

# THE EMPLOYMENT NON-DISCRIMINATION ACT AFTER *HOBBY LOBBY*: STRIVING FOR PROGRESS—NOT PERFECTION

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## I. INTRODUCTION

Workplace discrimination based on sexual orientation and gender identity is pervasive in our society. In 2008, “the General Social Survey found that of the nationally representative sample of [lesbians and gays], 37 percent had experienced workplace harassment in the last five years, and 12 percent had lost a job because of their sexual orientation.”<sup>1</sup> In one of the largest surveys of transgender individuals, “90 percent of respondents . . . reported having experienced harassment or mistreatment at work, or had taken actions to avoid it, and 47 percent reported having been discriminated against in hiring, promotion, or job retention because of their gender identity.”<sup>2</sup>

Despite the pervasiveness of discrimination based on sexual orientation and gender identity, federal legislation that explicitly prohibits it does not exist. To combat sexual orientation and gender identity discrimination, the Employment Non-Discrimination Act<sup>3</sup> (ENDA) has been proposed. ENDA, if enacted, would explicitly prohibit discrimination based on “actual or perceived sexual orientation or gender

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1. Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 721 (2012).

2. *Id.*

3. Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. § 4(a)(1) (2013), available at <https://www.govtrack.us/congress/bills/113/s815/text/is> [hereinafter ENDA].

identity.”<sup>4</sup> On November 7, 2013, the Senate passed ENDA.<sup>5</sup> However, John Boehner, Speaker of the House, stated there was “no way” that ENDA would be voted on in 2014, asserting that it was “unnecessary and would provide the basis for frivolous lawsuits” because there are laws already in place to protect the lesbian, gay, bisexual, and transgender (LGBT) community<sup>6</sup> in the workplace.<sup>7</sup> As former House Speaker Boehner predicted, the House never voted on ENDA in 2014, and to date, the House has yet to vote on it.<sup>8</sup>

Unsurprisingly, Boehner was sharply criticized for his statements regarding ENDA.<sup>9</sup> He is correct, however, in his assertion that there are protections available for the LGBT community in the workplace. First, some states have already passed laws that explicitly protect the LGBT community from workplace discrimination.<sup>10</sup> Second, the LGBT community may find protection via Title VII using gender stereotypes as the basis of the claim.<sup>11</sup> Third, the Equal Employment Opportunity Commission (EEOC) has taken a clear stance that discrimination based on gender identity falls under sex discrimination for Title VII claims.<sup>12</sup>

4. *Id.*

5. Burgess Everett, *Senate Passes Gay Rights Bill in Historic Vote*, POLITICO (Nov. 8, 2013, 10:03 AM EST), <http://www.politico.com/story/2013/11/enda-vote-senate-99538.html>.

6. Daniel Reynolds, *John Boehner: “No Way” ENDA Will Pass This Year*, ADVOCATE.COM (Jan. 30, 2014 2:32 PM), <http://www.advocate.com/politics/politicians/2014/01/30/john-boehner-no-way-enda-will-pass-year>.

7. *Id.* Much of society shares in former House Speaker Boehner’s assumption. Jeff Krehely, *Polls Show Huge Public Support for Gay and Transgender Workplace Protections*, CENTER FOR AM. PROGRESS (June 2, 2011), <https://www.americanprogress.org/issues/lgbt/news/2011/06/02/9716/polls-show-huge-public-support-for-gay-and-transgender-workplace-protections/>. A poll conducted in 2011 by Greenberg Quinlan Rosner Research of likely voters for the 2012 election cycle found that nine out of ten voters believed that federal laws protecting the LGBT community from workplace discrimination already existed. *Id.*

8. Amanda Terkel, *Civil Rights Bill Top Priority for LGBT Voters, According to New Poll*, HUFFINGTON POST (Mar. 17, 2015, 7:00 AM EDT), [http://www.huffingtonpost.com/2015/03/17/lgbt-discrimination\\_n\\_6879230.html](http://www.huffingtonpost.com/2015/03/17/lgbt-discrimination_n_6879230.html). As of March 2015, the House has yet to vote on ENDA. *Id.*

9. See, e.g., Benjy Sarlin, *Boehner’s Anti-Gay Turn Threatens GOP*, MSNBC.COM (updated Nov. 6, 2013), <http://www.msnbc.com/msnbc/boehner-kills-gay-rights-bill> (citing House Republican Charlie Dent’s disapproval of Boehner’s opposition to ENDA).

10. See Nat’l Gay & Lesbian Task Force Found., *Reports & Research: Nondiscrimination Laws Map*, THETASKFORCE.ORG, [http://www.thetaskforce.org/static\\_html/downloads/reports/issue\\_maps/non\\_discrimination\\_5\\_14\\_color.pdf](http://www.thetaskforce.org/static_html/downloads/reports/issue_maps/non_discrimination_5_14_color.pdf) (last updated May 21, 2014) (showing eighteen states that currently have laws prohibiting workplace discrimination based on sexual orientation and gender identity and three states that currently have laws prohibiting workplace discrimination based on sexual orientation but not gender identity).

11. See *Glenn v. Brumby*, 663 F.3d 1312, 1320–21 (11th Cir. 2011) (holding that an employee was protected under Title VII from sex-stereotyping discrimination when he was fired while transitioning from male to female); *Schwenk v. Hartford*, 204 F.3d 1187, 1202–03 (9th Cir. 2000) (stating discrimination based on a person failing to act in accordance with his or her gender is “forbidden under Title VII”).

12. *Macy v. Holder*, Appeal No. 0120120821, 2012 WL 1435995 (EEOC Apr. 20, 2012). In a landmark decision in 2012, the EEOC concluded that discrimination against transgender individuals

Despite these current workplace protections, there is still a large part of the LGBT community that is left in the lurch. Thus, federal legislation, like ENDA, is vital. ENDA, as currently proposed, would provide an explicit federal prohibition of discrimination based on sexual orientation and gender identity.<sup>13</sup> In turn, it would promote consistency amongst state laws and future decision-making, and ensure appropriate remedies are afforded to the LGBT community.<sup>14</sup>

Some legal scholars assert that ENDA, as it is currently written, includes concerning language that may have the effect of decreasing protection rather than increasing it.<sup>15</sup> One of the more concerning provisions is the religious exemption section,<sup>16</sup> especially in the wake of the Supreme Court's *Hobby Lobby*<sup>17</sup> decision in June 2014. In *Hobby Lobby*, the Supreme Court concluded that closely held for-profit organizations were entitled to protections under the Religious Freedom Restoration Act (RFRA).<sup>18</sup> *Hobby Lobby* elicited many questions and concerns regarding its normative implications for the future.<sup>19</sup> As a consequence, many major gay activist groups pulled their support for ENDA because of the religious exemption that is included,<sup>20</sup> asserting

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is discrimination based upon sex under Title VII. *Id.* The EEOC also found that lesbian, gay, and bisexual individuals alleging sex-stereotyping discrimination can state a Title VII claim under the sex-stereotyping theory. *Castello v. Donahoe*, Appeal No. 0120111795, 2011 WL 6960810, at \*3 (EEOC Dec. 20, 2011); *Veretto v. Donahoe*, Appeal No. 0120110873, 2011 WL 2663401, at \*3 (EEOC July 1, 2011).

13. ENDA, S. 815, 113th Cong. § 2(2) (2013).

14. Pizer et al., *supra* note 1, at 720 (arguing “the incompleteness, inconsistency, and lack of clarity of the existing legal protections have resulted in a system that is more confusing and less effective than would be possible with an explicit federal statute prohibiting sexual orientation and gender identity discrimination”).

15. See Mary Ann 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, 1374, 1380 (2014) (arguing that ENDA, as written, is too limited and ambiguous and that, if passed, could limit the scope of protection for discrimination based on sexual orientation when compared to current protections provided under Title VII).

16. ENDA, S. 815, 113th Cong. § 6 (2013).

17. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014).

18. *Id.* at 2759.

19. See Wade Goodwyn, *Hobby Lobby Ruling May Have Poked a Hole in the ‘Corporate Veil’* (Nat’l Pub. Radio broadcast Aug. 5, 2014, 4:17 PM ET), available at <http://www.npr.org/2014/08/05/338099703/hobby-lobby-ruling-may-have-poked-a-hole-in-the-corporate-veil> [hereinafter *All Things Considered*] (discussing how the *Hobby Lobby* decision may affect future bankruptcy cases); Peter Moskowitz, *Why Hobby Lobby Could Open a Pandora’s Box of Legal Discrimination*, AMERICA.ALJAZEERA.COM (July 3, 2014, 8:30 AM EDT), <http://america.aljazeera.com/articles/2014/7/3/hobby-lobby-future.html> (arguing that the decision in *Hobby Lobby* will adversely affect “women’s rights as well as LGBT rights and the rights of the disabled”); Zoë Schlanger, *Hobby Lobby Decision Likely to Open a Legal Floodgate*, NEWSWEEK (July 1, 2014, 5:08 PM), <http://www.newsweek.com/hobby-lobby-decision-likely-open-legal-floodgate-256990> (predicting that the holding in *Hobby Lobby* will “set in motion a raft of similar challenges”).

20. Michelle Garcia, *ACLU, NCLR, and More Groups Drop Support of ENDA*, ADVOCATE.COM (July 9, 2014, 1:47 PM ET), <http://www.advocate.com/enda/2014/07/08>

that the decision in *Hobby Lobby* is just “a hop, skip and jump” from allowing employers to discriminate against LGBT individuals because of religious beliefs.<sup>21</sup> Representative Barney Frank, however, who has been a major proponent of ENDA, called these arguments “ridiculous” and asserted that the groups who pulled support for ENDA are simply “uncomfortable being in the majority.”<sup>22</sup>

Although there are competing views about ENDA and whether it should be passed as it is currently written,<sup>23</sup> common ground can be found—there is bipartisan support among voters for federal legislation that prohibits discrimination based on sexual orientation and gender identity.<sup>24</sup> Thus, legislation will likely be enacted in the near future. But whether ENDA is enacted with the religious exemption section or without it, the burning question still remains—will *Hobby Lobby* play a role in its enforcement? This Article will attempt to answer that question.

In Part II, the Article will discuss the current workplace discrimination protections available to the LGBT community under Title VII and assert that the current protections are inadequate, especially for private-sector employees. Therefore, the Article will argue that federal legislation prohibiting workplace discrimination based on sexual orientation and gender identity is needed. Part III will discuss ENDA, as currently proposed, and its religious exemption. This Part will show that ENDA’s religious exemption is limited to the religious exemptions

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/breaking-aclu-nclr-and-more-groups-drop-support-enda; Ed O’Keefe, *Gay Rights Groups Withdrawing Support of ENDA After Contraceptive Decision*, WASH. POST (July 8, 2014), [http://www.washingtonpost.com/politics/gay-rights-groups-withdrawing-support-of-enda-after-contraceptive-decision/2014/07/08/2f32aa5a-06c1-11e4-8a6a-19355c7e870a\\_story.html](http://www.washingtonpost.com/politics/gay-rights-groups-withdrawing-support-of-enda-after-contraceptive-decision/2014/07/08/2f32aa5a-06c1-11e4-8a6a-19355c7e870a_story.html); Amanda Terkel, *Barney Frank Sharply Criticizes Gay Rights Groups’ Flip on ENDA*, HUFFINGTON POST (Aug. 6, 2014, 9:59 AM EDT), [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).

21. O’Keefe, *supra* note 20 (quoting Rea Carey, the executive director of the National Gay & Lesbian Task Force).

22. Terkel, *supra* note 20. Senator Barney Frank also stated, “What they’re saying is, because it does not give perfect protection, let’s not give any added protection at all.” *Id.* (internal quotation marks omitted).

23. See O’Keefe, *supra* note 20 (noting that some but not all gay activist groups have withdrawn support for ENDA); Terkel, *supra* note 20 (discussing Representative Barney Frank’s criticism of gay activist groups who withdrew their support for ENDA).

24. Krehely, *supra* note 7. Greenberg Quinlan Rosner Research conducted a poll of likely 2012 voters, asking whether voters would support protections for gay and transgender individuals in the workplace. *Id.* The poll’s results found that “81 percent of Democrats, 74 percent of independents, and 66 percent of Republicans [support] workplace nondiscrimination laws for gay and transgender people.” *Id.*; see also Office of the Press Sec’y, *Fact Sheet: Taking Action to Support LGBT Workplace Equality Is Good for Business*, WHITEHOUSE.GOV (July 21, 2014), <http://www.whitehouse.gov/the-press-office/2014/07/21/fact-sheet-taking-action-support-lgbt-workplace-equality-good-business-0> (outlining those who support legislation to protect LGBT workers, including various Fortune 500 companies, small businesses, federal contractors, state and local governments, and faith-based communities).

provided under Title VII. Part III will also discuss Title VII's religious exemption and explore how it has been applied to better understand ENDA's religious exemption, as it is currently proposed. Part IV will examine the genesis of the Religious Freedom Restoration Act and explore its possible future. This Part will discuss the importance of including a religious exemption in ENDA and argue that ENDA's current religious exemption is more beneficial than harmful. Furthermore, Part IV will discuss the *Hobby Lobby* decision and argue that it will not affect employment discrimination laws, such as ENDA. Alternatively, it will also argue that, even if ENDA is passed and then found to violate RFRA, ENDA will still bring society one-step closer to workplace equality. In conclusion, Part V will recommend that society reevaluate withdrawing support of ENDA as it is currently proposed and reconsider the additional possible benefits that may be provided under it.

## II. CURRENT FEDERAL WORKPLACE DISCRIMINATION PROTECTIONS

Although there is a lack of federal legislation that explicitly prohibits workplace discrimination against LGBT individuals, some workplace discrimination protections are available. On a federal level, these protections are primarily afforded through Title VII.<sup>25</sup> This Article will show, however, that Title VII does not provide adequate protections for the LGBT community and will argue why federal legislation, like ENDA, is needed.

Title VII does not explicitly protect the LGBT community.<sup>26</sup> Title VII states it is unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."<sup>27</sup> Although Title VII does not explicitly prohibit discrimination based on sexual orientation and gender identity, the Supreme Court's decision in *Price Waterhouse v. Hopkins*<sup>28</sup> provided the LGBT community an avenue to allege discrimination under Title VII.

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25. 42 U.S.C. § 2000e-2(a)(1) (2012).

26. *Id.*

27. *Id.*

28. 490 U.S. 228, 256–58 (1989).

*Hopkins* involved a heterosexual woman who was denied a promotion at her accounting firm.<sup>29</sup> After being denied the promotion, she was advised that, in order to improve her chances of being promoted in the future, she should walk, talk, and dress more femininely.<sup>30</sup> She then sued, claiming sex discrimination under Title VII.<sup>31</sup> Because her employer considered her nonconformance to sex-stereotypes in the decision of whether to promote her to partner, the Supreme Court held that her employer discriminated against her because of sex, and therefore, she was entitled to relief under Title VII.<sup>32</sup>

*Hopkins* opened the gates for the LGBT community to assert sex discrimination claims under Title VII. Like the plaintiff in *Hopkins*, LGBT workers can assert that their employers discriminated against them because of nonconformance to gender norms. But for the LGBT community, asserting sex discrimination based on nonconformance to gender norms may be limited,<sup>33</sup> especially for private-sector employees. The limited application for private-sector employees is discussed further below.

#### A. Enforcing Title VII: The EEOC's Role

Title VII claims are investigated and enforced by the EEOC.<sup>34</sup> Both federal and private-sector employees can file a complaint with the EEOC.<sup>35</sup> But the EEOC's role in enforcing Title VII is different for federal employees than it is for private-sector employees.<sup>36</sup> For federal employees, the EEOC has the authority to investigate the matter, issue a final order, and grant relief.<sup>37</sup> In contrast, for private-sector employees,

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29. *Id.* at 233. The case itself does not express that the plaintiff was heterosexual, but see Chai Feldblum, *Law, Policies in Practice and Social Norms: Coverage of Transgender Discrimination Under Sex Discrimination Law*, 14 J.L. & SOC'Y 1, 13 (2013).

30. *Hopkins*, 490 U.S. at 235.

31. *Id.* at 231–32.

32. *Id.* at 256, 258.

33. See Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 AM. U. L. REV. 715, 718 (2014) (discussing how courts are *more* willing to extend Title VII protections to gays and lesbians when their observable behavior does not conform to gender norms and *less* willing to extend Title VII protections for discrimination based on actual knowledge of an individual's sexual orientation).

34. 42 U.S.C. § 2000e-5(a)–(b) (2012).

35. *Id.*

36. U.S. Equal Emp't Opportunity Comm'n, *Filing a Charge of Discrimination*, EEOC.GOV, <http://www.eeoc.gov/employees/charge.cfm> (last visited Sept. 19, 2015). See generally Cody Perkins, Comment, *Sex and Sexual Orientation: Title VII After Macy v. Holder*, 65 ADMIN. L. REV. 427 (2013) (discussing the EEOC's role in Title VII claims for both federal and private-sector employees).

37. U.S. Equal Emp't Opportunity Comm'n, *Overview of Federal Sector EEO Complaint Process*, EEOC.GOV, [http://www.eeoc.gov/federal/fled\\_employees/complaint\\_overview.cfm](http://www.eeoc.gov/federal/fled_employees/complaint_overview.cfm) (last visited Dec. 14, 2015).

the EEOC only has the authority to investigate the complaint, and if a violation is found, the agency will “attempt to reach a *voluntary* settlement with the employer.”<sup>38</sup> If a settlement is unsuccessful, the EEOC will determine whether to (1) file a lawsuit on the complainant’s behalf or (2) provide the complainant with a Notice of a Right to Sue.<sup>39</sup> Thus, for private-sector employees, the EEOC does not issue an order nor can the EEOC grant specific relief to private-sector employees, other than the right to pursue the discrimination claim further in court.<sup>40</sup> Understanding this distinction is important because the EEOC’s interpretation of sex-stereotyping under Title VII is much broader than the federal courts’ interpretation, resulting in a disparity of protection for private-sector employees.<sup>41</sup>

In addition to the EEOC’s more generous application of Title VII, President Barack Obama has issued an executive order explicitly prohibiting workplace discrimination based on sexual orientation and gender identity for federal employees and employees of any individual or entity that has entered into a federal government contract.<sup>42</sup> Therefore, protections for federal employees are far more sweeping, while private-sector employees are left much more vulnerable.

## B. Federal Caselaw Interpreting Title VII

Courts have been clear that Title VII does not prohibit discrimination based on sexual orientation.<sup>43</sup> But, LGBT plaintiffs can bring a Title VII claim under the sex-stereotyping theory. This theory, however, has proven troublesome. The Second Circuit Court of Appeals stated: “When utilized by an avowedly homosexual plaintiff . . . gender stereotyping claims can easily present problems for an adjudicator. This is for the simple reason that ‘[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about

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38. *Filing a Charge of Discrimination*, *supra* note 36 (emphasis added).

39. *Id.*

40. *Id.*

41. See generally Perkins, *supra* note 36 (discussing the EEOC’s role in Title VII claims for both federal and private-sector employees).

42. Equal Emp’t Opportunity in the Fed. Gov’t, Exec. Order No. 13,672, 79 Fed. Reg. 42,971, 42,971 (July 23, 2014).

43. *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063 (9th Cir. 2002) (holding “that an employee’s sexual orientation is irrelevant for purposes of Title VII”); *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000) (“Because the term ‘sex’ in Title VII refers only to membership in a class delineated by gender, and not to sexual affiliation, Title VII does not proscribe discrimination because of sexual orientation.”).

heterosexuality and homosexuality.”<sup>44</sup> This “blur” disfavors a LGBT plaintiff. While a LGBT plaintiff’s sexual orientation may indeed be nonconforming to certain gender norms, courts have held that this type of discrimination alone is not enough for a Title VII claim because it is discrimination based on *sexual orientation*, and plaintiffs cannot use the sex-stereotyping theory as a way to “bootstrap protection for sexual orientation into Title VII.”<sup>45</sup>

LGBT plaintiffs asserting a discrimination claim under the sex-stereotyping theory are therefore presented with a stumbling block. LGBT plaintiffs appear to encounter an extra hurdle that their heterosexual counterparts do not have to jump, as LGBT plaintiffs must first prove that the discrimination was *not* based on their sexual orientation.<sup>46</sup> To overcome this obstacle, “gay plaintiffs bringing claims under Title VII [have been advised to] . . . de-emphasize any connection the discrimination has to homosexuality.”<sup>47</sup> While this advice may help some in the LGBT community to successfully assert a Title VII claim, it still leaves others without any protection—those of the LGBT community who, other than their sexual orientation, conform to gender norms, yet have been discriminated against because of sexual orientation.

For example, in *Simonton v. Runyon*,<sup>48</sup> the plaintiff, Mr. Simonton, was an openly gay employee.<sup>49</sup> His co-workers repeatedly harassed him by using explicit, derogatory statements about his sexual orientation, distributing posters that said he was mentally ill because of his sexual preference, placing notes in the bathroom with his name next to the names of celebrities who died of AIDS, and attaching sexually explicit photos to his work space.<sup>50</sup> Despite these repulsive factual allegations, the Second Circuit Court of Appeals affirmed the lower court’s dismissal of Mr. Simonton’s case for failure to state a claim under Title VII’s sex discrimination.<sup>51</sup> Addressing Mr. Simonton’s sex-stereotyping theory, the court stated:

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44. *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (internal citation omitted); see also *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 291 (3d Cir. 2009) (stating that “the line between sexual orientation discrimination and discrimination ‘because of sex’ can be difficult to draw”).

45. *Dawson*, 398 F.3d at 218 (internal citation omitted).

46. See *id.* at 217 (stating that it is difficult to discern from the plaintiff’s factual allegations whether the plaintiff is asserting that her employer took adverse employment action against her because of “her gender, her appearance, her sexual orientation, or some combination of these”).

47. Kristin M. Bovalino, *How the Effeminate Male Can Maximize His Odds of Winning Title VII Litigation*, 53 SYRACUSE L. REV. 1117, 1134 (2003).

48. 232 F.3d 33 (2d Cir. 2000).

49. *Id.* at 35.

50. *Id.*

51. *Id.* at 38.

We do not have sufficient allegations before us to decide Simonton's claims based on stereotyping because we have no basis in the record to surmise that Simonton *behaved* in a stereotypically feminine manner and that the harassment he endured was, in fact, based on his non-conformity with gender norms instead of his sexual orientation.<sup>52</sup>

The theory can also present problems for those who are discriminated against because of their *perceived* sexual orientation. Christopher Vickers's case is a prime example.<sup>53</sup> Mr. Vickers worked at a hospital as a private police officer.<sup>54</sup> Unlike Mr. Simonton, Mr. Vickers was not openly gay and did not discuss his sexuality at work.<sup>55</sup> He alleged that his co-workers began harassing him with vulgar remarks and gestures after he assisted a homosexual doctor in an internal investigation of misconduct at the hospital, and the harassment became worse after returning from a vacation he took with a male friend.<sup>56</sup> Mr. Vickers's complaint was very detailed<sup>57</sup> and described instances where his co-workers wrote the word "FAG" on his report forms, handcuffed him and simulated sexual acts on him, and touched him inappropriately while making derogatory statements.<sup>58</sup> Mr. Vickers made a complaint to the human resources department, which then triggered an investigation of Mr. Vickers's conduct and resulted in human resources scheduling a disciplinary meeting with Mr. Vickers, and instructing him not to bring his attorney.<sup>59</sup> Thereafter, Mr. Vickers resigned from his position and filed suit against the employer.<sup>60</sup> His claim alleged sex discrimination based on the sex-stereotyping theory.<sup>61</sup> Mr. Vickers argued that he was discriminated against because his "sexual practices, whether real or perceived, did not conform to the traditionally masculine role."<sup>62</sup> The Sixth Circuit Court of Appeals, however, rejected Mr. Vickers's sex discrimination argument, finding that the discrimination was based on

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52. *Id.* (emphasis added).

53. *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757 (6th Cir. 2006) ("The Supreme Court in *Price Waterhouse* focused principally on characteristics that were readily demonstrable in the workplace, such as the plaintiff's manner of walking and talking at work, as well as her work attire and her hairstyle.").

54. *Id.* at 759.

55. *Id.*

56. *Id.*

57. *See id.* at 759–60 (describing in detail the actions of his coworkers and the actions that the employer took in response to him reporting the misconduct).

58. *Id.*

59. *Id.* at 760.

60. *Id.* at 760–61.

61. *Id.* at 763.

62. *Id.*

Mr. Vickers's *perceived* homosexuality and therefore was not covered under Title VII.<sup>63</sup>

Contrast the above two cases with *Prowel v. Wise Business Forms, Inc.*<sup>64</sup> In *Prowel*, the plaintiff considered himself “effeminate,” had a rainbow sticker on his car, was well-groomed, talked in a high-pitched voice, and dressed neatly.<sup>65</sup> While noting that “the line between sexual orientation discrimination and discrimination ‘because of sex’ can be difficult to draw,”<sup>66</sup> the court stated that the plaintiff’s “effeminate traits” *might* have been the reason for the harassment.<sup>67</sup> Consequently, the Third Circuit Court of Appeals held that the lower court erred in granting summary judgment, finding that a jury should decide whether the discrimination was based on the plaintiff’s sexual orientation.<sup>68</sup>

The three cases discussed above demonstrate that plaintiffs who “look or act sufficiently ‘gay’ at work” are more likely to be protected under Title VII via the sex-stereotyping theory,<sup>69</sup> and those who do not are unable to establish a viable Title VII claim in federal court.

### C. EEOC’s Interpretation of Title VII

If the EEOC decided *Simonton* and *Vickers*, the outcomes of these cases would likely have been much different. Compared to federal courts, the EEOC has been more generous in applying the sex-stereotyping theory.

For example, in *Veretto v. Donahoe*,<sup>70</sup> the complainant experienced harassment at work after an announcement was published in the local newspaper regarding his engagement to his same-sex partner.<sup>71</sup> The complainant filed a discrimination claim under Title VII, arguing that the harassment was motivated by “attitudes about stereotypical gender roles in marriage.”<sup>72</sup> The EEOC found that this alone was sufficient to state a sex discrimination claim under Title VII using the sex-stereotyping theory.<sup>73</sup> And in *Castello v. Donahoe*,<sup>74</sup> the EEOC found that the

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63. *Id.* at 763, 766.

64. 579 F.3d 285 (3d Cir. 2009).

65. *Id.* at 287.

66. *Id.* at 291.

67. *Id.* at 291–92.

68. *Id.* at 292.

69. Soucek, *supra* note 33, at 716.

70. Appeal No. 0120110873, 2011 WL 2663401 (EEOC July 1, 2011).

71. *Id.* at \*1.

72. *Id.* at \*2–3.

73. *Id.* at \*3.

74. Appeal No. 0120111795, 2011 WL 6960810 (EEOC Dec. 20, 2011).

complainant filed a viable sex discrimination claim under Title VII when she alleged that she experienced harassment at work because of the “sexual stereotype that having relationships with men is an essential part of being a woman.”<sup>75</sup> Finally, in *Complainant v. Foxx*,<sup>76</sup> the EEOC made its stance loud and clear by explicitly stating that “sexual orientation discrimination . . . is sex discrimination” under Title VII.<sup>77</sup>

These cases are in stark contrast to the federal court cases described earlier.<sup>78</sup> Unlike those cases, the EEOC has interpreted the sex-stereotyping theory to encompass discrimination motivated by a person’s nonconformance to stereotypical sexual practices, whereas federal courts require that plaintiffs “look or act sufficiently ‘gay’ at work” to show sex-stereotyping occurred.<sup>79</sup>

Therefore, protections do exist for public and private-sector employees of the LGBT community. These protections, however, are currently far better for federal employees, and there is still much room for improvement. Federal legislation, like ENDA, is vital to ensure workplace equality.

### III. ENDA: A GLIMMER OF EQUALITY

ENDA, as it was proposed and passed by the Senate in 2013, explicitly prohibits workplace discrimination based on “actual or perceived sexual orientation or gender identity”<sup>80</sup> for the purpose of “address[ing] the history and persistent, widespread pattern of [this type of] discrimination” and “reinforc[ing] the Nation’s commitment to fairness and equal opportunity in the workplace.”<sup>81</sup> The prohibition

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75. *Id.* at \*3.

76. Appeal No. 0120133080 (EEOC July 16, 2015), available at [http://www.americanbar.org/content/dam/aba/administrative/sexual\\_orientation/eecolgbt-title-vii-decision.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/sexual_orientation/eecolgbt-title-vii-decision.authcheckdam.pdf).

77. *Foxx*, at \*9, 14.

78. While the EEOC cases were decided after the federal court cases discussed in Part II(A), federal courts have continued to use similar logic that was used in *Simonton* and *Vickers*. See *Kalich v. AT&T Mobility, LLC*, 679 F.3d 464, 471 (6th Cir. 2012) (finding that the plaintiff was not part of a protected class under Title VII because his boss’s name-calling was not due to plaintiff’s gender but rather due to plaintiff’s perceived sexual orientation); *McKibben v. Odd Fellows Health, Inc.*, No. 3:13-CV-1560 JCH, 2014 WL 3701022, at \*3–4 (D. Conn. July 25, 2014) (finding that the plaintiff did not sufficiently show that the harassment was due to sex-stereotyping because the record did not reflect any factual allegations that the plaintiff behaved in nonconformity with her gender other than her sexual orientation, and citing to *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000) in its reasoning).

79. Soucek, *supra* note 33, at 716; see also *supra* notes 45–69 and accompanying text (discussing how federal courts have interpreted and applied the sex-stereotyping theory).

80. ENDA, S. 815, 113th Cong. § 4(a)(1) (2013).

81. *Id.* § 2(1), (4).

applies to federal and private-sector employers;<sup>82</sup> therefore, the Act equalizes any disparate treatment that may currently exist between federal and private-sector employees.<sup>83</sup>

ENDA's use of the term "gender identity," however, may have limitations, and it does not necessarily encompass all individuals that are a part of the transgender community.<sup>84</sup> For example, some individuals in the transgender community identify under "gender expression." Gender expression includes individuals whose "characteristics and behaviors, such as appearance, dress and mannerisms . . . are perceived to be either masculine or feminine."<sup>85</sup> Understanding the terminology is important because gender identity does not include individuals identifying under gender expression,<sup>86</sup> so certain members of society are not necessarily protected under ENDA. A more inclusive term is *transgender*.<sup>87</sup> While *transgender* may be a better term to include in ENDA,<sup>88</sup> those who are excluded because of the use of the term "gender identity," such as those identifying under gender expression, can likely find protection under Title VII's sex-stereotyping theory.<sup>89</sup>

Within ENDA, Title VII is cross-referenced in the text of the Act multiple times as a way to define the substance and scope of ENDA. For example, regarding the enforcement powers of the Act, the EEOC, the Librarian of Congress, the Attorney General, and courts of the United States will have the same power to enforce ENDA as has been provided and defined in Title VII.<sup>90</sup> Title VII is also used as a way to define appropriate procedures and remedies,<sup>91</sup> the authority for decision makers

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82. *Id.* § 2(1).

83. In addition to providing more equality in the workplace, the economic benefits that ENDA would provide should also be considered. *See generally* Brad Sears & Christy Mallory, *Economic Motives for Adopting LGBT-Related Workplace Policies*, WILLIAMS INST. (Oct. 2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Sears-Corp-Statements-Oct2011.pdf> (discussing the economic benefits to instituting anti-discrimination legislation for the LGBT community); U.S. Congress Joint Econ. Comm. Democratic Staff, *The Economic Consequences of Discrimination Based on Sexual Orientation and Gender Identity*, U.S. JOINT ECON. COMM. (Nov. 2013), [http://www.jec.senate.gov/public/?a=Files.Serve&File\\_id=82ab1377-99ee-41bc-a99a-fced35ca578c](http://www.jec.senate.gov/public/?a=Files.Serve&File_id=82ab1377-99ee-41bc-a99a-fced35ca578c) (discussing why legislation like ENDA could benefit the economy).

84. Robyn B. Gigl, *Transgender: Understanding Who the "T" in "LGBT" Are and Their Unique Legal Issues*, N.J. LAW., June 2013, at 10, 11.

85. *Id.* at 11.

86. *Id.*

87. *Id.* Transgender is a much broader term and "includ[es] transsexuals; cross-dressers; androgynous individuals and individuals who do not want to be defined by any gender, often referred to as genderqueer." *Id.* (footnotes omitted).

88. *Id.*

89. *See supra* Part II (discussing the current workplace discrimination protections available to the LGBT community under Title VII, and asserting that the current protections are inadequate, especially for private-sector employees).

90. ENDA, S. 815, 113th Cong. § 10(a) (2013).

91. *Id.* §§ 10(b)(1), 11(d).

to award attorneys' fees,<sup>92</sup> and religious organizations that are exempt from the Act.<sup>93</sup> The importance of Title VII being cross-referenced in multiple sections of ENDA will be discussed later in this Article.

For the purposes of this Part, however, ENDA's reliance on Title VII's religious exemption is of utmost importance. ENDA's religious exemption states: "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>94</sup> Certain groups have expressed concerns that ENDA's religious exemption is too broad.<sup>95</sup> Based on the language of the proposed Act, however, the religious exemption is limited to only those entities that are also exempt under Title VII.<sup>96</sup> Accordingly, to provide insight as to how the religious exemption may be applied by ENDA, this Part will look to Title VII's religious exemption and the caselaw that has interpreted and developed it.

## A. Looking to Title VII to Understand the Scope of ENDA's Religious Exemption

### 1. Statutory Exemptions

Title VII's religious exemption allows religious organizations to give employment preferences to members of the same religion when it is a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise";<sup>97</sup> it does not,

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92. *Id.* § 12(b).

93. *Id.* § 6(a).

94. *Id.* (emphasis added).

95. *E.g.*, The Leadership Conference, *ENDA Religious Exemption—Fact Sheet*, CIVILRIGHTS.ORG, <http://www.civilrights.org/lgbt/enda/religious-exemption.html> (last visited Dec. 14, 2015); *see also* Chris Johnson, *Nadler 'Concerned,' Wants to Narrow ENDA's Religious Exemption*, WASH. BLADE (July 8, 2014, 4:10 PM EDT), <http://www.washingtonblade.com/2014/07/08/rep-nadler-says-enda-religious-exemption-overbroad/> (discussing New York Representative Jerrold Nadler's concerns that ENDA's religious exemption is too broad and must be narrowed because of the holding in *Hobby Lobby*).

96. ENDA, S. 815, 113th Cong. § 6(a).

97. 42 U.S.C. § 2000e-2(e)(1) (2012). In full, the statute states an employer may lawfully discriminate in the hiring and employing of employees on "the basis of [the employee's] religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." *Id.* The exemption also allows education institutions to discriminate in hiring and employing on the basis of the employee's religion if the institution is:

in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

however, allow the organization to otherwise discriminate based on “race, color, national origin, sex, age, or disability.”<sup>98</sup>

Some of the factors courts consider in determining whether an organization is a “religious organization” are:

if it is organized for a religious purpose, is engaged primarily in carrying out that religious purpose, holds itself out to the public as an entity for carrying out that religious purpose, and does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.<sup>99</sup>

For example, courts have interpreted religious organizations to “include places of worship, religious educational institutions, and not-for-profit organizations with clear religious affiliations.”<sup>100</sup>

While this statutory exemption applies whether the activity is religious or nonreligious in nature, the exemption only allows religious organizations to discriminate based on whether the employee shares the religious values of the religious organization.<sup>101</sup> On its face, the religious exemption appears limited. However, it has been applied inconsistently among federal circuit courts, as some circuits construe it narrowly,<sup>102</sup> and others more broadly.<sup>103</sup>

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*Id.* § 2000e-2(e)(2).

98. See U.S. Equal Emp’t Opportunity Comm’n, *Questions and Answers: Religious Discrimination in the Workplace*, EEOC.GOV (last modified Jan. 31, 2011), [http://www.eoc.gov/policy/docs/qanda\\_religion.html](http://www.eoc.gov/policy/docs/qanda_religion.html) [hereinafter *Questions and Answers*].

99. *Spencer v. World Vision, Inc.*, 633 F.3d 723, 724 (9th Cir. 2011). The EEOC lists very similar factors to consider on its website. *Questions and Answers*, *supra* note 98.

100. Julie Dabrowski, Note, *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, 1964 (2014).

101. *Questions and Answers*, *supra* note 98.

102. See *EEOC v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 618 (9th Cir. 1988) (stating that “only those institutions with extremely close ties to organized religions would be covered” by the religious exemption); see also Kate B. Rhodes, *Defending ENDA: The Ramifications of Omitting the BFOQ Defense in the Employment Non-Discrimination Act*, 19 LAW & SEXUALITY 1, 13 (2010) (discussing the Ninth Circuit’s limited interpretation of the Title VII’s religious exemption); *id.* at 14 (discussing the Third Circuit’s broad interpretation of Title VII’s religious exemption).

103. See, e.g., *Little v. Wuerl*, 929 F.2d 944, 945 (3d Cir. 1991) (stating that “we interpret the exemption broadly”); see also Steven H. Aden & Stanley W. Carlson-Thies, *Catch or Release? The Employment Non-Discrimination Act’s Exemption for Religious Organizations*, 11 ENGAGE: J. FEDERALIST SOC’Y PRAC. GROUPS, Sept. 2010, at 4, 5 (stating that Title VII’s religious exemption has been “broadly construed”).

## 2. *Constitutional Exemptions*

In addition to the statutory exemptions explicitly articulated in Title VII, courts have also interpreted a ministerial exception based on First Amendment protections.<sup>104</sup> If a court finds that the ministerial exception applies, a Title VII claim, or a similar employment discrimination claim, cannot be brought against the religious employer.<sup>105</sup> As noted by the EEOC on its website, “[t]he exception applies only to employees who perform essentially religious functions, namely those whose primary duties consist of engaging in church governance, supervising a religious order, or conducting religious ritual, worship, or instruction.”<sup>106</sup> At first glance, this exception seems limited. However, after the recent ruling of the United States Supreme Court in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,<sup>107</sup> where the Supreme Court adopted and applied the exception, the exception appears to be broader than first articulated.<sup>108</sup>

In *Hosanna-Tabor*, a teacher who worked at a Lutheran school brought a discrimination claim against the school under the American with Disabilities Act.<sup>109</sup> There were two different types of teachers employed at the school, “called” teachers and “lay” teachers.<sup>110</sup> Other than the differences in the academic credentials needed to be a “called” teacher, the functions of the positions were essentially the same.<sup>111</sup> Even though the day-to-day duties of both “called” and “lay” teachers were essentially the same, the Court found that the teacher’s position fell within the ministerial exception, agreeing with the school that the teacher’s position as a “called” teacher was as a minister of the church.<sup>112</sup>

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104. *McClure v. Salvation Army*, 460 F.2d 553, 560–61 (5th Cir. 1972) (establishing the ministerial exception). Many federal circuit courts soon followed the Fifth Circuit and adopted the ministerial exception. See generally Harvard Law Review Association, Note, *The Ministerial Exception to Title VII: The Case for a Deferential Primary Duties Test*, 121 HARV. L. REV. 1776, 1777–86 (2008) (discussing the development and purpose of the ministerial exception).

105. *McClure*, 460 F.2d at 560 (stating “that the application of the provisions of Title VII to the employment relationship existing between . . . a church and its minister would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment”).

106. *Questions and Answers*, *supra* note 98.

107. 132 S. Ct. 694 (2012).

108. Marsha B. Freeman, *What’s Religion Got to Do with It? Virtually Nothing: Hosanna-Tabor and the Unbridled Power of the Ministerial Exemption*, 16 U. PA. J.L. & SOC. CHANGE 133, 135 (2013).

109. 132 S. Ct. at 700–01.

110. *Id.* at 699.

111. *Id.* at 699–700 (the teacher in this case was a “called” teacher, and “called” teachers were required to have religious training).

112. *Id.* at 700, 708, 709. It should be noted that the Court did not make a determination of whether an employee hired as a “lay” teacher would also fall under the ministerial exception. *Id.* at 708 (“We express no view on whether someone with [a “called” teacher’s] duties would be covered

Therefore, the Court found that the First Amendment precluded the teacher from pursuing a claim against her employer.<sup>113</sup>

The Court stated that there is not a “rigid formula” to determine whether the ministerial exception applies.<sup>114</sup> In *Hosanna-Tabor*, the Court considered the following: “the formal title given [by the employer], the substance reflected in that title, [the employee’s] use of that title, and the important religious functions [the employee] performed for the [employer].”<sup>115</sup> While the Court stated that an employee’s title alone is not determinative of whether the exception applies, it appears this was one of the main considerations of the Court, as the day-to-day duties of a “called” teacher and a “lay” teacher varied very little.<sup>116</sup> The effect of this holding appears to broaden the ministerial exception.<sup>117</sup> The exception once functioned as a way to avoid interfering between “the employment relationship existing between . . . a church and its minister,”<sup>118</sup> and it now appears to encompass far more employee relationships.

While there may be inherent issues with the religious exemptions associated with Title VII, these issues are problematic in employment discrimination claims across the board. A law banning sexual orientation and gender identity discrimination would be subject to the same religious exemption issues that all of the other Title VII discrimination laws currently face. Thus, pulling support for the current ENDA proposal because it includes the Title VII religious exemption is unwarranted. Any supporters of ENDA who have qualms about Title VII religious exemptions can look to the legislature to address these issues broadly, rather than trying to narrow ENDA’s religious exemption. As far as the ministerial exception is concerned, it is based on constitutional grounds; unless the Court abrogates or limits its ruling in *Hosanna-Tabor*, this exception cannot be undone by the legislature—except in the very unlikely event the legislature amends the United States Constitution.

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by the ministerial exception in the absence of the other considerations we have discussed. But though relevant, it cannot be dispositive that others not formally recognized as ministers by the church perform the same functions.”).

113. *Id.* at 708.

114. *Id.* at 707.

115. *Id.* at 708.

116. *Id.* at 700, 708.

117. Freeman, *supra* note 108, at 135.

118. McClure v. Salvation Army, 460 F.2d 553, 560 (5th Cir. 1972).

## IV. THE IMPORTANCE OF RELIGIOUS FREEDOMS

## A. RFRA's Genesis &amp; Its Uncertain Future

From the early formation of the United States, ensuring religious freedom has been a priority.<sup>119</sup> Accordingly, the First Amendment provides, “Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise* thereof.”<sup>120</sup>

The Religious Freedom Restoration Act (RFRA) was enacted to expand religious freedoms beyond what is afforded under the First Amendment.<sup>121</sup> RFRA was enacted by Congress in direct response to the Supreme Court's holding in *Employment Division, Department of Human Resources of Oregon v. Smith*.<sup>122</sup> In *Smith*, two Native Americans who worked for the State of Oregon were fired for ingesting peyote, a hallucinogenic drug, as part of a religious ceremony.<sup>123</sup> The Court had to decide whether an Oregon law violated the Free Exercise Clause of the First Amendment by prohibiting the use of peyote and denying government employees unemployment benefits for ingesting peyote.<sup>124</sup>

The United States Supreme Court held that the State of Oregon did not violate the Free Exercise Clause.<sup>125</sup> The Court stated, “The government's ability to enforce *generally* applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, ‘cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development.’”<sup>126</sup> Thus, laws of general applicability are not subject to invalidation due to the Free Exercise Clause.<sup>127</sup>

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119. See Carolyn A. Deverich, *Establishment Clause Jurisprudence and the Free Exercise Dilemma: A Structural Unitary-Accommodationist Argument for the Constitutionality of God in the Public Square*, 2006 B.Y.U. L. REV. 211, 211–12 (2006) (accounting the story of the early settlers of the United States who left England in search of religious freedom and noting that, as a result, “America has continued to build in the tradition of religious freedom”).

120. U.S. CONST. amend. I (emphasis added).

121. See 42 U.S.C. § 2000bb(b) (2012) (explaining the purpose behind RFRA is to “guarantee its application in all cases where free exercise of religion is substantially burdened”).

122. 494 U.S. 872 (1990); see 42 U.S.C. § 2000bb(a)(4) (referring directly to the Supreme Court's holding in *Smith*).

123. *Smith*, 494 U.S. at 874.

124. *Id.*

125. *Id.* at 890.

126. *Id.* at 885 (emphasis added) (internal citation omitted).

127. See generally Jacqueline Prats, Article, *Religious Victory over the Affordable Care Act? Possible Recourse for the Employee of the Religious Employer*, 5 WM. MITCHELL L. RAZA J. 39, 47–55 (2014) (discussing the development of Free Exercise Clause jurisprudence and the emergence of RFRA).

In reaction to the Court's holding in *Smith*, Congress enacted RFRA.<sup>128</sup> Congress stated in its findings that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise"<sup>129</sup> and that the purpose of RFRA is to provide a claim for a person whose "religious exercise is substantially burdened by the government."<sup>130</sup> Accordingly, RFRA provides that the "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of *general* applicability."<sup>131</sup> RFRA, therefore, broadened religious protections after *Smith*. It is important, however, to keep in mind that *Smith* remains the precedent used to determine the protections afforded under the Free Exercise Clause of the First Amendment.<sup>132</sup> RFRA, on the other hand, is a statutory scheme that is intended to provide broader religious protections than the constitutional framework.<sup>133</sup>

While there was nearly unanimous support for RFRA among both the House and the Senate when it first passed,<sup>134</sup> support may now be dwindling, especially after the Court's decision in *Hobby Lobby*.<sup>135</sup> In response to the Court's holding in *Hobby Lobby*, Representative Jerry Nadler of New York stated, "The point of [RFRA] was that we wanted the law to be used as a shield to protect people's religious beliefs, not as a sword to impose somebody's religious belief on somebody else";<sup>136</sup> and Senator Barbara Boxer of California stated, "[The Supreme Court in *Hobby Lobby*] turned the Religious Freedom Restoration Act on its head."<sup>137</sup>

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128. *Id.* at 52–53.

129. 42 U.S.C. § 2000bb(a)(2) (2012).

130. *Id.* § 2000bb(b)(2).

131. *Id.* § 2000bb–1(a) (emphasis added).

132. Prats, *supra* note 127, at 53.

133. *Id.*

134. See 139 CONG. REC. H2356, H2363 (daily ed. May 11, 1993) (indicating that no individual votes were taken as "the rules were suspended and the bill was passed"); 139 CONG. REC. S14461, S14470–71 (daily ed. Oct. 27, 1993) (showing that RFRA passed with a favorable 97/3 vote).

135. See Stephanie Condon, *Democrats Unveil Bill to Reverse Supreme Court's Hobby Lobby Ruling*, CBS NEWS (July 9, 2014, 1:26 PM), <http://www.cbsnews.com/news/democrats-unveil-bill-to-reverse-supreme-courts-hobby-lobby-ruling/> (stating members of Congress have "charged that the Supreme Court misinterpreted [RFRA]"); see also Lauren Markoe, *Should Congress Repeal the Law Behind the Hobby Lobby Case?*, WASH. POST (July 3, 2014), [http://www.washingtonpost.com/national/religion/should-congress-repeal-the-law-behind-the-hobby-lobby-case/2014/07/03/d99431b4-02f0-11e4-866e-94226a02bc8d\\_story.html](http://www.washingtonpost.com/national/religion/should-congress-repeal-the-law-behind-the-hobby-lobby-case/2014/07/03/d99431b4-02f0-11e4-866e-94226a02bc8d_story.html) (discussing whether RFRA should be repealed or narrowed after the Court's decision in *Hobby Lobby*).

136. Condon, *supra* note 135 (internal quotation marks omitted).

137. *Id.* (internal quotation marks omitted).

Others have expressed concerns as well. While RFRA has been criticized from its genesis,<sup>138</sup> after *Hobby Lobby*, criticisms and concerns are more widespread.<sup>139</sup> As one legal scholar asserted, “[t]he tide in favor of RFRA has turned.”<sup>140</sup> The future of RFRA, therefore, is not entirely clear: it could remain good law, it could be repealed, or it could be amended in some way to narrow its scope.<sup>141</sup> Whatever RFRA’s future might be, it remains good law today and must be considered. So the question remains: Does RFRA affect the enforcement of employment discrimination laws, such as ENDA, after *Hobby Lobby*?

### B. The Importance of ENDA’s Religious Exemption

ENDA needs a religious exemption. First, it is needed for bipartisan support.<sup>142</sup> Second, if a religious exemption is not explicitly articulated in the statute, the courts that interpret it will likely create one because there is a long history in United States jurisprudence of protecting religious freedoms.<sup>143</sup>

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138. See, e.g., Marci A. Hamilton, *Power, the Establishment Clause, and Vouchers*, 31 CONN. L. REV. 807, 815 (1999) (arguing that expanding religious rights through RFRA will have “untoward effects on many elements of society”).

139. Michael C. Dorf, a Professor of Law at Cornell University Law School, in reaction to *Hobby Lobby*, voiced his concerns about the Court’s holding and suggested repealing RFRA. Michael C. Dorf, *How to Fix the Religious Freedom Restoration Act*, VERDICT (July 16, 2014), <http://verdict.justia.com/2014/07/16/fix-religious-freedom-restoration-act>. Marci A. Hamilton, a Professor of Law at Benjamin N. Cardozo School of Law, who has been a critic of RFRA from its enactment, noted that she was pleased that groups who once supported RFRA are now taking a stance against it. Marci A. Hamilton, *What’s Really Wrong with the Decisions in Burwell v. Hobby Lobby and Conestoga Wood v. Burwell?*, VERDICT (June 30, 2014), <http://verdict.justia.com/2014/06/30/whats-really-wrong-decisions-burwell-v-hobby-lobby-conestoga-wood-v-burwell> [hereinafter Hamilton, *What’s Really Wrong*]; see also Marci A. Hamilton, *The Religious Freedom Restoration Act Is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 1–2 (1998) (arguing that RFRA was unconstitutional from its enactment).

140. Hamilton, *What’s Really Wrong*, *supra* note 139.

141. While some have called upon Congress to repeal RFRA, no bill has been proposed to do so. However, there was a bill proposed after *Hobby Lobby* to limit RFRA’s application, which would have required employers to provide contraceptives under the Affordable Care Act (ACA) despite any religious objections the employer may have to the mandate; in other words, the proposed bill was intended to nullify the Court’s holding in *Hobby Lobby*. Protect Women’s Health from Corporate Interference Act of 2014, S. 2578, 113th Cong. § 3(15)–(19) (2014). This bill was only introduced and was never considered for a vote. See *Protect Women’s Health from Interference Act*, 160 CONG. REC. S4535 (daily ed. July 16, 2014) (showing that a cloture on the motion to proceed was not invoked, and the bill was not considered for a vote).

142. See Dabrowski, *supra* note 100, at 1970 (stating that ENDA’s religious exemption is “politically necessary”); see also Terkel, *supra* note 20 (Senator Barney Frank stated that “[t]he religious exemption we had was the least we could put in there to pass the bill”) (internal quotation marks omitted).

143. See *supra* note 119 and accompanying text (noting the importance of religious freedom to our founding fathers). The ministerial exception is a prime example of how our legal system strives to protect religious freedoms under the First Amendment. See *supra* Part III(A)(2) (discussing the development of the ministerial exception). Title VII set out statutory religious exemptions for the

ENDA, as proposed, includes a religious exemption, and the exemption's scope is defined by Title VII.<sup>144</sup> While there may be inherent issues associated with Title VII's religious exemption, any issues apply to all employment discrimination claims and are not unique to ENDA specifically. Narrowing the scope of ENDA's religious exemption through an alternative proposal of the Act could pose problems in garnering support for it.<sup>145</sup>

Additionally, because ENDA's current religious exemption is defined by Title VII, there is predictability in how the exemption will be applied. In contrast, if Congress passes ENDA without a religious exemption, or an amended one, Congress leaves the statute more vulnerable to interpretation, which could have unwanted effects, such as a broader religious exemption than what is currently articulated in the proposed statute. Also, as discussed below, ENDA's religious exemption being defined by Title VII also helps to ensure that the Court's decision in *Hobby Lobby* will not affect ENDA's enforcement.

### C. *Hobby Lobby's* Effect on Employment Discrimination Laws

In *Hobby Lobby*,<sup>146</sup> the Supreme Court asked two pivotal questions: (1) whether "person," as referred to in RFRA,<sup>147</sup> includes for-profit corporations, entitling for-profit corporations to religious protections under RFRA; and (2) whether the Affordable Care Act's contraceptive mandate violated RFRA for closely held corporations that have religious objections to the mandate.<sup>148</sup> The Court answered both questions in the affirmative.<sup>149</sup>

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Act, but the Supreme Court of the United States also found a ministerial exception applied under the First Amendment. *Id.*

144. See *supra* Part III (noting that Title VII defines the substance and scope of ENDA in much of the Act).

145. See Dabrowski, *supra* note 100, at 1969–70 (discussing the development of ENDA's religious exemption and stating that the current language of the exemption was in response to concerns regarding other proposed religious exemptions).

146. It should be noted that the purpose of this Article is not to argue whether the Court's decision in *Hobby Lobby* was correct or incorrect. Rather, this Article will look to the Court's opinion and reasoning to discuss the possible implications its holding might have for employment discrimination legislation, specifically ENDA.

147. 42 U.S.C. § 2000bb–1 (2012). RFRA provides that the "[g]overnment shall not substantially burden a *person's* exercise of religion even if the burden results from a rule of general applicability." *Id.* (emphasis added). However, there is an exception. "Government may substantially burden a person's exercise of religion only if it . . . (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." *Id.*

148. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2767 (2014).

149. *Id.* at 2775.

*Hobby Lobby's* decision does not mean that every for-profit corporation is entitled to religious accommodations—not for now anyway. The Court's opinion limited its holding to closely held for-profit corporations.<sup>150</sup> While the Court did not hold that RFRA provided protections to publicly traded corporations, it left the opportunity for that issue to be addressed at a later date.<sup>151</sup> The principal dissent voiced concerns that the Court's logic would extend RFRA protections in the future, stating that

[t]he Court's determination that RFRA extends to for-profit corporations is bound to have untoward effects. Although the Court attempts to cabin its language to closely held corporations, its logic extends to corporations of any size, public or private. Little doubt that RFRA claims will proliferate, 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>152</sup>

In response to these concerns, the Court's opinion reasoned that a RFRA claim by a publicly traded company would be “unlikely” because “the idea that unrelated shareholders—including institutional investors with their own set of stakeholders—would agree to run a corporation under the same religious beliefs seems improbable” due to “numerous practical restraints.”<sup>153</sup>

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150. *Id.*

151. *Id.* at 2774.

152. *Id.* at 2797 (Ginsburg, J., with Sotomayor, J., dissenting and with Breyer and Kagan, JJ., joining in part) (footnote omitted).

153. *Id.* at 2774 (majority opinion). Shareholders of a publicly traded corporation could decide, as a strategic decision, to run the corporation under certain religious beliefs if the result of such religious beliefs meant fewer costs (not providing contraceptives = less insurance costs), which in turn means better profit margins. But “a corporation's pretextual assertion of a religious belief in order to obtain an exemption for financial reasons would fail.” *Id.* at 2774 n.28.

The corporation would also have to show that its religious beliefs were sincere, which requires having an “honest conviction.” *Id.* at 2779 (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.*, 450 U.S. 707, 716 (1981)). As the Court properly noted, a corporation, as a fiction, cannot hold religious beliefs. *Id.* at 2768. Rather, it is the people behind the corporation that hold the religious beliefs, and the purpose of the corporation as a fiction is “to provide protection for human beings.” *Id.*

A corporation is simply a form of organization used by human beings to achieve desired ends. An established body of law specifies the rights and obligations of the *people* (including shareholders, officers, and employees) who are associated with a corporation in one way or another. When rights, whether constitutional or statutory, are extended to corporations, the purpose is to protect the rights of these people.

*Id.* (emphasis in the original). For a publicly traded corporation, the “human beings” are its shareholders. When numerous shareholders are involved and those shareholders can change on a

Whether the Court's opinion is correct is debatable. For example, in *Citizens United v. Federal Election Commission*,<sup>154</sup> the Supreme Court held that corporations are entitled to political speech protections under the First Amendment.<sup>155</sup> When addressed with concerns of protecting the interests of shareholders who object to the corporation's political speech, the Court stated these objections could be handled "through the procedures of corporate democracy."<sup>156</sup> Similarly, a court could find shareholders' religious objections could be handled through the corporation's democratic procedures. But for now, it appears that RFRA's protections are limited to closely held for-profit corporations.<sup>157</sup>

The Supreme Court, however, did not explicitly specify what constitutes a closely held corporation. In *Hobby Lobby*, there were three corporations involved.<sup>158</sup> Each corporation was owned and operated by a single family.<sup>159</sup> This might mean that, for the purposes of RFRA, a closely held corporation is one that is solely owned by a single family. But the Court never explicitly defined it this way, and other definitions of what constitutes a closely held corporation exist, creating some ambiguity.<sup>160</sup> Because of this uncertainty, there is still some fear that, even if ENDA is passed, some corporations will still be allowed to discriminate against the LGBT community. But as will be argued below, *Hobby Lobby* does not provide corporations this latitude.

After determining whether RFRA protections should be afforded to closely held for-profit corporations, the Court asked whether the contraceptive mandate of the ACA violated RFRA.<sup>161</sup> Again, the Court

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daily basis, it becomes difficult to prove the "honest conviction" of a publicly traded corporation. *See id.* at 2774 (stating it is improbable that a set of shareholders "would agree to run a corporation under the same religious beliefs").

154. 558 U.S. 310 (2010).

155. *Id.* at 365.

156. *Id.* at 362 (quoting *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 794 (1978)) (internal quotation marks omitted).

157. *Hobby Lobby*, 134 S. Ct. at 2775.

158. *Id.* at 2759.

159. *Id.* at 2764–66. The Hahn family owned and operated the first corporation. *Id.* at 2764. The Green family (husband, wife, and three children) owned and operated the other two corporations. *Id.* at 2765.

160. *See* Drew Desilver, *What Is a 'Closely Held Corporation,' Anyway, and How Many Are There?*, PEW RES. CENTER (July 7, 2014), <http://www.pewresearch.org/fact-tank/2014/07/07/what-is-a-closely-held-corporation-anyway-and-how-many-are-there/> (providing several different definitions for "closely-held" corporations, including the IRS's definition, which is much broader than the definition implicated in *Hobby Lobby*); *see also* *Hobby Lobby Ruling Raises a Question: How to Define 'Closely Held'?* (Nat'l Pub. Radio broadcast July 1, 2014), *available at* <http://www.npr.org/2014/07/01/327369386/hobby-lobby-ruling-raises-a-question-how-to-define-closely-held> (discussing the absence of a "specific definition" for closely held corporations).

161. *Hobby Lobby*, 134 S. Ct. at 2775, 2779.

answered in the affirmative.<sup>162</sup> This part of the holding should come as little surprise because RFRA imposes a very stringent burden on the government. RFRA provides that the government cannot impose a substantial burden on religion unless the government can show that it has a compelling interest and there is no other less restrictive means available to accomplish that compelling interest.<sup>163</sup>

In *Hobby Lobby*, the Court's decision hinged upon the availability of less restrictive means.<sup>164</sup> Before *Hobby Lobby* was decided, a framework was established to accommodate nonprofit religious organizations that objected to the contraceptive mandate.<sup>165</sup> This framework imposed the costs of contraceptives to insurance providers.<sup>166</sup> In providing contraceptive coverage, insurance providers are eligible to be "reimbursed through an adjustment to the Federally-facilitated Exchange user fee" for participating in the Federal Exchanges.<sup>167</sup> Thus, the framework shifted the burden of providing contraceptive services from the objecting non-profit to the insurance providers and the government.

The availability of this framework was an important aspect in the Court's decision. The Court reasoned that a less restrictive alternative was already available and that there was no reason that the alternative could not also be applied to for-profit corporations with the same religious objections.<sup>168</sup> The Court noted that there would be no additional costs for insurance providers, as it had been previously determined that the costs of providing contraceptive services were equal to or lesser than the costs associated with not providing the services.<sup>169</sup> This framework allowed the government to pursue its compelling interest (making contraceptives available to women) while also respecting the religious beliefs of the objecting corporations.

Had this framework not been in place, it is likely that the Court would have decided *Hobby Lobby* differently. In Justice Kennedy's concurring opinion, he articulated:

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162. *Id.* at 2785.

163. 42 U.S.C. § 2000bb-1 (2012).

164. *Hobby Lobby*, 134 S. Ct. at 2780.

165. 78 Fed. Reg. 39,892, 39,892-93 (July 2, 2013).

166. *Id.* at 39,892-93.

167. *Id.* at 39,893.

168. *Hobby Lobby*, 134 S. Ct. at 2759.

169. *Id.* at 2763; *see* 78 Fed. Reg. 39,870, 39,877 (stating that "issuers would find that providing contraceptive coverage is at least cost neutral because they would be insuring the same set of individuals under both the group health insurance policies and the separate individual contraceptive coverage policies and, as a result, would experience lower costs from improvements in women's health, healthier timing and spacing of pregnancies, and fewer unplanned pregnancies").

As the Court's opinion explains, the record in these cases shows that there is an existing, recognized, workable, and already-implemented framework to provide coverage.

. . .

[T]he Court does not address whether the proper response to a legitimate claim for freedom in the health care arena is for the Government to create an additional program. The Court properly does not resolve whether one freedom should be protected by creating incentives for additional government constraints. In [the cases at hand], it is the Court's understanding that an accommodation may be made to the employers without imposition of a whole new program or burden on the Government.<sup>170</sup>

Thus, the Court strongly relied on the fact that a framework was already in place, and if one did not exist, it would have been improper for the Court to determine "whether one freedom should be protected by creating incentives for additional government constraints."<sup>171</sup>

There are many questions regarding the Court's decision in *Hobby Lobby* and its implications for the future.<sup>172</sup> Among other concerns, the principal dissent voiced apprehensions regarding *Hobby Lobby*'s implications for future decision-making in employment discrimination.<sup>173</sup> The Court, however, addressed these concerns quite explicitly.

In response to the dissent's concerns regarding religious accommodations being made for employment discrimination, the majority stated:

The 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. Our decision today provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to

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170. *Hobby Lobby*, 135 S. Ct. at 2786 (Kennedy, J., concurring) (internal citations omitted).

171. *Id.*

172. E.g., Donna Barry et al., *Infographic: The Ripple Effect of the Hobby Lobby Decision*, CENTER AM. PROGRESS (Sept. 9, 2014), <https://www.americanprogress.org/issues/religion/news/2014/09/09/96460/infographic-the-ripple-effect-of-the-hobby-lobby-decision/> (suggesting that the *Hobby Lobby* decision may also allow employers to refuse to provide other types of health coverage such as vaccinations, blood transfusions, and certain prescription medications); Moskowitz, *supra* note 19 (arguing that the decision in *Hobby Lobby* will adversely affect "women's rights as well as LGBT rights and the rights of the disabled"); Goodwyn, *supra* note 19 (discussing how the *Hobby Lobby* decision may affect future bankruptcy cases); Schlanger, *supra* note 19 (predicting that the holding in *Hobby Lobby* will "set in motion a raft of similar challenges").

173. *Hobby Lobby*, 134 S. Ct. at 2804 (Ginsburg, J., with Sotomayor, J., dissenting and with Breyer and Kagan, JJ., joining in part).

race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.<sup>174</sup>

This statement by the Court has been criticized because it only mentions that the decision will not affect laws that prohibit discrimination “on the basis of race.”<sup>175</sup> Taking a closer look, the Court’s opinion addresses employment discrimination laws *generally*; therefore, rather than being exclusionary, the Court’s opinion arguably is all-inclusive. The Court stated that its decision does not provide a “shield” for “discrimination in hiring, *for example* on the basis of race.”<sup>176</sup> “Race” is mentioned simply as an “example.” By using broad language, the Court arguably included all current employment discrimination laws as well as any that might be enacted in the future, such as ENDA. While these statements by the Court were only dicta, it is a strong indication of its outlook on RFRA’s application in the context of employment discrimination laws.

Furthermore, while the Court did not explicitly state that Title VII will be unaffected by its ruling in *Hobby Lobby*, the Court’s statement 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>177</sup> strongly implies that the Court was referring to Title VII protections because Title VII is the principal federal statute establishing a prohibition of workplace discrimination based on race. Therefore, Title VII will likely remain unaffected by the Court’s decision in *Hobby Lobby*, as the Court impliedly noted that Title VII was already narrowly tailored to achieve the government’s compelling interest in ensuring equality in the workplace.<sup>178</sup>

The Court’s analysis is important because, although ENDA would not be a part of Title VII, ENDA essentially is a derivative or an extension of Title VII. As discussed above, Title VII is used throughout the text of ENDA as a means to define ENDA’s substance and scope.<sup>179</sup> Because Title VII, including its religious exemption, defines much of ENDA’s substance and scope, it can be argued that, as a mere derivative of Title VII, ENDA is narrowly tailored to achieve the government’s compelling purpose. In other words, if Title VII is unaffected by *Hobby Lobby*, ENDA should also be unaffected.

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174. *Id.* at 2783 (majority opinion) (internal citation omitted).

175. *Id.*

176. *Id.* (emphasis added).

177. *Id.* (emphasis added) (internal citation omitted).

178. *Id.*

179. *See supra* Part III (discussing ENDA’s substance and scope and its relation to Title VII).

#### D. Alternative Thoughts: If ENDA Violates RFRA

One should, however, consider the alternative outcome—if courts find that ENDA does violate RFRA. In such a case, for a violation to exist, a court would have to find that the employer has a sincere belief and honest conviction in discriminating against someone of the LGBT community.<sup>180</sup> All other employers would still be subject to the statute—bringing the LGBT community one step closer to equality in the workplace. At the very least, ENDA provides an additional hurdle for employers to overcome in a workplace discrimination suit. While this is short of an ideal scenario, ENDA still broadens the protections for the LGBT community compared to what is currently provided.

Additionally, RFRA's future is uncertain.<sup>181</sup> While it was originally passed with overwhelming support on both ends of the political spectrum, it has been reexamined because, for some, the statute has created unintended and undesirable consequences.<sup>182</sup> There is the possibility that RFRA may be amended.<sup>183</sup> Alternatively, in the most extreme scenario, RFRA may get repealed and the ruling in *Hobby Lobby* would become null and void.<sup>184</sup> If repealed, ENDA would be considered a law of general applicability, and as a law of general applicability, it would be subject to the same analysis that was articulated in *Smith* and less scrutinized on the basis of religious objections.<sup>185</sup>

Moreover, ENDA does not replace Title VII; rather, it provides an alternative means of requesting relief.<sup>186</sup> The only restriction that ENDA provides is that an individual cannot receive relief both under Title VII and ENDA; a remedy is available under one or the other.<sup>187</sup> Therefore, if a court finds that an employer does not have to comply with ENDA because of RFRA, the employee can, as an alternative, still request relief under Title VII. Admittedly, this is an imperfect solution, as this Article has discussed the gaps in protection for the LGBT community under Title VII. However, Title VII still provides an avenue to request relief, and while Title VII may not *currently* provide adequate protections, “[t]here

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180. *Hobby Lobby*, 134 S. Ct. at 2774.

181. See *supra* Part IV(A) (discussing criticisms of RFRA after the Court's decision in *Hobby Lobby*).

182. *Id.*

183. See *supra* note 141 (noting a bill that was proposed to nullify the Court's holding in *Hobby Lobby*).

184. See *id.* (noting that while there has been a call to repeal RFRA no legislation has been introduced along those lines).

185. For a discussion regarding *Smith*, see *supra* Part IV.

186. ENDA, S. 815, 113th Cong. § 10(d) (2013).

187. *Id.*

is some reason for optimism” that Title VII protections will continue to develop in favor of the LGBT community.<sup>188</sup>

Therefore, while this Article argued that the enforcement of ENDA would not be affected by the Court’s holding in *Hobby Lobby*, even if it does, ENDA would still provide much broader and much needed protections for the LGBT community than what is currently afforded.

## V. CONCLUSION

Discrimination based on sexual orientation and gender identity is widespread,<sup>189</sup> and Title VII does not currently provide adequate protections for the LGBT community. Federal legislation, like ENDA, is vital to ensure workplace equality. While ENDA, as proposed, may not be perfect,<sup>190</sup> it passed the Senate<sup>191</sup> and now has momentum, getting one step closer to providing much needed protections to the LGBT community.

While concerns exist regarding the impact of the Supreme Court’s decision in *Hobby Lobby*, it will likely have little effect on the enforcement of employment discrimination laws, including ENDA. The Court explicitly stated that its opinion does not shield employers who engage in discriminatory hiring practices by using religion to escape legal sanctions.<sup>192</sup> Thus, discrimination laws are narrowly tailored to achieve the government’s compelling interest in providing an equal opportunity in the workplace.<sup>193</sup> While the Court did not reference Title VII explicitly, or any other specific employment discrimination law, the broad language used is arguably inclusive of all current and future employment discrimination laws, like ENDA.

If a court finds that ENDA violates RFRA, that court could only come to this conclusion if the corporation could show that it had a sincere belief and honest conviction in discriminating against someone of the LGBT community.<sup>194</sup> All other employers would still be subject to ENDA, bringing the LGBT community another step closer to equality within the workplace.

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188. Case, *supra* note 15, at 1352.

189. Pizer et al., *supra* note 1, at 721.

190. See Case, *supra* note 15, at 1373–74, 1380 (criticizing the language of ENDA). Also, as discussed in Part III, ENDA’s use of gender identity does not include all individuals of the transgender community, and therefore, it may not provide protection to certain individuals, such as those who identify under gender expression.

191. Reynolds, *supra* note 6.

192. *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2783 (2014).

193. *Id.*

194. *Id.* at 2774.

There is more to gain than to lose in passing ENDA. While the current proposal of ENDA may not be perfect, those who may have pulled support for it should reconsider, keeping in mind the old aphorism: progress not perfection.