



Dear friends and allies:

Since 1994, advocates of homosexual behavior have introduced a congressional bill for the “Employment Non-Discrimination Act” (“ENDA”). The goal of ENDA is to make “sexual orientation” and “gender identity” discrimination illegal under federal law. Representative Barney Frank introduced ENDA this year as HR 2015.

His bill gained momentum until the religious community learned of its potential impacts on religious organizations and ministries—and responded with forceful, reasoned opposition. Representative Frank yielded, and held HR 2015 in committee. But on September 27, 2007, he quietly introduced two alternative bills, one to protect “sexual orientation” (HR 3685) and the other, “gender identity” (HR 3686). His strategy was simple: he would push to pass HR 3685 and accept the loss of the “trans-inclusive” HR 3686 “gender identity” bill.<sup>1</sup>

Unsurprisingly, some advocates of homosexual behavior—such as Lambda Legal—immediately criticized Representative Frank for yielding to pressure, particularly on the “transgender” issue. His response is important and telling, as he argued that HR 3685 (which theoretically applies only to “sexual orientation”) was broad enough to protect “gender identity.”<sup>2</sup>

Both bills threaten our first liberty—religious freedom—just as severely as did HR 2015. This holds true despite the bills stating that the “Act shall not apply to a religious organization,” where “religious organization” is simply and deceptively defined as “a religious corporation, association, or society.”

That definition may exempt churches, but it puts parachurch ministries at grave risk. For example, one court held that a United Methodist children’s home was not a “religious organization” under a very similar definition found in the 1964 Civil Rights Act. Amazingly, the court held fast to its opinion despite the fact that the home was hiring a new minister *specifically to protect its religious mission*.<sup>3</sup> Another court recently devised a nine-part, subjective “balancing” test to decide whether a Jewish community center was “religious” under the same federal law.<sup>4</sup> Importantly, two of the nine “secularizing” factors are very common among parachurch ministries: few such ministries are directly controlled by a church; and many will provide “secular” products (such as food, shelter, counseling, or legal services that are not of themselves religious).

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<sup>1</sup> See HRC Board does not support non-trans inclusive ENDA, [http://washblade.com/thelatest/thelatest.cfm?blog\\_id=14555](http://washblade.com/thelatest/thelatest.cfm?blog_id=14555)

<sup>2</sup> See <http://www.house.gov/frank/enda100307.html> (“[T]here are eight states with laws covering sexual orientation but not gender identity, and I am not aware of any instance where anti-gay discrimination, even based to some degree on gender non-conformity [i.e., “transgender”], was not covered.”)

<sup>3</sup> *Fike v. United Methodist Children’s Home of Virginia, Inc.*, 547 F. Supp. 286 (E.D. Va., 1982) *aff’d*, 709 F.2d 284 (4<sup>th</sup> Cir., 1983).

<sup>4</sup> *LeBoon v. Lancaster Jewish Community Center Ass’n*, \_\_\_ F.3d \_\_\_, 2007 WL 2713026 (3<sup>rd</sup> Cir., 2007).

In short, the definition is so vague that a ministry sued under ENDA will suffer complex, hard-fought litigation just to prove itself “religious” and end the case.

Each bill poses its own unique threats to religious ministries. HR 3685 authorizes a lawsuit if action is taken “against an individual based on the actual or perceived sexual orientation of a person with whom the individual associates or has associated.” Consider a ministry that counsels persons struggling with the desire to engage in homosexual behavior. If that ministry fired a counselor, the mere fact he “associated” with ministry clients would give the employee a claim under HR 3685.

And worse, HR 3685 includes § 8(a)(5) of HR 2015—an odious provision that prohibits an employer from using marriage as a requirement for any job. Thus, a marriage counseling ministry could not require its counselors to be married, nor could a ministry to wayward youth require that its house parents be married.

HR 3686—the “trans-inclusive” bill—protects “gender identity,” meaning “the gender-related identity, appearance, or mannerisms or other gender-related characteristics of an individual, with or without regard to the individual’s designated sex at birth.” This bill unhinges masculinity and femininity from biological sex, so that federal lawsuits could arise for absurd reasons. For example, a woman fired for persistently wearing overpowering, obnoxious perfume could claim that she was fired for being “too feminine.” And as with HR 3685, HR 3686 would allow a counselor fired from a ministry that dealt with sexually confused men to claim he was fired because of his “association” with the very clients he was trying to restore.

Neither bill allows an employer to provide separate bathroom facilities for sexually confused employees, whether manifest by a person’s “sexual orientation” or their “gender identity.” Even more outlandishly HR 3686, an employer that has dressing rooms or showers “in which being seen unclothed is unavoidable” could not prevent a man who believes himself to be a woman from using the woman’s facilities—or vice versa. The employer’s only option is to provide “adequate facilities” consistent with the employee’s “gender identity.” In the ministry context, this means that a homeless shelter with open showers would have to add new facilities to accommodate as many “gender identities” as may occur among the clientele.

In sum, many parachurch ministries may not be protected by the simplistic, narrow “religious exception.” Such Christian ministries would be forced by law to accept employees who openly transgress Biblical standards. Moreover, ministry employees would be confronted with pragmatic risks, such as having sexually confused men asserting their “right” to use women’s bathrooms, and vice versa.<sup>5</sup>

I therefore write today to advise you of these risks to your ministry, and urge you to take appropriate action before ENDA forces your ministry to become a second-class citizen in the community.

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<sup>5</sup> Just seven years ago the Minnesota Court of Appeals held that a man must be permitted to use the women’s restroom. *Goins v. West Group*, 619 N.W.2d 424, 429 (Minn. App., 2000). Although later reversed by the state supreme court, the case stands as a stark warning as to how ENDA might be enforced.