Supplemental Position Statement
of
National Religious Broadcasters
Regarding the Nondiscrimination Act of 2007 (ENDA)
H.R. 3685

October 16, 2007

National Religious Broadcasters ("NRB") is the nation's pre-eminent association representing the interests of Christian broadcasters and communicators. The largest percentage of our 1400 plus members are radio and television stations and networks, and those participating in religious broadcast-related activities.

In the past we expressed grave concerns about the effect of the Employment Non-Discrimination Act of 2007 ("ENDA") on Christian broadcasters, and its potential conflict with existing protections afforded our members under Federal Communications Commission ("FCC") regulations. [1] NRB and other like-minded groups had objected to the original religious exemption language in ENDA on the grounds that it insufficient, overly complex, confusing, and vague. NRB also noted that the complicated system of exemptions was also inherently contradictory. [2]

Further, the fact that ENDA creates special employment protections for "the actual or perceived sexual orientation" of employees (e.g. including homosexuality or bisexuality) makes it thoroughly objectionable from a policy standpoint. Such artificially invented protections do not spring from any historical or constitutional basis, are inconsistent with the best interests of America, will overly burden private employers, and will create an irreconcilable conflict with the moral values of people of faith who desire to integrate their spiritual values in their places of employment.

[1] Statement of National Religious Broadcasters Regarding the Nondiscrimination Act of 2007 (ENDA), September 14, 2007, Craig L. Parshall, Esq.
[2] Id., at page 3, n.5.

ENDA's General Religious Exemption: Implications for Broadcasters

The sponsors of ENDA have now changed the religious exemption scheme in the legislation. In addition, other textual changes have been made which will not be discussed at any length in this paper.[3]

Employment discrimination laws which fail to adequately provide for the exemption of faith-based hiring/promotion/firing decisions of religious employers violate the Free Exercise Clause of the First Amendment. [4]

The newest version of the religious exemption creates a "carve-out" in Section 6: "This Act shall not apply to a religious organization." In turn, "religious organization" is defined in Section 3. (a)(8).

The exemption for all religious groups *other than educational institutions* appears at 3(a)(8)(A) where it is defined as "a religious corporation, association, or society." This language closely tracks the language currently found in Title VII employment discrimination laws, where, at 42 U.S.C. § 2000e-1(a) it exempts any "religious corporation, association … or society …" regarding the employment of anyone who performs any of the activities of that enterprise. It is my opinion that courts would likely construe ENDA's general religious exemption in ways that correspond to the case law in Title VII religion cases.

Those cases illustrate that exemption from Title VII's prohibition against religious discrimination has been permitted for faith-based employment decisions in some, but not all, traditional non-profit religious organizations, and some, but not very many other types of religious employers. The courts have applied a list of some nine different criteria in a dizzying variety of outcomes. [5]

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[3] For instance, the inclusion of the bewildering reference to "gender identity" as a protected class in the original ENDA bill has been omitted from the current version.

[4] *Montrose Christian School Corp. v. Carver, Montrose Christian School Corp. v. Walsh,* 770 A. 2d 111 (Md. Ct. App. 2001).

[5] *Leboon v. Lancaster Jewish Community Center Association*, No. 05-2073 (3rd Cir. September 19, 2007) (Jewish Community Center qualified as a religious organization so that its firing of a Christian was non-actionable under Title VII); *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); *Hall v. Baptist Memorial Care Corp.*, 215 F. 3d 618 (6th Cir. 2000) (Baptist entity training students for health care had sufficiently religious overtones to qualify for exemption regarding its firing of a lesbian staffer who was a minister at a pro-

This has made it very difficult to predict which religious organizations, under Title VII, can make unfettered religious employment decisions; in the same way, ENDA will be interpreted by the courts with the same criteria and will create the same uncertainty. Unfortunately, if ENDA is passed, religious employers who maintain moral and spiritual objections to homosexuality and bisexuality will bear a disproportionate burden in trying to balance the requirements of law against their religious convictions.

Regarding Christian broadcasters, whose interests are represented by NRB, it is my opinion that the current general religious exemption in ENDA is a *functional equivalent* to the protections currently afforded by the Federal Communications Commission, even though ENDA's exemption is not a *linguistic equivalent*. Currently, the F.C.C. exempts "religious broadcasters" from EEO employment rules regarding religious discrimination, which it defines as "a licensee which is, or is closely affiliated with, a church, synagogue, or other religious entity, including a subsidiary of such an entity." [6]

Further, the F.C.C. evaluates religious qualification based on a case-by-case analysis, applying criteria, several of which are the same as those applied by the courts in Title VII religion cases (i.e. whether the entity operates as a non-profit, and whether the incorporating documents indicate a religious mission). [7]

ENDA's Educational Exemption

The current version of ENDA provides an exemption for religious schools that tracks the language of Title VII. It exempts a religious school if it is "in whole or substantial part" controlled, managed, owned, or supported by a religion, or religious corporation, society or association; also, a school may qualify if its "curriculum … is directed toward the propagation of a particular religion." Section 3 (a) (8) (B).

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homosexual church); *Feldstein v. Christian Science Monitor*, 555 F. Supp. 974 (D. Mass. 1983) (newspaper covering secular news but with close relationship with Christian Science Church allowed to discriminate on basis of religion); But see: *EEOC v. Townley Eng'g & Mfg. Co.*, 859 F. 2d 610 (9th Cir. 1988) (no exemption for manufacturing company whose owner had a clearly religious world view and wanted it to permeate the work place).

[6] *Review of the Commission's Broadcast and Cable Equal Employment Opportunity Rules and Policies*, 17 FCC Rcd. 24018 (2002) ("EEO Order"), at 24037 (par. 50).

[7] Id..

The problem is that under Title VII., the case-by-case approach used by the courts has yielded unfair results: a private Protestant school with religious classes and religious activities has been found not to qualify. See: note 5, *infra, EEOC v. Kamehameha School/Bishop Est*ate; also, despite the fact that it was founded by Jesuits, its charter requires its President to be a Jesuit, and more than one third of its trustees are Jesuits, Loyola University of Chicago was held not to be entitled to the general exemption, *Pime v. Loyola University of Chicago*, 585 F. Supp. 435 (N.D. Ill. 1984), but a BFOQ defense upheld, however, at 803 F. 2d 351 (7th Cir. 1986).

An even bigger problem is created by ENDA's invitation to secular courts to go wading into religious curriculum to determine whether or not it advances the religious views of the school. The First Amendment Establishment Clause prohibits "government entanglement in religious affairs," *Lemon v. Kurtzman*, 403 U.S. 602, 613 (1971), which the court in *Leboon v. Lancaster Jewish Community Center Association* [8] recently construed to mean that courts are not allowed under the First Amendment to analyze the difference between "Jewish culture" and Jewish religion; yet in other cases the courts have held that "it is appropriate to consider and weigh the religious and secular characteristics of the institution," *Hall v. Baptist Memorial Health Care Corp.*, *supra* at 215 F. 3d 624.

Lastly, the history of the Title VII exemption for religious institutions, upon which the exemption language of ENDA was based, reveals the confusion on the floor of Congress during debate regarding the purpose or effect of the educational institution exemption: *See Lancaster Jewish Community Center Association* (majority opinion noting one Congressman's comment that "if ever there was a legislative history which became confused in less than an hour, this is it …" with the majority disapproving of a different view contained in the case of *EEOC v. Townley Eng'g & Mfg. Co.* regarding that exemption, thus engendering a dissenting opinion in the *Lancaster Community Center* case which argues for the *Townley* approach). ENDA's use of the Title VII paradigm compounds confusion with more confusion.

[8] Citation at note 5 above.

Conclusion

ENDA is a bad bill from a broad policy standpoint and should be opposed.

Regarding the general religious exemption, it does follow Title VII, and would yield the same results for religious broadcasters as is found in current F.C.C. regulations; however, those exemptions are only minimal and certainly are far from generous.

Regarding the exemption for religious schools, ENDA follows a Title VII pattern that has yielded unjust results in those cases, invites an unconstitutional entanglement between secular courts and the religious educational institutions whose curricula they will be required to analyze, and uses a Title VII paradigm with a legislative history that is confusing. These flaws will create considerable uncertainty for religious schools, and as a direct result, will substantially burden them.

Respectfully submitted,

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