "that is exempt from the *religious discrimination provisions* of title VII …" But what are the "religious discrimination provisions of title VII?" They are both elements (1) and (2), as outlined in my testimony.

You have asked, Senator Franken, why I believe the court inquiries into Section 6 of ENDA would be "so different" from past judicial analysis of the religious exemption of Title VII. The answer to that, first, is that courts would be faced with the *Catch-22* that I mentioned above, deciding whether just factor (1) or both (1) and (2) are included in ENDA. Second, the courts would be faced with the fact that prior decisions (several of which are listed in this Memorandum) have already expanded the natural and reasonable reading of Title VII's prohibition against discrimination because of "sex" to now include discrimination on the basis of sexual orientation and gender identity – categories that, as a form of "sex" discrimination, the courts have uniformly ruled can be protected through legal claims which trump the religious exemption language of Title VII in all cases except for adverse employment actions involving a pastor, priest, rabbi or other similar religious leadership position.

Lastly, Title VII's religious exemption language is itself fraught with interpretative problems. Unfortunately, Congress "did not define what constitutes a religious organization – 'a religious corporation, association, educational institution, or society'" under Title VII. *Spencer v. World Vision, Inc*., 570 F. Supp. 2d 1279, 1283 (W.D. Wash. 2008). As a result, "courts conduct a factual inquiry and weigh '[a]ll significant religious and secular characteristics …'" *Id*. (citations omitted). This has led to numerous decisions depriving religious employers of fundamental liberties: *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F. 2d 610 (9th Cir. 1988) (no exemption for a small, closely held manufacturing shop whose owner had a clearly Christian world view and wanted it to permeate the work place); *Fike v. United Methodist Children's Home of Virginia, Inc*., 547 F. Supp. 286 (E.D. Va. 1982) (A Methodist orphan's home dedicated to instilling in orphaned children Christian beliefs was held <u>not</u> to be qualified as a "religious corporation …" etc. when it sought to return to its original spiritual mission following a temporary period of more secular leadership); *EEOC v. Kamehameha School/Bishop Est*ate, 990 F.2d 458 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 439 (1993) (private Protestant religious school was denied Title VII religious exemption even though it had numerous religious characteristics and activities); *Pime v. Loyola University of Chicago*, 585 F. Supp. 435 (N.D. Ill. 1984) (Catholic college held not to be entitled to religious exemption relating to its preference for Jesuit professors over a Jewish professor), reversed on other grounds at 803 F.2d 351 (7th Cir. 1986) (where Judge Posner noted in his concurrence that, regarding the religious

exemption issue, "the statute itself does not answer it" and "the legislative history … is inconclusive" *Id*. at 357).

This sad parade of bad decisions has been reinforced recently by the EEOC, which filed its own action last month in *Equal Employment Opportunity Commission v. Voss Electric Company, d/b/a Voss Lighting*, U.S. District Court for the Northern District of Oklahoma, Case No. 12-CV-330-JHP-FHM. In the Complaint, page 2, paragraph 6. B., the EEOC alleges that "Voss Lighting generally considers itself and its employees to be Christian." Press reports indicate that the company was founded by a Christian man who wanted to incorporate faith-based principles in his workplace, and currently the website of the company spells out that Christian mission explicitly. However, because the company discussed religious subjects with a prospective employee during an employment interview, and the person was ultimately not hired, the EEOC is suing this company and asking the court for a permanent injunction against the company, enjoining it from carrying out its religious mission, and also asking the court to assess punitive damages against the company, a remedy that could well devastate its ability to continue.

In summary, the lack of precision in Title VII's own religious exemption language, the decisions by courts, and the EEOC elevating sexual orientation and gender identity rights and at the same time lowering the protection afforded to religious employers under Title VII, together with the interpretative dilemma created by ENDA's Section 6, which I have outlined above, all lead me to believe that ENDA would not offer adequate or constitutional protection for religious employers.