

U.S. COMMISSION ON CIVIL RIGHTS

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BRIEFING

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EXAMINING WORKPLACE DISCRIMINATION AGAINST LESBIAN,
GAY, BISEXUAL AND TRANSGENDER AMERICANS

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MONDAY, MARCH 16, 2015

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The Commission convened in Suite 1150
at 1331 Pennsylvania Avenue, Northwest, Washington,
D.C. at 9:01 a.m., Martin R. Castro, Chair, presid-
ing.

PRESENT:

MARTIN R. CASTRO, Chair

PATRICIA TIMMONS-GOODSON, Vice Chair

ROBERTA ACHTENBERG, Commissioner

GAIL L. HERIOT, Commissioner

PETER N. KIRSANOW, Commissioner

DAVID KLADNEY, Commissioner

KAREN K. NARASAKI, Commissioner

MICHAEL YAKI, Commissioner *

** Present via telephone*

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STAFF PRESENT:

TERESA BROOKS

MARGARET BUTLER, Acting Chief, OCRE

IVY L. DAVIS, Director, ERO

PAMELA DUNSTON, Chief, ASCD

DARREN FERNANDEZ

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ANGELA FRENCH-BELL, Assistant Staff Director for
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MYRNA HERNANDEZ

TINALOUISE MARTIN, Director, OM

LENORE OSTROWSKY, Acting Chief, PAU

ROREY SMITH

COMMISSIONER ASSISTANTS PRESENT:

SHERYL COZART

ALEC DEULL

JASON LAGRIA

CLARISSA MULDER

AMY ROYCE

JUANA SILVERIO

ALISON SOMIN

KIMBERLY TOLHURST

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P R O C E E D I N G S

(9:01 a.m.)

I. INTRODUCTORY REMARKS BY CHAIRMAN

CHAIRMAN CASTRO: Good morning, everyone. I am going to call the meeting to order while we await the arrival of our Vice Chair.

I am Marty Castro. I am Chairman of the U.S. Commission on Civil Rights, and I want to welcome everyone here to our briefing, Examining Workplace Discrimination Against LGBT Employees.

It is currently 9:02 a.m., and we are at the Commission's headquarters at 1331 Pennsylvania Avenue NW.

I am joined today by Commission Vice Chair Patricia Timmons-Goodson, Commissioners Narasaki, Heriot, Kirsanow, Achtenberg, and Kladney are all here with me. Commissioner Yaki is participating today by telephone. Commissioner Yaki, when you do have a question, just please speak up since I obviously can't see you and will need to know that you have a question that you want to ask.

The purpose of today's briefing is to closely examine the various federal protections that exist against LGBT workplace discrimination, including the federal government's recent implemen-

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tation of protections in the workplace against LGBT discrimination, and two, Title VII protections in the workplace for all LGBT Americans.

I want to thank Commissioner Achtenberg and her staff for their overwhelming efforts to bring this concept paper to us and to have this be selected as one of the issues that our Civil Rights Commission is looking at this year, and I also want to thank our staff from our Office of Civil Rights Evaluation for putting together an excellent panel, which you will all see develop throughout the day.

You know, I couldn't help but reflect that when Commissioner Achtenberg and I joined this Commission four years ago, one, she was the first openly gay member of the Commission, and I became the first Latino chair. That alone made a big difference, I think, in the history of this Commission.

But more importantly, it was the first time we ever looked at an LGBT issue when we looked at the issue of bullying against children and students of all protected classes, including LGBT students, and that was a very important moment for this Commission. Again, Commissioner Achtenberg was a leader in that effort.

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And then fast forward just to a couple of years ago: what was once through unachievable, marriage equality, is now virtually a majority in this nation, and today, we're looking at an important issue of discrimination in the workplace. And I can't help but think that when the Constitution says that we all have certain unalienable rights, yet many Americans are being denied that unalienable right in the workplace because of indelible characteristics, and whether those indelible characteristics are race, gender, national origin, or sexual orientation, it is the duty of this Commission to examine those issues and ensure that those protections are there. Otherwise, we cannot really have true equal opportunity in this country.

Today's panelists are going to present us with a number of points of view. Each of them is an expert in their area, and they're going to talk to us about the current and proposed legislation that's pending. They're also going to elaborate upon actions being advanced by advocacy groups to alleviate some of the issues in the workplace.

But we are all going to be able to address these issues from a very thoughtful perspec-

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tive and ultimately prepare a report to the President and Congress on what we derive from today's briefings and from the research conducted by our staff.

Today's panel features 18 distinguished speakers who are going to provide us with their viewpoints. They are divided into five different panels. The first panel is federal agencies. The second panel will consist of advocacy groups who share their perspectives. The third panel is going to touch on the economic impact of LGBT workplace discrimination. Panel four is going to look at the unique challenges of the transgender community. And panel five will conclude with religious exemption issues.

During the briefing, each panelist is going to have seven minutes to speak. After all the panelists have made their presentations, Commissioners will then have the opportunity to ask questions. We will then be able to, at the end of that panel, move onto the next one.

In order, however, to maximize the opportunity for discussion, I want to make sure that all the panelists do the best they can to adhere to the time. You will see a series of warning lights

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in front of you: green, get going, yellow, get ready to wrap it up, and red, please stop.

My colleagues know that I will be fair in trying to allocate time to them, but we all want to be fair to one another to ensure that everyone has an opportunity to ask questions.

Finally, the record of this briefing is going to remain open for the next 30 days. If panelists or members of the public, those in the audience or those who are tuned in or watching us via live stream, they have comments, they can send them to us either by mail at the U.S. Commission on Civil Rights, Office of Civil Rights Evaluation, 1331 Pennsylvania Avenue NW, Washington, D.C., our suite number is 1150, and our zip code is 20425; or via email to publiccomments@usccr.gov.

So with those bits of housekeeping out of the way, I'd like to present our first panel.

II. PANEL I: GOVERNMENT ISSUES

CHAIRMAN CASTRO: Our first panelist this morning is Ms. Jeanne Goldberg, Senior Attorney Advisor in the Office of the Legal Counsel of the EEOC, and our second panelist is Mary Beth Maxwell, the Principal Deputy Assistant Secretary for Policy at the U.S. Department of Labor.

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I am now going to ask each of the panelists to raise their right hand and swear and affirm that the information that you're about to provide to the Commission is true and accurate to the best of your knowledge and belief. Is that correct?

(Whereupon, the panelists were sworn.)

CHAIRMAN CASTRO: Great, thank you.

Ms. Goldberg, you have the floor.

MS. GOLDBERG: Thank you.

Thank you for the opportunity to appear before you today.

The Commission's -- the Commission's congressionally mandated role is to enforce Title VII of the Civil Rights Act of 1964, as well as the other federal employment non-discrimination laws. Collectively, these laws enforced by the EEOC prohibit discrimination based on race, color, sex, religion, national origin, age, disability, genetic information, and reprisal for protected activity.

For EEO charges against private sector, state, and local government employers, the Commission investigates and mediates and where appropriate litigates selected claims, if we cannot obtain a conciliated resolution after a cause finding.

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For EEO complaints against federal government agencies, EEOC administrative judges may conduct hearings, and the Commission adjudicates appeals from final agency administrative decisions.

Despite these two different processes, the Commission's statutory interpretations under Title VII and the other laws it enforces apply to both private and government employment.

My statement today, along with the more detailed written testimony I have submitted, summarizes actions the EEOC has taken to enforce Title VII sex discrimination prohibition with respect to gender identity and sexual orientation. The Commission's 2013-2016 Strategic Enforcement Plan, adopted by a bipartisan vote in December 2012, includes as one of its enforcement --

CHAIRMAN CASTRO: Your microphone went off. You might want to hit that again. Try it one more time, please.

No, did it die? Okay. We'll stop your time.

MS. GOLDBERG: Thanks.

CHAIRMAN CASTRO: And put -- put some additional seconds back on the game clock for you.

(Laughter)

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CHAIRMAN CASTRO: Did that take care of it, Pam? Okay, try that.

MS. GOLDBERG: Okay. The Commission's 2013-2016 Strategic Enforcement Plan, adopted by a bipartisan vote in December of 2012, includes as one of its enforcement priorities that coverage of LGBT individuals under Title VII sex discrimination provisions as they may apply.

Importantly, this does not recognize any new protected characteristics under Title VII. Rather, it affirms that existing Title VII protections can provide employment rights for LGBT applicants and employees.

Discrimination based on LGBT status is typically found to be actionable as sex discrimination in either or both of two ways.

First, some cases have held that LGBT discrimination involves non-conformance with gender norms and stereotypes under the Supreme Court's 1989 decision in Price Waterhouse v. Hopkins, in which the Court explained that Title VII's prohibition on discrimination because of sex strikes at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.

Second, some cases have additionally

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found discrimination actionable under Title VII based on a plain reading of the statute's "because of sex" language. For example, in *Schroer v. Billington*, the D.C. Federal District Court held that because sex includes gender, discrimination based on transgender status is literally sex discrimination.

By analogy, the court said, an employer who says he harbors no bias toward either Christians or Jews but only toward converts has engaged in a clear case of discrimination because of religion, which easily encompasses discrimination because of a change in religion.

In its 2011 private sector amicus brief in *Pacheco v. Freedom Buick*, and in its 2012 federal sector appellate decision in *Macy v. Department of Justice*, the Commission invoked both the Price Waterhouse sex stereotyping theory and the plain language rationale to take the position that discrimination based on transgender status, gender identity, having transitioned in the past, currently transitioning, or planning to transition in the future is sex discrimination in violation of Title VII.

In *Macy*, the Commission held that to

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prove such a claim, a plaintiff need not have specific evidence of gender stereotyping by the employer because consideration of gender stereotypes will inherently be part of what drives discrimination against a transgender individual.

Following *Macy*, the Commission further held in *Jameson v. U.S. Postal Service* that intentional repeated misuse of a transgender employee's new name and pronoun may constitute sex-based harassment, and in *Complainant v. Department of Veterans Affairs*, the failure to revise agency records to conform to an employee's changed gender identity stated a valid Title VII sex discrimination claim.

The Commission has also continued to reach public conciliations, initiate lawsuits, and file amicus briefs addressing coverage of transgender individuals under Title VII, including just two months ago, in the well publicized Texas case against the Saks clothing retailer.

The Commission's position in each of these cases is consistent with a clear judicial trend. After *Price Waterhouse*, every court of appeals that has addressed the question has recognized that a transgender plaintiff may state a claim for sex discrimination under Title VII where

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the defendant's action was motivated by the plaintiff's non-conformance with a sex stereotype or norm.

The Commission has also found that discrimination against lesbian, gay, and bisexual individuals based on gender norms, expectations, assumptions, or stereotypes, such as the belief that men should only date women or that women should only marry men, is discrimination on the basis of sex under Title VII.

This was recognized in two federal sector decisions in 2011: Veretto v. U.S. Postal Service, allowing a Title VII sex discrimination claim to proceed on the theory that a supervisor's harassment of a gay subordinate who had entered into a same-sex marriage was motivated by the sexual stereotype that men should only marry women; and Castello v. U.S. Postal Service, allowing a Title VII sex discrimination claim by a lesbian alleging supervisor harassment about her same-sex relationship was motivated by a sexual stereotype that having relationships with men is an essential part of being a woman.

Similar federal sector decisions followed and are collected in my written testimony

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along with citations to district court decisions that have adopted this rationale. These include *Terveer v. Billington*, decided by the D.C. Federal District Court, as well as *Hall v. BNSF Railway*, a case challenging as sex discrimination an employer's policy of providing health insurance coverage to employees for their legally married opposite-sex spouses but not for legally married same-sex spouses.

In a brief filed in the Fifth Circuit in *EEOC v. Boh Brothers*, a same-sex harassment case, the Commission stated that terms historically used against gay and lesbian persons, such as "fag" or "faggot," are degrading sex-based epithets and constitute evidence of discrimination on the basis of sex.

In 2014, the Commission also approved an amicus brief in support of re-hearing in *Muhammad v. Caterpillar, Inc.*, a Seventh Circuit case in which the original panel opinion stated categorically that Title VII does not prohibit sexual orientation discrimination and employee complaints about it are not protected activity for purposes of a Title VII retaliation claim. On re-hearing, the Seventh Circuit amended its opinion to delete the

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language that had said these claims are barred.

The Commission took the position in its Muhammad brief that intentional discrimination based on an individual's sexual orientation can be proved to be grounded in sex-based norms, preferences, expectations, or stereotypes, and thus violate Title VII's prohibition on discrimination because of sex.

As reflected in the Muhammad brief, such norms and expectations can include the expectation that men should be sexually attracted to women and that women should be sexually attracted to men and do not require that the person claiming sex discrimination has been viewed as insufficiently masculine or feminine by others based on the person's dress or manners.

In light of these precedents, the EEOC accepts and investigates charges of discrimination on the basis of gender identity and sexual orientation as claims of sex discrimination under Title VII. Moreover, we have coordinated with our state and local Fair Employment Practice Agency partners so that they advise charging parties of the right to file such claims under Title VII with EEOC, and similarly, our staff seeks to ensure dual filing

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where a state or local law prohibits discrimination explicitly based on sexual orientation or gender identity.

EEOC staff continues to address LGBT legal developments in numerous live outreach and training presentations to the public. In addition, a document for our stakeholders compiling all of these developments as well as charge data entitled "What You Should Know About EEOC and the Enforcement Protections for LGBT Workers," along with other pamphlets and materials cited in my written testimony, are available on our public website.

CHAIRMAN CASTRO: Thank you.

MS. GOLDBERG: Finally, the Commission is in coordination with our sister agencies in recognizing these legal developments.

For example, the U.S. Department of Justice, in both its enforcement and defense of litigation, has joined the EEOC in asserting that discrimination based on transgender status is sex discrimination in violation of Title VII, and citations to DOJ's amicus briefs as well as the Attorney General's memorandum on this topic are included in my testimony.

My fellow panelists will address devel-

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opments at the U.S. Department of Labor, and I would also note that the U.S. Office of Personnel Management has also issued guidance for federal agencies and employees on this topic.

Thank you again for the opportunity to participate in today's briefing, and I look forward to answering any questions that you may have.

CHAIRMAN CASTRO: Thanks, Ms. Goldberg.

Ms. Maxwell?

MS. MAXWELL: Okay. And do I need to do something different with the microphone too?

CHAIRMAN CASTRO: You'll probably need to speak into that one there, yes, thank you.

MS. MAXWELL: Good morning, Chairman Castro and Commissioners. Thank you very much for inviting me to testify today.

As Chairman Castro announced, my name is Mary Beth Maxwell. I am the Principal Deputy Assistant Secretary for Policy at the Department of Labor.

The Department is making enormous strides to provide legal protections for lesbian, gay, bisexual, and transgender workers, and I am proud to be here today to share our many accomplishments.

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As Secretary Perez said last year, our workforce and our entire economy are strongest when we embrace diversity to its fullest, and that means opening doors of opportunity to everyone and recognizing that the American dream excludes no one.

We at the Department are making sure that these basic values are reflected in the full range of our activities, from rulemaking and guidance documents to program policies in our own internal practices.

First, we are hard at work on implementation of Executive Order 13672, the July 2014 order that prohibited employment discrimination by covered federal contractors based on sexual orientation and gender identity.

As President Obama said when signing the Order, it doesn't make much sense, but today in America, millions of our fellow citizens wake up and go to work with the awareness that they could lose their job, not because of anything they do or fail to do, but simply because of who they are: lesbian, gay, bisexual, transgender, and that is wrong. We are here to do what we can to make it right.

This is a historic development. Feder-

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al contractors collectively employ about one-fifth of our nation's workforce. While 18 states and more than 200 cities already ban workplace discrimination against LGBT workers, the Executive Order protects millions more workers from discrimination. And as President Obama said in June, this builds on progress in the private sector.

Equality in the workplace is not only the right thing to do; it turns out to be good business. That is why most Fortune 500 companies already have non-discrimination policies in place.

The Department's implementation efforts include publication of a final rule in December of 2014 to implement the Executive Order. We have held multiple listening sessions with stakeholders. We are continuing to host webinars and other conversations. We have issued Frequently Asked Questions, and we will continue to issue guidance as we assist contractors with implementation.

Second, the Department has worked to ensure compliance with the Supreme Court's June 2013 decision in the United States v. Windsor, another landmark development for LGBT rights. The Windsor decision struck down Section III of the Defense of Marriage Act as unconstitutional, and at

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the President's direction, DOL immediately instituted a Department-wide process to review and update all rules and practices in which marital status is a relevant consideration.

So for example, under the Family and Medical Leave Act, FMLA, we updated our rules so that legally married same-sex couples have the same leave rights as opposite-sex couples.

The basic premise of the FMLA is that no one should have to choose between the job security they need and taking time off to care for themselves or a loved one. This update to the FMLA builds on our earlier work at DOL to ensure that LGBT families can provide caregiving under the FMLA.

In June of 2010, the Wage and Hour Division issued guidance clarifying that a son or daughter under the FMLA includes a child to whom an employee stands in loco parentis. This is important for LGBT families and other families who may not have a biological or legal relationship with a partner's child.

Also following Windsor, we made changes to policies under the Employment Retirement Income Security Act, ERISA, the Federal Employees' Compens-

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sation Act, FECA, and several other workers' compensation programs, and we issued guidance to the workforce development community, the details of all of those in the written testimony.

Wherever possible, we have followed a place of celebration rule which recognizes marriages based on the laws of the state in which they were entered into rather than the state where the couple resides. This rule ensures greater uniformity across employment laws and ensures that no matter whom you love, you will receive the same rights and protections as everyone else.

Third, the Department has made it a top priority to protect the rights of transgender workers. In 2011, DOL updated its own Equal Employment Opportunity policies to explicitly add protection on the basis of gender identity. We have updated policies and trainings to help ensure that the Department is a respectful, safe, and inclusive environment for federal employees.

Last year, the Department clarified that we provide the full protection of the federal non-discrimination requirements that we enforce to transgender individuals. This view is consistent with recent guidance from both the EEOC and DOJ

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that discrimination based on gender identity, including transgender status, is discrimination based on sex.

The Department is working to update our policies based on these important legal developments. In January, the Office of Federal Contract Compliance Programs, OFCCP, issued a proposed rule to update its regulations on sex discrimination. The proposal includes the clarification that sex discrimination encompasses gender identity discrimination.

The Employment and Training Administration will issue guidance to its stakeholders in the workforce investment community, and we will seek more opportunities to ensure equality for transgender workers.

We are also providing the training that employees and grantees need to put these policies into action, including for all OFCCP staff as well as for our Job Corps operators and contractors and our Workforce Development System grantees.

Finally, we are making inroads in a remaining challenge, and that is collecting data on the LGBT community. The Bureau of Labor Statistics added questions regarding domestic partnership ben-

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efits to the National Compensation Survey for the first time in 2011. Our 2012 survey on the FMLA included for the first time a question about respondents' sexual orientation. We have more to do, and this is a space that we plan to focus on in the future.

I am looking forward to our discussion today with you and with colleagues from across the government so that we can learn from each other about what more we can do to ensure equal employment opportunity for all LGBT workers. Thank you.

CHAIRMAN CASTRO: Thank you, Ms. Maxwell.

I will now turn to my fellow Commissioners and find out who would like to -- would you like to have the opening question, Commissioner Achtenberg?

COMMISSIONER ACHTENBERG: I would like to make a brief opening statement, and then --

CHAIRMAN CASTRO: Please do.

COMMISSIONER ACHTENBERG: -- offer the first question.

Today is a significant day for the United States Commission on Civil Rights. As the Chairman mentioned, while we have dealt at least

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partially with other issues that pertain to the LGBT community, this is the first time that we will have dealt -- dealt directly and forthrightly with the question of LGBT protection in the workplace.

I want to thank my colleagues on the Commission for agreeing to undertake this investigation by unanimous vote. It is much appreciated.

The struggle for LGBT -- federal protections of LGBT rights in general and employment rights in particular has been a lengthy one, marking more than 50 years.

In 1974, the legendary Congresswoman Bella Abzug introduced the first proposed federal statute to protect gay and lesbian Americans based on their sexual orientation, the Equality Act of 1974, which was a proposed amendment to the Civil Rights Act of 1964, and it would have included protections of lesbian and gay people in federally assisted programs and housing -- and other federally assisted programs, I beg your pardon.

In that era, however, given the nascent state of LGBT rights movement and the negative public attitudes that pertained to LGBT people, it won't come as a surprise to you that while that law -- proposed law was introduced, it was promptly re-

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ferred to House Committee on the Judiciary and died there with no co-sponsors. That was 1974.

20 years later, Senator Edward Kennedy proposed the first federal standard that would have protected lesbian, gay, and bisexual Americans from employment discrimination, the first version of EN-DA. It has been a 20-year effort since that introduction to achieve a federal standard for employment protection of lesbian, gay, and bisexual people.

In 2013, significantly, that proposed protection, bundle of protections, was amended to include protection on the basis of gender identity as well as sexual orientation, and that proposal was considered and adopted by one House, but not taken up by the other.

The harm of employment discrimination remains pervasive and severe. While many things have changed for the good, the fact that there remains no uniform federal protection is troubling and the issue that is under consideration by this body here today.

The attitudes of a majority of Americans are such that they believe that equality in the workplace, even as it pertains to LGBT Ameri-

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cans, should be the rule of law, and that is true for a majority of members of both political parties. In fact, many believe that it is already the rule of law that pertains in the United States today, although that belief is erroneous.

It is also the case that many local jurisdictions and some states have adopted jurisdiction-wide and statewide protections, although it is less than half. We will hear testimony later today that many large corporations and smaller employers have voluntarily adopted declarations of protection for LGBT workers, and that is laudable as well.

But large corporations, even a majority of them, do not employ even a majority of the eight million LGBT workers in this country, and while that level of protection, as I say, is laudable, again, it is certainly not sufficient.

It is also the case that over the course of the last few weeks and months, we have seen that governors are in a position to retract longstanding executive orders that had generated support for state workers, in the State of Kansas, for example, and states are still in a position to retract protections afforded by local jurisdictions, so these guarantees afforded by states and

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locales are important protections, but what has been given can also easily be taken away without a formal national standard.

My own view is that without a federal guarantee, without a federal legal backstop, perhaps even a series of federal laws in employment, housing, credit, public accommodations, education, et cetera, that is now being boldly proposed by certain members of both Houses of the Congress, the equality promise for LGBT Americans will not be realized.

However, consideration of such a series of bold protections is a consideration for another day. Today, in this Commission, we are looking at the narrow proposition of whether or not uniform federal protection of LGBT people in the workplace is an issue of paramount importance. We will be in a position to make recommendations to the President of the United States and to the Congress of the United States about how serious and pervasive this problem is or is not and whether or not they should consider seriously on the basis of the recommendation of this United States Commission on Civil Rights the adoption of a uniform federal standard, and I am eager to listen to the deliberations of my

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colleagues as we consider this very, very serious issue of public policy.

So thank you very much for according me your indulgence, and I would like to ask the representative of the EEOC if you would talk to us about the record keeping that the EEOC is doing, and talk to us as well about the nature of the -- the number and the nature of the complaints that you have received over the last few years since you have been undertaking this data collection.

MS. MAXWELL: Certainly.

The EEOC began tracking the private sector charge data and the federal sector appeal data in terms of sex discrimination claims relating to gender identity and sexual orientation in January of 2013.

For the final three quarters of fiscal year 2013, we received 667 sex discrimination charges relating to sexual orientation and 161 sex discrimination charges relating to gender identity, transgender status.

For the first three quarters -- the final three quarters of FY 2013, so January 2013 through September 30, 2013, we received 667 relating to sexual orientation and 161 relating to

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transgender status.

In the first three quarters of fiscal year 2014, the numbers were similar. We received 663 relating to sexual orientation and 140 relating to gender identity.

So we are receiving these charges and continuing to investigate and adjudicate and obtain relief.

The fact patterns, the other piece of your question, really run the gamut from alleged non-hire of an applicant who is either perceived in a certain way or is out in the application process, denial of a promotion, termination at the time that someone goes through a transition or announces to their supervisor their intentions to go through a transition, a number of these are harassment cases relating to -- involving hostile work environment harassment, verbal harassment, graffiti, as was the issue in the Muhammad case in the Seventh Circuit, we are seeing some of those harassment fact patterns as well.

So they do run the gamut, and some of them involve in addition these more specific transition-related issues that I mentioned in my statement such as access to bathrooms, conforming em-

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ployment records, and other transition-specific issues that might arise in the workplace.

COMMISSIONER ACHTENBERG: Thank you.

CHAIRMAN CASTRO: Other Commissioners? Commissioner Kladney? Commissioner Heriot, then Commissioner Kladney.

COMMISSIONER HERIOT: I want to talk about ENDA, and this I guess is directed to you, Ms. Goldberg.

You know, listening to your testimony, this is starting to sound like one of those situations where you've got a bill pending in Congress, I think Commissioner Achtenberg said for 20 years, it's been controversial, it hasn't passed yet, and suddenly it sounds like well, you know, Title VII really covers all of this anyway.

Could you tell me what ENDA would cover that you believe is not covered by Title VII?

MS. GOLDBERG: I think the main issue with respect to ENDA that I could comment on is that the courts have not taken a uniform position by any means with respect to the interpretations of Title VII sex discrimination --

COMMISSIONER HERIOT: Did you mean the cases that have gone against what you were saying

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earlier, then? Were there some cases that you didn't discuss with us that found that these theories were inappropriate and not covered by Title VII?

MS. GOLDBERG: Oh, there certainly are a number of those cases, and --

COMMISSIONER HERIOT: Why did you leave them out in your first testimony?

MS. GOLDBERG: I didn't. They are discussed in the cases such as the Muhammad -- and the briefs such as the Muhammad brief, the Saks brief, and the others that are referenced in my testimony. The Commission goes through its analysis and discusses why those decisions in its view don't -- don't use the correct analysis.

But there certainly are a wide range of approaches. The case law is not -- is not consistent. There are -- particularly on the sexual orientation issue, the case law is developing and courts are --

COMMISSIONER HERIOT: So --

MS. GOLDBERG: -- finding their way --

COMMISSIONER HERIOT: -- could you give me some hint as to what the courts that are going the other way, what they're saying?

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MS. GOLDBERG: Sure. With respect to sexual-orientation-related sex discrimination claims, the courts that have rejected Title VII sex discrimination coverage have ruled applying really decades-old case law reflexively that sexual orientation discrimination is excluded under Title VII, and they have not agreed with the reasoning in Terveer and Hall, some of the cases that I discussed in the materials, that have applied a Price Waterhouse sex stereotyping theory.

What ENDA would add as a general proposition is explicit protections and would therefore provide clarity and consistency across the country for our stakeholders, both employees and employers, and at this point in time, we don't -- we don't have that.

COMMISSIONER HERIOT: I am curious about the lack of a bona fide occupational qualification exception in ENDA. I mean, under Title VII, employers are permitted to hire on the basis of sex if sex is a bona fide occupational qualification: jobs like bathroom attendant, topless dancer, prostitute even, or possibly rape counselor. Why is there no bona fide occupational qualification in the --

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MS. GOLDBERG: Yeah, I can't --

COMMISSIONER HERIOT: -- in ENDA?

MS. GOLDBERG: -- I cannot speak to a particular version of the legislation pending in Congress. I know that obviously as Commissioner Achtenberg said there have been a number of versions introduced, including one in the last Congress, and they -- they are not the same every time, and I know that Congressman Polis had originally been scheduled by your Commission to be on this panel, perhaps to address specific questions about the legislation.

I think that the piece that I can speak to is the interaction with Title VII and the development of the case law under Title VII, and what a federal employment non-discrimination law prohibiting discrimination explicitly based on transgender status, gender identity, and sexual orientation would add is clarity and consistency for our stakeholders.

We don't know how the courts will rule, the -- as this issue continues to percolate and develop, and the case law at this time is by no means uniform.

COMMISSIONER HERIOT: On the cases that

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you were talking about since January of 2013, I didn't quite get the numbers there, but how many of these have now gone through the process at the EEOC, and of those, how many were found to be meritorious?

MS. GOLDBERG: Many of those charges are still pending. The --

COMMISSIONER HERIOT: Do you have the numbers on that?

MS. GOLDBERG: Of how many are -- of those are still pending?

COMMISSIONER HERIOT: Yes, and how many --

MS. GOLDBERG: I do not.

COMMISSIONER HERIOT: Can you get that for us --

MS. GOLDBERG: Certainly.

COMMISSIONER HERIOT: -- and get, you know, brief descriptions of each one of those?

MS. GOLDBERG: Of -- I don't -- I would certainly be happy to try to provide descriptions of the types of issues that are raised in the -- in the cases --

COMMISSIONER HERIOT: If you -- if they come in groups, that would be fine, to be able to

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say these were situations where someone thought that they should be able to use the women's room and were not able to, or whatever, in groups, I don't mind, but yes, I would like to know what each one of those is about.

MS. GOLDBERG: Okay. I don't know how the -- that the data is broken down by charge, but I will certainly find out what is available and be happy to submit that.

CHAIRMAN CASTRO: Thank you. I am going to now turn it over to Commissioner Kladney.

COMMISSIONER KLADNEY: Thank you, Mr. Chairman.

CHAIRMAN CASTRO: You're welcome.

COMMISSIONER KLADNEY: I noticed in your written statement that the -- there were cases against the Postal Service in 2013, that was resolved, and DOJ in 2012, and Homeland Security in 2014.

I found it interesting that this was the government, and so my question really is -- ~~is~~ in your outreach and training, how pervasive is it through the government? I know you talked about 350 events in your written testimony, public events I think they were, so I am wondering what are we

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doing inside the government regarding -- I mean, these are fairly recent cases, and that were not resolved through mediation, obviously, but went to a hearing.

MS. GOLDBERG: Are you asking about our outreach to our federal government agency stakeholders?

COMMISSIONER KLADNEY: That is correct.

MS. GOLDBERG: Okay. I am glad you asked about that, and this is also a section in my written testimony although I did not include it due to time in the oral statement.

The Commission has from the outset issued instructions which are on our website to the federal government agency EEO office about how to accept LGBT-related discrimination claims as sex discrimination claims under the ~~the~~ governing process which is in 29 CFR Part 1614, the EEO process for federal government agencies.

And the Commission has through its Office of Federal Operations quarterly meetings with all the EEO directors from the covered agencies, and so there are -- there is a continuing dialogue with them and support for them.

In addition, we have a series of work

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groups on both the private and federal sector side who are giving technical assistance to employers and employees every day who call with questions about these matters, and we also have given a lot of technical assistance to federal government agencies that are seeking to develop specific transition policies to assist supervisors and HR departments with the nitty-gritty of how to assist an employee with any changes that might be necessary.

COMMISSIONER KLADNEY: So my follow-up question then is these cases went all the way to hearing: was that because there was a good faith belief that the agency was correct, or -- ?

MS. GOLDBERG: Those are -- the cases that I believe you're referring to, Veretto and Castello, the 2011 federal sector appellate decisions, are administrative appeals that were decided by the -- by the EEOC, and those -- so those would have come on appeal after the agency found that the complaint should be dismissed, and the employee has an opportunity to either go to an EEOC administrative judge, if there had been an investigation, or if there's a dismissal outright, to -- either way to appeal to the EEOC --

COMMISSIONER KLADNEY: Right.

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MS. GOLDBERG: -- so in those cases, the Agency dismissed the complaint, said this type of claim is not actionable under Title VII as sex discrimination. It came on appeal to the Commission, which then ruled otherwise and remanded it for investigation by the agency EEO office, because in that federal sector process, complaints are filed initially with the agency's own -- the respondent agency's own EEO office --

COMMISSIONER KLADNEY: Right.

MS. GOLDBERG: -- which then conducts an investigation or rules -- otherwise rules on the complaint before it comes to EEOC.

COMMISSIONER KLADNEY: And if I can ask about some of these numbers from 2013 and 2014, are these complaints directly to the -- your EEOC Office as opposed to state EEOC offices?

MS. GOLDBERG: Yes. Those were private sector charges, so those -- the numbers I gave you relate specifically to the private sector charges that EEOC has done the intake on.

COMMISSIONER KLADNEY: And do state EEOC offices also receive these types of complaints?

MS. GOLDBERG: I am referring to our 50

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field offices --

COMMISSIONER KLADNEY: Oh, okay.

MS. GOLDBERG: -- of the EEOC. We also have in many -- work sharing agreements with many state and local government Fair Employment Practice Agencies, FEPAs, and so the state and local Human Rights Commissions, as they're often called, and so in those instances where we have an agreement, they can intake the charge or we can, and it's usually dual-filed so that the individual's rights are preserved under all -- under both the federal and local law even though it may be one agency or the other that is doing the investigation.

COMMISSIONER KLADNEY: And it's my understanding that when a complaint is filed, the EEOC or these other agencies try to mediate it between the parties, and then if -- if mediation fails, either EEOC picks up the case and tries it or a right-to-sue letter is issued.

How long is it taking to get, after mediation, how long is it taking from the time a complaint is filed until a right-to-sue letter issues or EEOC takes the case?

MS. GOLDBERG: It -- we are provided with 180 days, 6 months, at a minimum. It does

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take longer in some cases, so some it's less, and some it is more.

COMMISSIONER KLADNEY: And how long does it take to get to a hearing in front of the administrative law judge?

MS. GOLDBERG: Okay, so on the -- I was just speaking about the private sector process. If you're talking about the federal sector process where there are EEOC administrative judge hearings available, that is made available by the EEOC as soon as somebody requests a hearing, which they can do following the agency's EEO investigation.

COMMISSIONER KLADNEY: The reason I ask is I remember years -- and this is a long time ago, I had hair and everything -- but it took quite a while to get -- to get the right-to-sue letter, it was like a year and a half or two years. Is it still that long?

MS. GOLDBERG: Depending on the case. I think the Commission has improved its process of the inventory and brought those numbers down quite a bit. However, after that six month minimum has passed, that 180 days, any charging party is permitted to request a right-to-sue letter under the

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statute and proceed to take the claim to litigation if they desire to do that rather than go through the EEOC administrative process.

COMMISSIONER KLADNEY: And do many do that? Is it recommended by EEOC to do that? Do you have a position on that?

MS. GOLDBERG: It really does depend on the case. We certainly make that available to people. We -- if folks want a reference to private attorneys who might specialize in employment discrimination, all our district offices maintain those lists and try to provide those resources, but our process really depends on the case, whether it would appear strong for that.

COMMISSIONER KLADNEY: Okay, thank you.

CHAIRMAN CASTRO: Commissioner Kirsanow, then after that the Vice Chair.

COMMISSIONER KIRSANOW: Thank you, Mr. Chairman. Thank you to the witnesses for your testimony.

This is a follow-up on Commissioner Kladney and Commissioner Heriot's questions, and I don't mean to give you --

CHAIRMAN CASTRO: Could you speak up a

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little bit, Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Yeah.

I don't mean to give you any extra homework to do, but in terms of the data related to the charges filed, could you disaggregate those for us -- I know you can't do it right now -- but in the provision of such data, by how many you found probable cause or you issued a right-to-sue letter, how many went to complaint?

Also, of the 667 sexual orientation charges and the 161 transgender charges, do you know what percentage of those -- strike that. What percentage they constitute out of all sexual discrimination charges, and also, do you know for a comparable period of time the cumulative number of race discrimination, national origin discrimination, religious discrimination, all the protected classes under Title VII, what the total number of those charges are?

MS. GOLDBERG: Sure. I mean, you know, we get -- we get, you know, about 95,000 charges a year at this point on the private sector side, and the -- the breakdown ranges from the religion -- religious discrimination charges are about 4 per-

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cent, the retaliation charges are the highest, often about 35 percent, and the other claims somewhere in between, and I'd be happy to provide that breakdown with respect to sex discrimination charges when we provide the other information you --

COMMISSIONER KIRSANOW: Thank you very much.

MS. GOLDBERG: -- have requested.

COMMISSIONER KIRSANOW: And just one other follow-up question.

I don't know where it stands now, but 15, 20 years ago, the EEOC had an administrative process where it would categorize certain charges as they came in by A charges, B charges, C charges, in terms of prioritization. Is that still the case?

MS. GOLDBERG: We do still have a priority chart handling system --

COMMISSIONER KIRSANOW: Can you then also --

MS. GOLDBERG: -- that was adopted in the mid-90s. The letters and numbers and names have changed a bit in terms of that, but we do still use a system for triage.

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COMMISSIONER KIRSANOW: And if, in the provision of that data, if it's at all possible, if you could identify which of the charges or category of charges have been prioritized, that would be helpful, if it's able to do so -- if you're able to do so.

MS. GOLDBERG: Certainly, and the -- the best guide for that in part in terms of the current Commission is the Strategic Enforcement Plan that I referenced in my testimony, and you have the hyperlink to it, so you can view it on our website in my written testimony, that lays out the priority issue areas that the Commission has designated for this three-year period.

COMMISSIONER KIRSANOW: Thank you.

CHAIRMAN CASTRO: Madam Vice Chair?

VICE CHAIR TIMMONS-GOODSON: Thank you. Thank you very much, Mr. Chair, and I thank both witnesses for appearing.

Ms. Goldberg, the question is for you, and it follows up on what Commissioner Kirsanow was asking.

The Commission conceived this briefing in large measure to investigate the scope of feder-

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al protection in the workplace of LGBT discrimination in the workplace, and I -- we noted that in your presentation, or the materials you provided, you indicated that the EEOC Strategic Enforcement Plan, December 2012, includes as one of its enforcement priorities for fiscal year 2013-2016 "coverage of LGBT individuals under Title VII's sex discrimination."

And I wanted you to talk about with us please what led to the decision to include that among your Strategic Enforcement Plan.

MS. GOLDBERG: Certainly.

The Commission has, since the fall of 2011 under Chair Berrien, our former chair, instructed all of its district and field offices to intake claims of LGBT-related discrimination as sex discrimination charges, knowing that it was studying the issue that it had found that some of these types of claims were meritorious, and so the charges were presenting themselves, and the Commission had that opportunity to see these arise. So that was prior to the Macy decision in the federal sector and a number of the other private sector developments that I noted.

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So by the time of the adoption of the Strategic Enforcement Plan by the bipartisan vote in December 2012, the Commission had had an opportunity to see some of the fact patterns that were arising, the kinds of issues that employers and employees were seeking guidance on, that raised -- often the Strategic Enforcement Plan focuses on issues where the -- the fact patterns that are being presented to the Commission present novel issues that require development of the law, application of the law, consideration of how the laws we enforce may apply.

So it -- they presented areas and issues that -- where the law was not always clear and needed development. Other times, issues included, as you'll see when you look at the Strategic Enforcement Plan, are ones where there seems to be great need, and there are issues on there about vulnerable workers relating to immigrant employees, human trafficking. There are also issues relating to statutes that are novel like the scope of disability under the ADA Amendments Act.

So there are a lot of different reasons why issues might present themselves to Commission-

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ers, and they decide to include them on the Strategic Enforcement Plan, though certainly, unlike some commissions, however, those aren't the only charges that get priority, and the district directors have the discretion to decide that a particular charge is meritorious or it raises important issues for other reasons, and can give priority as they see fit.

CHAIRMAN CASTRO: Commissioner Narasaki?

COMMISSIONER NARASAKI: Thank you, Mr. Chair.

I am very excited that we are having this hearing today. The Employment Non-Discrimination Act, Senator Kennedy's version, was one of the first pieces of legislation that I worked on when I came to Washington, and it's a little sad that 20 years later, we're still having this conversation, but it's great to see that actually progress is being made.

It sounds like both the EEOC and the Department of Labor have been engaging employers as they -- as this legal interpretation of Title VII moves on, and as the administration has taken executive action.

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I am wondering what you are hearing from employers in terms of concerns that may be arising from them, and how you're addressing them.

Since you're interpreting Title VII, I assume that means that you are applying the bona fide occupational qualification theory and religious exemptions that exist under that as you move forward, and so I am wondering how that is working out as well.

MS. GOLDBERG: I'm -- I'm not familiar with any decisions that have been issued by the Commission in this area, where they have been called upon to address the BFOQ exception, in other words, where that has been raised by an employer as applying to one of these fact patterns that might arise, and the Commission presumably will then consider that in due course and address it.

With respect to --

COMMISSIONER NARASAKI: So as far as you know, it hasn't really arisen as a huge issue?

MS. GOLDBERG: No, I have not encountered that in the discussion of these cases.

With respect to Title VII's religious organization exemption in the statute, that is

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limited by its terms to allowing religious organizations, churches and certain religious nonprofits, to prefer members of their own religion for employment. It does not permit sex discrimination or race discrimination or any other -- employment actions on any other prohibited basis.

So for many decades, there has been a wealth of Title VII case law ruling that religious organizations can't engage in various forms of sex discrimination even if the employment action they seek to take is motivated by their religious beliefs: so, for example, cases where a religious organization, while they are permitted of course under the statute to prefer co-religionists for hire, is found to have engaged in unlawful sex discrimination under Title VII by providing, for example, a higher salary or different benefits for male employees rather than female based on a religious belief about heads -- relating to heads of households and some other issue intersecting with sex.

So the religious organization statutory exception is very narrow. If an employer were to raise religious defenses relating to RFRA or the

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First Amendment in defense of a charge, arguing that Title VII should not be applied to a particular fact pattern, presumably the Commission would address that in the case where --

COMMISSIONER NARASAKI: And --

MS. GOLDBERG: -- it's raised.

COMMISSIONER NARASAKI: And has that been being raised for other agencies as an issue by employers?

MS. GOLDBERG: I know of a couple of charges where that has come up, been raised.

MS. MAXWELL: And Commissioner Narasaki, I would add, as you know, OFCCP in general has a lot of robust engagement with the contractor community, and in particular, as we prepare for implementation of the new Executive Order, so while I don't have those specific answers handy, but we're happy to follow up, and as that -- that is absolutely -- that engagement is impacting how we design guidance and how we assist contractors with compliance, and we'll be happy to provide additional information to the Commission following up on that.

COMMISSIONER NARASAKI: Thank you. So it seems that perhaps those religious groups who

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are concerned about ENDA might actually prefer a version of ENDA that has some accommodation for religion than the Title VII application, if I understand the current state of the law correctly?

MS. GOLDBERG: I understand your --

COMMISSIONER NARASAKI: I am not asking you to speak on behalf of them.

MS. GOLDBERG: If I understand your question, I don't know that I can speculate about -- about that, but I do understand what you're saying.

COMMISSIONER NARASAKI: Great. Well, it would be very helpful to get some follow-up information about the issues that are being raised as you reach out to the contractor community and how you're planning to address them.

MS. MAXWELL: And to clarify as well, understanding that question more clearly, we with intention also had a real robust engagement of folks from the religious community to be involved in the listening sessions and implementation sessions as we prepare for implementation of the Executive Order, so we thought it was very important to get those perspectives as well, so that will be reflected.

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COMMISSIONER NARASAKI: I am also wondering, one last question Mr. Chair, so there has been a lot of reporting about policies around employment discrimination in Utah and some potential compromises that have been worked out between Mormon church leaders and advocates on behalf of the LGBT community. It may be early because this is very recent reports, but I am wondering if your agencies have a view to what has been discussed.

MS. MAXWELL: Go ahead.

MS. GOLDBERG: I certainly -- there is no formal EEOC position on that. It is interesting to note that the Utah legislation, from what we've all read about it and taking a look at the bill, that it does not have any religious exemption for employment-related discrimination, and in that sense tracks Title VII with its very limited religious organization exception.

MS. MAXWELL: And there is no official DOL view on that as well.

I would just speak again, though, to the listening sessions and implementation sessions that OFCCP has convened, which is a really important listening process to come up with

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solutions.

There is just -- there is a range of best practices, and plenty of places all over this country that people are figuring out how to make things work. And so I think we will see that in the guidance that comes ahead, right, that there's -- people are coming up with solutions to how to implement these situations.

COMMISSIONER NARASAKI: Mr. Chair, I am sorry, I have one more question I forgot to ask, and that is so Roger Clegg, who will be testifying in the next panel, has raised the specter of a flood of litigation with the passage of former legislation. It's my understanding that since the time the EEOC has been moving down this path that that in fact has not occurred, and I am wondering if that is the correct reading of the data.

MS. GOLDBERG: I think that that, Commissioner, is absolutely the correct reading of the data. As I mentioned, the figure might have been so staggering you didn't -- couldn't even believe it, but we receive close to 95,000 charges a year on all the statutes that we enforce, and as I said, in those three quarters in fiscal year 2013 and looking at a snapshot of three quarters in

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fiscal year 2014, we are talking about a fraction, really a very small fraction, talking about 800 charges altogether raising these issues, and obviously, a number of them may not be meritorious for unrelated reasons.

COMMISSIONER NARASAKI: He's also arguing that discrimination seems to be declining to be almost negligent. I am not sure what that's based on, but I don't see that in the data as well, and I just wanted to get your reading of that.

MS. GOLDBERG: I am sorry, could you clarify the question?

COMMISSIONER NARASAKI: One of his arguments for not needing ENDA is his view that discrimination in employment against LGBTQ people is in fact declining to be almost negligible, so any action is not actually necessary.

MS. GOLDBERG: Well, I think that the Commission -- the EEOC takes so seriously the enforcement of all the statutes we enforce, and none of us, for example, would think that the religious discrimination protections that we enforce under Title VII are so negligible as to not be necessary, yet with all the attention that we give those, as I mentioned, they are at about 4

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percent of our charges, and 20 years ago, they were about 1.5 percent, yet the Commission has continued to pay close attention to those issues to be responsive to the concerns raised by our religious stakeholders and employers for guidance in that area: issuing technical assistance publications in the past year on religious garb and grooming in the workplace, a new Compliance Manual in 2008 on religious discrimination in the workplace, yet -- so very important issues, even though a small percentage of our charges, and ones that our stakeholders want clarity on and want this guidance, employers as well as employees, so that they can promote equal employment opportunity in the workplace and comply with the law.

COMMISSIONER NARASAKI: Great, thank you.

CHAIRMAN CASTRO: I guess if it's negligible, it won't lead to a big old rush for cases, right?

(Laughter)

CHAIRMAN CASTRO: Commissioner Achtenberg?

COMMISSIONER ACHTENBERG: Negligible but significant --

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CHAIRMAN CASTRO: Yes.

COMMISSIONER ACHTENBERG: -- as opposed to de minimis, Mr. Chairman.

Ms. Maxwell, you mentioned that the Bureau of Labor Statistics has revised its practices. Could you explain again what you now take note of that you didn't before, and also could you talk a little bit about -- you also made reference to the amendment to change practices with regard to ERISA, could you talk a little bit about what the -- the nature of the disparate treatment that was the result of ERISA that pertained before and does not pertain now?

MS. MAXWELL: For BLS, what I would note is --

CHAIRMAN CASTRO: The microphone, please?

MS. MAXWELL: Oops.

For BLS, what I would note is one great step forward in asking -- adding a question on domestic partner benefits to the National Compensation Survey, so I wouldn't characterize that yet as a full -- a revision of all practices. It's a question has been added to a survey, which is significant, and I'm sure you will hear from

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experts later today on the need for data.

That's similar to us adding a question to the FMLA survey that Wage and Hour commissioned in 2012, so I would characterize us as at the early stages of looking for places to add appropriate questions about the LGBT community right in the data collection efforts of the Department of Labor.

COMMISSIONER ACHTENBERG: So it's on the issue of compensation and the fact that an LGBT person with a non-married partner -- is it that issue that you're --

MS. MAXWELL: Yes, in the past -- in the past you wouldn't have even captured that some people were getting benefits through domestic partner benefits, so it's simply our -- is the reality of the LGBT experience in the workforce showing up in the data that we're collecting? That is the primary thing that it was --

COMMISSIONER ACHTENBERG: I see.

MS. MAXWELL: -- based on.

COMMISSIONER ACHTENBERG: Okay, thank you.

MS. MAXWELL: And same for the FMLA.

Under ERISA, EBSA issued guidance on the meaning of "spouse" and "marriage" as these

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terms appear in the act, in ERISA, and in the relevant provisions of the IRS Code that the -- Internal Revenue Code that the department interprets, the guidance provides that "marriage" and "spouse" includes same-sex marriages and individuals in same-sex marriages respectively and follows the place of celebration rule.

So this is less that it was remedying a wrong and more that the President had instructed all agencies post-Windsor to look at every single authority that we have and make sure that we are updating it now so that the intent of those protections are fully available to everyone post the Windsor decision.

COMMISSIONER ACHTENBERG: I see. So in the event that one's marriage is legal in the state where the marriage took place, then the federal protections pertain, is that correct?

MS. MAXWELL: That is our intent. Our decision is to go in every single place possible with the state of celebration standard, not the state of residence, right?

So if you are married legally, right, wherever you are married legally, you will be covered by those protections regardless of where

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you reside --

COMMISSIONER ACHTENBERG: Thank you.

MS. MAXWELL: -- the same as for opposite-sex marriages.

COMMISSIONER ACHTENBERG: Thank you for the clarification.

CHAIRMAN CASTRO: Any other questions, Commissioners? Commissioner Yaki?

(No audible response.)

CHAIRMAN CASTRO: None? Okay, well then I want to thank --

COMMISSIONER YAKI: No, I am good.

CHAIRMAN CASTRO: Oh --

COMMISSIONER YAKI: I am good.

CHAIRMAN CASTRO: You are good?

COMMISSIONER YAKI: Thank you.

CHAIRMAN CASTRO: Okay. Yeah, your mute button, right?

Well thank you. I want to thank this panel for your responses and your information. It was very useful, and we look forward to hearing from you in terms of the additional data that has been requested, so thank you.

MS. GOLDBERG: Thank you.

MS. MAXWELL: Thank you.

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CHAIRMAN CASTRO: I will now ask the next panel to begin to prepare to come up.

(Pause)

CHAIRMAN CASTRO: Okay, we are -- all right, Commissioners, we are going to go back to the panel.

III. PANEL II: GENERAL ISSUES

CHAIRMAN CASTRO: We will now proceed. I want to first of all introduce the panelists in the second panel.

Our first panelist is Mr. Roger Clegg, President and General Counsel for the Center for Equal Opportunity.

Our second panelist is Kate Kendell, Director for the National Center for Lesbian Rights.

Our third panelist is Ms. Sarah Warbelow from the Human Rights Campaign.

Our fourth panelist is Ms. Stacey Long Simmons, Director of Public Policy and Government Affairs at the National LGBTQ Task Force.

And our fifth and final panelist for the second panel is Ms. Winnie Stachelberg, Executive Vice President for External Affairs for the Center for American Progress.

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I will ask you all to raise your right hand and to swear and affirm that the information that you're about to provide to us is true and accurate to the best of your knowledge and belief. Is that correct?

(Whereupon, the panelists were sworn.)

CHAIRMAN CASTRO: Thank you. Mr. Clegg, good to see you again. You have the floor.

MR. CLEGG: Okay.

CHAIRMAN CASTRO: Seven minutes.

MR. CLEGG: Thank you very much.

I appreciate the opportunity to testify today. My name is Roger Clegg, and I am President and General Counsel of the Center for Equal Opportunity, which is a nonprofit research and educational organization that is based in Falls Church, Virginia.

Our chairman is Linda Chavez, and our principal focus is on public policy issues that involve race and ethnicity, such as civil rights, bilingual education, and immigration and assimilation.

I should add that Ms. Chavez was once the Staff Director of the U.S. Commission on Civil Rights and that I was once the Deputy Assistant

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Attorney General in the Justice Department's Civil Rights Division.

The points I make in the written testimony that you all have about the Employment Non-Discrimination Act are six, and I am just going to list them.

Number one, Congress lacks the constitutional authority to pass this bill.

Number two, there is no call for a federal role in this area anyway.

Number three, the bill is inconsistent with free market, federalism, and personal freedom principles. We shouldn't forget that there is a strong presumption in letting businesses make their own personnel decisions.

Number four, it is not necessarily immoral or irrational to discriminate on the basis of sexual orientation or gender identity.

Number five, this legislation would create many practical problems for employers.

And number six, the main purpose of this bill is to try to marginalize the views of Americans who believe that gay sex is a sin, and this is a bad aim.

There is some overlap among these

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points, by the way, but they are distinct.

So that is my written testimony. In my oral testimony today, I'd like to talk a little more about when discrimination on the basis of sexual orientation might be rational.

The situations I discuss in my written testimony are principally where the employer, his other employees, or his customers might have objections to working with someone whom they view as engaging in immoral activity.

And when you think about it, there are at least two other groups of situations where discrimination on the basis of sexual orientation might make sense.

Number one, when the person's sexual orientation might give them insights useful with others of that sexual orientation.

And number two, when the fact that the employee might be sexually attracted to another individual is relevant, either positively or negatively, to the job.

On the first class of cases, I myself am not a great fan of the notion that it's important to be a member of a particular group in order to know how members of that group might

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think. For example, "diversity" proponents will frequently argue that to market a product to this or that group, a company needs to be sure that it has employees who belong to this or that group.

As I said, I generally don't buy this, but some companies do, or at least they say they do, and so it is ironic that liberals now want to pass this bill, under which those companies would be forbidden from giving a preference to hiring, say, gay employees if they wanted insights on how best to target gay customers for this or that product.

Here's another example which I like better: marriage counselors for straight couples might be more credible if they too are straight and married, and marriage counselors for gay couples might be more credible if they too are gay and married.

As I said, there's a second category which would include situations where it might be relevant whether an employee will be sexually attracted or might be perceived to be sexually attracted to some other individual.

For example, suppose your company provides caregivers to disabled or elderly

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individuals. Those individuals might not want someone in that position whom they perceive as someone who might become attracted to them sexually. Thus, a woman might be more comfortable with a caregiver who is a straight woman, or even a gay man, than with a caregiver who is a straight man or a lesbian.

Similarly, if a job requires close contact with adolescents, parents might prefer straight men to be working with adolescent males and straight women to be working with adolescent females.

Now, if you think I'm wrong and that no rational employer would ever discriminate on the basis of sexual orientation, it does not follow that ENDA should be passed. There are all the other objections to it that I discuss in my written testimony, plus another one.

If discrimination on the basis of sexual orientation is always irrational, then employers that engage in such discrimination will be at an economic disadvantage, and the market will punish them. They are not hiring the best-qualified people. That is bad for business.

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discrimination will make it more likely that they will be driven out of business by their more rational competitors in the marketplace.

This is a point that was made years ago by the late Gary Becker, a professor who won the Nobel Prize in economics.

So if it's true that no rational employer ever engages in discrimination on the basis of sexual orientation, you don't need to pass the Employment Non-Discrimination Act because the market will take care of the problem.

Thank you very much, Mr. Chairman. I am happy to try to answer any questions that the Commission may have.

CHAIRMAN CASTRO: And I am sure we'll have them.

Ms. Kendell?

MS. KENDELL: Good morning Mr. Commissioner, Ms. Vice Commissioner.

It is a pleasure for me to be here. My name is Kate Kendell, I am Executive Director of the National Center for Lesbian Rights. We are a 38-year organization based in San Francisco that does national legal and policy work all over the country.

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Now, in that 38 years, it is fair to say that we have seen enormous changes in the place of LGBT people in this culture and in society, and as Commissioner Castro pointed out, this year alone, we expect and hope, that we will have a ruling from the U.S. Supreme Court in June that will once-and-for-all give this country finality with regard to the recognition and full dignity and respect for our relationships through the recognition of marriage nationwide.

We applaud the gains that we have seen, but one of the most intractable issues continues to be in the area of employment. Almost every day, we hear from LGBT individuals who suffer either some sort of negative employment action or are terminated from their jobs or are harassed on the job based on their sexual orientation or their gender identity.

Even here today, you will hear from a former NCLR client, Lisa Howe, who was separated from employment at her private Christian college when she came out to her players, her soccer players, very successful soccer coach, celebrating the fact that she and her wife were going to have a baby.

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To be free from negative job action, to be free to be able to be employed, and to be judged only based on your ability so that you can provide for yourself and family is at the heart of being able to live fully in civil society.

Both methodological and anecdotal information reinforces that LGBT, particularly transgender, employees, even in this moment of great acceleration for LGBT rights, suffer in the employment realm.

We have heard from the EEOC, from the Department of Labor, and we know the Department of Justice, the Office of Personnel Management and the Obama administration all support an interpretation of Title VII that would include coverage for gender identity, and sexual orientation, and yet we also know that the case law is decidedly mixed, with a number of cases, holding that sexual orientation discrimination is not sex discrimination under Title VII, therefore allowing employers in 28 states to openly discriminate on the basis of sexual orientation, and in many cases, on the basis of gender identity as well.

We need federal protections, and we ask that those federal protections be furthered in

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whatever way is possible by this Commission.

We also want to assure that federal protections do not include overly broad religious exemptions or a license to discriminate, which is why NCLR among other of our colleagues no longer support a version of the Employment Non-Discrimination Act, which contained overly broad exemptions that went beyond the exemptions in Title VII, exemptions, which I want to be clear, we support.

In the wake of a possible imminent positive ruling on marriage, and certainly in the wake of a wave of victories at the district and circuit court levels, we have seen a number of states enact laws which encroach on the recognition of those relationships by claiming that religious liberty is infringed by acknowledging and respecting these relationships as legally recognized.

This is nonsense, it is offensive to many people of faith, to LGBT people of faith and people committed to principles of equality and fairness.

Nothing has changed in regard to the First Amendment protections for religious faith and

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belief, which we support 100 percent and unreservedly, and in fact, in the wake of the Hobby Lobby ruling, it can be argued that there are even greater and to some degree some questionable protections for religious belief.

No church will ever be forced to recognize or perform a marriage that they disagree with, and we would be first front line defending a minister or a pastor if he or she were compelled to perform a marriage that he or she disagreed with.

What we're talking about are incursions on the ability to participate in all realms of civic life. That is the permission that some of these amendments and bills are seeking.

Our commitment to non-discrimination trumps private prejudice. That is the history, that is, the balance we have embraced in this country. The participation in civic life is free to all individuals, and we are concerned that weakening non-discrimination protections with religious entitlements will carve out not just LGBT people from protection, but protections that have historically been afforded to individuals who have suffered or been made vulnerable based on who they are or how they identify.

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The Utah example is an important one to note. Utah is my home state. I was raised Mormon in Utah, some would say good girl gone bad, but what I understand about Utah is that it is near -- as near to a theocracy as any state we have in this country. Utah was founded by one religion, the Church of Jesus Christ of Latter Day Saints. It is dominated by the LDS faith, and Utah law already contains broad religious exemptions.

There was no compromise made in gaining the protections for LGBT people in Utah, and I applaud the law that was passed. What happened is sexual orientation and gender identity were imported into existing non-discrimination laws which already contains broad religious exemptions because it's Utah. It is not a federal model. We have a federal model. It is Title VII, and that's the law that we want to see equally protect individuals based on sexual orientation or gender identity.

Thank you.

CHAIRMAN CASTRO: Thank you, Ms. Kendell. Ms. Warbelow?

MS. WARBELOW: Mr. Chairman, members of the Commission, thank you for having me today.

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My name is Sarah Warbelow. I am the Legal Director for the Human Rights Campaign, the nation's largest lesbian, gay, bisexual, and transgender advocacy organization.

On behalf of our 1.5 million members and supporters nationwide, I am honored to be here before you today.

Following the recent economic recession, families across the country have faced unemployment and underemployment every day. LGBT workers and their families are experiencing these tough financial realities alongside the rest of America, but for many of these families, daily discrimination on the job serves as one more barrier keeping them from getting back on their feet.

Although the advances in equality for LGBT people over the last decade cannot be denied, employment discrimination is still a persistent barrier to economic success for too many hardworking Americans.

Currently, 29 states offer no explicit protections from discrimination on the basis of sexual orientation, and 32 states offer no explicit protections on the basis of gender identity.

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According to a 2011 survey, nearly 40 percent of lesbian, gay, and bisexual employees who are open about their sexual orientation had experienced discrimination in the workplace during the five years prior to the survey.

Transgender people face an even starker reality, with 47 percent of transgender people reporting discrimination in the employment context.

The impact of this discrimination is clear and harsh. Discrimination on the job and during the hiring process results in lower earning for LGBT people across the lifespan.

In recent years, the EEOC and some federal courts have interpreted the sex provisions of Title VII of the Civil Rights Act of 1964 to include protections for sexual orientation and gender identity. Specifically, in 2012, in *Macy v. Holder*, the EEOC held that an employee's complaint of discrimination on the basis of gender identity could be covered under Title VII's prohibition of sex discrimination.

Most recently, in January of this year, in *Coates v. Wal-Mart Stores*, the EEOC determined that Wal-Mart's denial of spousal health benefits to a same-sex spouse of an employee was unlawful

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discrimination under Title VII.

Federal courts have cited and relied upon the precedent set by the landmark case Price Waterhouse v. Hopkins. Both the Sixth Circuit and the Eleventh Circuit applied this precedent in extending the Price Waterhouse prohibition of sex stereotyping to apply to transgender employees who allege that they were fired because of their gender identity.

Although these court decisions and the EEOC policy send a powerful message to employers regarding the reach of Title VII, LGBT people are still not explicitly protected as a covered class of employees under the act. In the absence of clear protections, LGBT people may be forced to file lawsuit in order to enforce these protections, a luxury that most in our community cannot afford.

The Obama administration has taken meaningful steps towards protecting workers from discrimination.

In particular, I'd like to highlight the Executive Order signed by the President in July of 2014 which prohibits discrimination on the basis of sexual orientation and gender identity in government actions of contractors and

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subcontractors. This is one of many examples that underscores the administration's recognition of government's clear, compelling interest in ending this harmful discrimination.

While the government has a clear, compelling interest in eradicating discrimination in employment, we also recognize the interest that has historically been balanced with religious rights of employers. Given this history, religious employers already benefit from ample exemptions from federal non-discrimination provisions.

Specifically, Title VII provides strong protections for religious organizations, including exemptions for religious employers in the context of hiring and firing. For example, the ministerial exemption examined by the Supreme Court in *Hosanna Tabor v. EEOC* exempts religious employers from discrimination prohibitions when making employment decisions involving ministerial staff. This exemption has since been extended by the courts to include many other non-ministerial employees whose jobs serve a religious function, including professors, lay teachers, and even cemetery personnel.

Additional exemptions are not only

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unnecessary but could lead to adverse consequences for discrimination protections.

Non-discrimination provisions protecting LGBT workers from discrimination on the job will not infringe upon the religious beliefs of employers. Employers already have these ample protections, but under the First Amendment and through explicit statutory exemptions.

The courts have also not been shy in applying these exemptions and the rights liberally. The Supreme Court has noted that the U.S. Constitution gives special solitude to the rights of religious organization.

The Supreme Court has also recognized that government has a unique, compelling interest in protecting against employment discrimination. Writing for the majority in *Burwell v. Hobby Lobby*, Justice Alito rejected the possibility that discrimination in hiring might be cloaked as a religious practice to escape legal sanction. He wrote, "Our decision today provides no such shield. The government has a compelling interest in providing equal opportunity to participate in the workforce."

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business support comprehensive non-discrimination workplace protections because they know that in order to remain competitive, they must recruit and retain the best possible talent, including members of the LGBT community. The civil rights community also stands behind comprehensive non-discrimination workplace protections, including a coalition of more than 200 civil rights, religious, labor, and women's rights organizations.

HRC and our coalition partners support the introduction of comprehensive non-discrimination legislation that will protect LGBT Americans from discrimination not just in employment, but also in housing, education, public accommodations, jury service, and credit.

Thank you so much for the opportunity to testify today.

CHAIRMAN CASTRO: Thank you. Ms. Simmons?

MS. LONG SIMMONS: Good morning Mr. Chairman, members of --

CHAIRMAN CASTRO: Turn your mic on. Thank you.

MS. LONG SIMMONS: Good morning Mr. Chairman, members of the Commission. I would like

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to thank you for inviting the National LGBTQ Task Force to participate in this briefing to examine workplace discrimination that is faced by lesbian, gay, bisexual and transgender Americans.

I am the Director of Public Policy and Government Affairs for the National LGBTQ Task Force, the nation's oldest LGBT advocacy organization. Today's testimony will examine the scope of federal protections to eliminate workplace discrimination against LGBT employees.

LGBT Americans face high levels of employment discrimination. There are an estimated 5.4 million LGBT workers in the United States. Discrimination against LGBT people in the workplace persists despite the increasing visibility of these communities, improved local and statewide protections against anti LGBT prejudice and violence.

The data indicates that employment discrimination can lead to a significant impact on the economic, social and physical well-being of LGBT people. Over 50 studies of discrimination against lesbian, gay bisexual people have been conducted. And though limited, the data shows that LGBT people face significant barriers to equality.

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Even fewer studies have been conducted about discrimination against transgender people. And to address this gap in 2011, in a joint effort with the National Center for Transgender Equality, the Task Force published "Injustice at Every Turn," a report of the National Transgender discrimination survey.

This documented the discrimination transgender people experience in employment, education, healthcare and many other areas. Our key finding is this, the state of the workplace for transgender workers in this country is abysmal.

Discrimination in employment against transgender people is a nearly universal experience with 90 percent of the survey sample reporting mistreatment or discrimination on the job. Or taking actions like hiding who they are to avoid it. Nearly half lost their jobs or were denied a job or a promotion as a direct result of being transgender.

And survey respondents experienced a series of devastating negative outcomes. Many of which stem from the discrimination that they face in employment.

Later on in this afternoon's panel on

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transgender issues you'll hear more about this important survey and the findings from that landmark research that we conducted.

A point about data collection was made earlier, which I would like to reiterate. Additional data collection is essential because LGBT people face staggering levels of discrimination in employment, housing, public accommodations and other areas.

And as these policies change, we expect discrimination to decline. However, in order to measure the change in discrimination and to create interventions that more accurately respond to the needs of the LGBT community, we need to collect more data on LGBT people.

And in the coming years, as the EEOC receives complaints, as the second nationwide study of transgender people is administered and data on employment discrimination will be collected, there may reflect the changes in levels of discrimination. But put simply, these measures are simply not enough.

More comprehensive data collection is needed. Every federal agency should be changed with collecting information on sexual orientation

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and gender identity in all of their surveys. This effort can be spearheaded by a Presidential Executive Order calling for agencies to determine the best methods for integrating these demographic questions into their data collection instruments.

And for example, workplace discrimination data can be collected through the inclusion of sexual orientation and gender identity questions and population-based surveys of the workforce, like the American Community Survey and surveys fielded by the Bureau of Labor Statistics.

With respect to cases of discrimination, instances of discrimination occur across sectors, at any state of employment process, in various fields, sectors and positions. And stories that highlight discrimination in hiring, firing, and workplace harassment, were included in our written testimony to this body.

LGBT workplace protections exist as we heard from earlier testimony, but explicit protections are needed. In recent years LGBT workplace employment protections have gained momentum and received broad public support, such that we currently have 19 States and the Washington, D.C. area that have employment non-

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discrimination laws that protect employees from discrimination on the grounds of sexual orientation and gender identity. And an additional three States that cover only sexual orientation.

The EEOC has recognized Title VII's prohibition on sex discrimination extends to gender identity and sexual orientation. Federally, this grants protections to LGBT and gender non-conforming people.

In 2014 the President issued an Executive Order protecting federal employees of federal contractors from discrimination. However, to ensure that workplace discrimination against LGBT employees is eradicated, we need explicit inclusion of gender identity and sexual orientation in federal legislation prohibiting employment discrimination.

Without establishing sexual orientation and gender identity as protected classes, employers are likely to be unaware of their potential liability under federal law. And LGBT and gender non-conforming employees are also likely unaware of their right to be free from discrimination on the job or take recourse.

The passage of such legislation would

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serve to explicitly prohibit discrimination on the basis of sexual orientation or gender identity in the same way that Title VII of the Civil Rights Act of '64 prohibits discrimination on the basis of race, color, religion, sex or national origin.

In conclusion, workplace discrimination is a pervasive issue that prevents employees from meaningfully contributing their talents to our nation's workforce. Workers who encounter anti LGBT sentiments or actions are faced with the perilous choice of either hiding their LGBT identity in the workplace or risking discriminatory treatment and harassment by disclosing their LGBT identity.

While EEOC protections take shape and agencies issue guidance, it will take time for employers and employees to recognize the legal protections available. We hope that more data will be collected as we await a new legal precedent or legislation is enacted that will set this matter unequivocally in the past.

On behalf of the Task Force, I would like to thank the Commission for this opportunity to provide a statement on the workplace discrimination faced by LGBT Americans. We are

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grateful that it is being examined in further detail.

CHAIRMAN CASTRO: Thank you, Ms. Simmons. Ms. Stachelberg please?

MS. STACHELBERG: Good morning. It's an honor to be here today. My name is Winnie Stachelberg and I'm the Executive Vice President for External Affairs at the Center for American Progress.

CAP is an independent, nonpartisan, educational institution dedicated to improving the lives of all Americans through progressive ideas and action. As an institution and as Americans, we believe in the right of all people to equal opportunity in society and equal protection of the laws.

Yet today in America it remains legal in 29 States to fire an individual because of their sexual orientation. In 32 States transgender Americans lack basic explicit protections from discrimination in the workplace. And despite the historic progress we have seen on marriage equality, in 16 States and counting, same sex couples can be legally married and legally fired for doing so, all on the same day.

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Workplace protections lie at the center of America's non-discrimination laws. For marginalized communities, these protections serve as an integral part of the American dream and the gateway to equal opportunity and financial stability. The lack of binding and enumerated federal employment protections for lesbian, gay, bisexual and transgender workers remains a central need for our community in order to combat the pervasive discrimination faced in all areas of life including and particularly in employment.

In June 2013 the Center for American Progress in collaboration with our partners at the Movement Advancement Project and the Human Rights Campaign released a comprehensive report outlining the broken bargain for LGBT workers that leaves many unable to provide the basics for themselves and their families. The report demonstrated what many of our families know too well, that LGBT workers face serious barriers to both gaining and keeping a job due to discrimination based on sexual orientation and gender identity.

Among lesbian, gay, bisexual and transgender individuals, between 11 and 28 percent reported being denied or passed over for promotion

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because of their sexual orientation. While one in ten reported having been fired from a job in the last five years because of whom they love.

The rates of discrimination are even more alarming for transgender people. 47 percent of whom have reported being fired, not hired or denied a promotion because of their gender identity. Of that 47 percent, roughly half have reported being fired from a job they already had because they were transgender.

For LGBT Americans with jobs, many report experiencing unequal pay due to their identity. Gay and bisexual men make 10 to 32 percent less than straight men with similar backgrounds in comparable jobs. Similarly, transgender women see a dramatic pay decrease after transitioning, contributing to a poverty rate for transgender people that is significantly higher than the general population.

While employment laws remain at the heart of our push for non-discrimination protections, any discussion about ensuring fair and equal access to a job cannot be limited to protections in the workplace. The ability to find work does not begin and end with the application

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process. It also includes the ability to gain a quality education in a safe school, secure stable housing and have equal access to the goods and services that every American needs to live and thrive.

This past December my colleagues at the Center for American Progress released a report entitled "We the People," which outlined the discrimination faced by LGBT people in employment, housing, education, credit and public accommodations. The report called on Congress to join the growing number of States in passing a comprehensive LGBT Non-Discrimination Act which would provide protections based on sexual orientation and gender identity in vital aspects of life.

LGBT Americans are routinely denied shelter. More than half of LGBT students feel unsafe in their schools. And LGBT customers are too often refused equal access or treatment in our nation's marketplaces.

Without protections to combat these instances of discrimination along with protections in employment, too many LGBT Americans will be denied the basic tools necessary to gain

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employment. Despite these alarming instances of discrimination both in and outside of the workplace, considerable progress has been made on the federal level to utilize existing civil rights protections to combat discrimination against LGBT Americans.

Two years ago the EEOC rightly determined that discrimination based on gender identity in employment constituted illegal sex discrimination under Title VII. Today the Department of Justice is utilizing that same rationale to combat workplace discrimination by public employers.

In the single largest expansion of LGBT workplace protections in our nation's history, President Obama added sexual orientation and gender identity protections to the Executive Order banning discrimination by federal contractors.

In the end, whether we achieve these protections through the courts or through the legislature, or most likely through some combination of the two, the fact remains that the force of these laws relies on adequate resources and tools for those tasked with their enforcement. While many believe that discrimination is a relic

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of the past, the number of overall discrimination charges filed by the EEOC has reached historic levels.

Despite this increase in complaints, the EEOC has nearly a quarter fewer full time employees than it did 20 years ago. The same trend is occurring in many other offices charged with enforcing our nation's civil rights laws.

Many of these offices like the EEOC are already proactively protecting many in the LGBT community. The fact that they are doing so with diminishing staff is unacceptable. And as we continue to push Congress to expand protections to include all Americans, we also will push for the necessary appropriations needed to ensure that all current and future non-discrimination protections are fully enforced.

In conclusion, as our recent report notes, the American dream rests on the promise of a level playing field. A society where all people have equal access to the central pillars of opportunity.

With the significant rates of discrimination faced by LGBT Americans, it is abundantly clear to ensure that level playing field

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that LGBT Americans both need and deserve the same protections that are currently afforded to all others. The time has come to ensure fairness and to fully fund that fairness for all Americans, regardless of their sexual orientation or gender identity.

Thank you very much.

CHAIRMAN CASTRO: Thank you. Madam Vice Chair, you have the first question on this panel.

VICE CHAIR TIMMONS-GOODSON: Thank you very much Mr. Chairman. And thank you all for taking your time to be with us.

My question is for Ms. Simmons. As we look at existing workplace protections, which one day could include ENDA, we've heard from an earlier panel some of the numbers on the complaints regarding employment discrimination.

Some might describe those complaint numbers as rather small. Others might call them minuscule. In your testimony, you said that discrimination in employment is universal. You said that with workplace discrimination it's a pervasive issue.

Address for me please, the argument

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that some might make that the figures that we have available don't support the rather strong description that you've given regarding the pervasiveness of discrimination.

MS. LONG SIMMONS: Certainly. Thank you so much for that question. Two key points. The data that I was referencing in terms of near universal discrimination was from our National Transgender Discrimination Survey.

And that was a survey that was limited to over 6,500 transgender individuals that were surveyed across the nation and across the U.S. territories. And so that was particular to transgender and gender nonconforming individuals.

The second point with respect to the filings that were referenced from the Department of Labor, I think that it's critical that we continue to examine the levels of the filings and examine what types of discrimination are happening. Because the two aspects are happening simultaneously in terms of the public becoming aware of their rights and their ability to file such claims.

And the ability for government agencies to be responsive. Government agencies such as the

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Department of Labor to be responsive to the types of claims that are being filed.

In addition, I think that a point that was made earlier with respect to the marketplace, is another clear indicator that the trend is moving in the direction of affording protections and providing a safe workplace for LGBT employees. And what we're simply looking for is a way to have the numbers go in an opposite direction in terms of the prevalence of discrimination by creating a workplace that is more affirming and supportive of LGBT individuals.

VICE CHAIR TIMMONS-GOODSON: Thank you.

CHAIRMAN CASTRO: Commissioner Achtenberg followed by Commissioner Yaki.

COMMISSIONER ACHTENBERG: One question to Ms. Kendell. It was referenced that there were over 50 studies of discrimination that have been undertaken. The conclusion of which studies were that employment discrimination against LGBT people is significant and pervasive.

In 2007 a meta-analysis was done by the Williams Institute, which drew the same conclusion. It's my understanding that for more than 40 years, your organization has made available to LGBT people

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a nationwide advice and counseling line. I'm imagining that you have gathered statistics over that period of time as well.

Could you discuss how the conclusions of the 50 studies and the Williams Institute meta-analysis compares to the statistics that you have gathered over this period? And could you also identify the kinds of discrimination that your callers identify as pertinent to this particular inquiry that we are discussing?

MS. KENDELL: Yes. Thank you for that. What we see is very consistent with what the studies and the reports see. And so to your question and also to Vice Chair Timmons-Goodson's question. Much -- many of the calls that we get are from individuals in these 29 States where there are no protections.

If they live in a State where there are protections, it's an easy answer for them. We encourage them to file a complaint. We refer them to attorneys that do LGBT employment discrimination cases. There is recourse they can take. And then our resource is really just to hook them up with the knowledge base and with someone who can be their advocate.

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Most of what we -- the calls that we get are in States where there is no protection. And it's only been recently in light of the EEOC's Macy ruling that we've seen an expansion of Title VII perhaps being available as a vehicle.

Many, many times the most difficult answer that we give to people when they call saying that they've suffered some adverse employment action is, I'm sorry, there is nothing we can do. There is no protection in your State.

So it doesn't mean it isn't happening. I want to point out that the numbers are very significant. And the nature is the whole gambit.

Most of the calls that we get are probably along two tracks. Either an employee is going along fine in their job, doing a good job, getting good performance reviews, doing well, being promoted. And then something happens where they are discovered to be lesbian, gay, bisexual or transgender.

Somebody sees a Facebook post. They actually -- they do get married and a couple of people in the office attend the wedding and then the rest of the office realizes, wait, we didn't know that we had a gay or lesbian or bisexual

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person working for us.

Or in some other manner they come out to someone and then that's told to other people. And then all of a sudden things just go straight downhill. Either they're fired outright or all of a sudden the performance evaluations, the documenting two minutes late, documenting you know, bringing in coffee when you're not supposed to have coffee at your desk.

I mean, all sorts of things start to happen. And very soon, they lose their jobs. Or, the second track that we see the most of is harassment on the job.

And the irony here is that many employers will go through a very long period of either open harassment or death by a million cuts. Sort of negative adverse job actions, thinking that they can't fire the individual simply based on their sexual orientation when they would be perfectly free to do so.

So, many times the employee is tortured over a period of time. Either harassed openly based on their sexual orientation or their gender identity. And this can take the tone of being actually anti-gay harassment or it can be sexual

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harassment. And eventually they either quit or are terminated from their job.

So of the -- we get about 7,000 calls a year. About 30 percent of those are employment related. And the bulk of those are in either of one of those two broad scenarios.

CHAIRMAN ACHTENBERG: Thank you.

CHAIRMAN CASTRO: Commissioner Yaki and then followed by Commissioners Kirsanow and Heriot.

COMMISSIONER YAKI: Yes, thank you very much Mr. Chair. And I want to thank the panelists and you know the previous panelists for appearing today.

And I want to apologize for my absence today. But I've been knocked down by the flu and my doctor really did not want me to travel.

With that being said, this is an extremely important subject for me personally. It's something that I wanted when I was initially appointed to the Commission over ten years ago. I met with the Human Rights Campaign Fund. We talked about how we can try to bring these types of issues to bear at the Commission.

And it's taken a long road to get there. But we finally are here. And I want to

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thank all my colleagues for that.

The question I have is directed to the panel from something that Mr. Clegg said. And Mr. Clegg, thank you for being here. You and I are quite often spar quite vigorously at these hearings.

And -- but there's something that he said that I would like the other members of the panel to address. And then Mr. Clegg if you'll respond to that, go ahead.

But I wanted to go toward from what the legal basis for the Non-Discrimination Act. And that goes toward the impact on interstate commerce. And I'd like -- I'd like to especially hear from the advocates on the panel today about why you believe that this does have a substantial impact on interstate commerce and justify the use of the Commerce Clause in pushing forward these changes in the law.

CHAIRMAN CASTRO: Anybody want to start? Ms. Warbelow?

MS. WARBELOW: Sure. More so then ever, our economy is interconnected. We no longer live in a world in which goods and services are produced in one particular area, they stay in that

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area. Mom and pop shops are virtually a thing of the past when you're talking about production that is sole within a given area.

Instead, even small businesses purchase their goods that they are then selling to their customers from all over the world. Not just from within the United States.

Congress has had ample opportunity and has passed many laws that ensure non-discrimination not only on the basis of race and sex, but also on the basis of religion and disability. The Supreme Court has weighed in on these issues time and time again. And never has the Court reached the conclusion that Congress did not have a right to pass laws prohibiting discrimination in employment.

As I mentioned in my testimony, just very recently, one of the most conservative members of our Supreme Court, Justice Alito, found that there was a compelling government interest in having non-discrimination laws in place in the employment arena. If he'd felt that that was not true or that Congress did not have a right to pass these laws to begin with, he had ample opportunity to do so.

Instead what we see is the courts

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upholding these laws.

CHAIRMAN CASTRO: Anyone else? Mr. Clegg, do you have a response?

MR. CLEGG: Well, I'll just refer to my written testimony and the cases that I cite there. The Supreme Court has said that there has to be a substantial effect on interstate commerce in order for the Congress to pass law under these circumstances.

And as I read United States v. Morrison and United States v. Lopez, I think that Congress is going to have a hard time meeting those standards. The kind of chain of events that Ms. Warbelow points to is something that the Supreme Court explicitly warned about in its decision in Morrison.

And I would add also that with respect to the other enumerated power that Congress cites in ENDA, the Fifth Amendment of the -- or Section Five of the Fourteenth Amendment, I think that Kimel v. Florida Board of Regents is a substantial hurdle for the United -- for the Congress to clear.

CHAIRMAN CASTRO: Ms. Stachelberg?

MS. STACHELBERG: May I make a comment here as a non-lawyer on a panel of august lawyers

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and smart people?

Just would sort of go back as someone who was involved in 1996 during the Senate debate around the Employment Non-Discrimination Act, the vote was on -- the Senate was on September 10, 1996. Someone, along with my colleagues who was involved in the debate around ENDA the last time it was brought to the Senate and other debates.

I think it is interesting to note that Democrats and Republicans in particular did not bring up the issues that Mr. Clegg is mentioning in terms of the constitutionality of the Employment Non-Discrimination Act. There might have been disagreements about the law and sexual orientation and gender identity and whether that should be something that should be protected.

But when you go back and you look at the record and you look at the debate of something that I'm sadly all too familiar with, and we don't have this law on the books now, it was not part of the discussion in terms of the constitutionality of employment protections and civil rights laws for Congress.

MR. CLEGG: Let me say that I don't doubt that a bit. And I think that unfortunately,

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Congress, and this is true of both sides of the isle, frequently thinks that it can do whatever it wants. And I think that the sensitization of Congress - that no, you actually need enumerated powers before you can act - is something that has only recently taken hold, you know, unfortunately.

I remember just about the time that you're talking about, just that time period; I was talking with a Senate staffer about ENDA and about this problem. And he said, "Well, you know, I think that we would have to be absolutely convinced that no court would uphold this before we would hesitate to pass a statute like this."

I thought that that was an appalling mindset for someone to have. I think that somebody, and this was a Congressional staffer, I think that the mindset should be that unless a Congressman believes himself that there will be a substantial effect on interstate commerce, he or she should not vote for this statute.

It's not up to -- I don't think that the mindset that well, it's up to the courts to keep us honest. And that therefore we're not going to worry if we have an enumerated power of not. While widespread, is not the right attitude and is

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the kind of attitude that I would warn against in this context.

COMMISSIONER YAKI: I would just like to state that I strongly disagree with the characterization of Mr. Clegg in the Supreme Court opinion. First of all, the Commerce Clause has been widely used and has been recognized as widely used by Congress as a basis for enacting much of these protections for a very simple -- two very -- fundamental purpose is one that Congress calls as far reaching.

Sure, Congress has the ability to fact find and indeed think that it does have this kind of impact. Now I think that what you've heard from the testimony here today and you will hear later on is that there -- this is not a very isolated population. This is not a small population.

This is a -- these are Americans throughout every State and every community, in everywhere today, who are part of the lifeblood of how this nation works. And to say to that, to any section of that population that you're not a welcome member or participant.

Or because of the way that someone perceives who you are or who you're with, can

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negatively impact your economic earning, your ability to move freely between jobs, I think it's clearly within the purview of Congress. And is a fairly, barely low threshold to be met in justifying how they are remiss with this, the use of the clause.

I'm not as -- I'm not into -- I don't believe a duty Mr. Clegg that there's this imaginary high bar here when in fact even if there was a high bar, I think the high bar should be cleared by the facts presented by the people here today. And by the people who may experience and who are in that message, who have lived with over the years it over the years.

So, -- and certainly the history of the Commerce Clause cases are with regards to the Civil Rights Act, I think would lead one to believe one to believe that this is -- you could certainly nowhere near an insurmountable hurdle. What the insurmountable hurdle is more to the point of some of the points you made in your testimony, which is there's some things you just can't do.

You can't erase bigotry from the way people think. But what you can do, is make sure that they act in a way that is not -- that is non-

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bigoted towards those individuals in the matter of what -- whether we want to do or try to do to change their hearts and minds.

CHAIRMAN CASTRO: Okay. Next, we have Commissioner Kirsanow.

COMMISSIONER KIRSANOW: Thank you Mr. Chairman. As with this panel, I want to thank the panelists here for very splendid testimony. I think we've got some outstanding panelists here.

I would note however that we strive on the Commission to have balanced panels. We've been doing that for at least a dozen years now. And I'm a little chagrined that we have a dramatic imbalance in terms of those who would support a broad or a federal statute and those who may be skeptical about the use of Congressional power on a nationwide basis.

And I think that derogates whatever report or briefing we may have. And that's unfortunate. It really affects legitimacy of that.

My question would be to Mr. Clegg. From a practical perspective, when we have employers dealing with new statutes, there is always going to be some type of dislocations.

Sometimes those dislocations are very

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much merited and they're going to have to deal with them. And it may be merited in this particular circumstance if ENDA was passed. Given that with erosions over the course of time to the principle of at-will-employment, two questions.

To what extent do you see ENDA or whatever reiteration of ENDA we're at right now, having an impact on the nature of at-will-employment? And second, how would this differ, if at all, from the protections against race discrimination?

MR. CLEGG: Well, one of the points that I make in my written testimony is, that I'm afraid that -- and I also think I repeated it in my oral testimony -- is that I am afraid that we are moving away from the general presumption that we ought to have, that people should be able to use their private property the way that they want to use their private property -- and that employers should be able to make personnel decisions without interference from the government. This is something that goes along with at-will employment.

And there should be a presumption against the government, at any level, stepping in and saying that well, you know, we know better than

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you whom you should hire and whom you should promote. And there should be an especially strong presumption against the *federal* government passing a law that second guesses employers in this regard.

And one reason for that - and I think you alluded to this in your question - is that the laws become reality in this area through litigation and regulation. And those are very expensive and distortive media.

You know, you don't just pass a law and magically have the principle that you think is embodied in that law become reality. It has to become reality through a lot of bureaucrats making a lot of decisions and bossing a lot of people around- and through a lot of lawyers and a lot of lawsuits and a lot of judges bossing a lot of people around.

And this is a very unsatisfactory way to do business in an economy that's supposed to be based on freedom and free markets. You know, I don't doubt that you know, many times employers do things that a majority of Americans might find to be unfair or wrongheaded. But, it doesn't follow from that that therefore there should be a federal law passed saying "No employer shall ever do

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anything that is unfair or unwise." That law will have costs that are far higher than any benefits that it would have.

And it's the same situation here in this specific instance. I think that the problems that you will inevitably raise by, you know, passing a law that says that you can't discriminate on the basis of "gender identity"— and "'gender identity' means the gender- related identity, appearance, or mannerisms or other gender- related characteristics of an individual, with or without regard to the individuals designated sex at birth."

Well, you just know that lawyers and bureaucrats are going to have a great time interpreting language like that. Here's another part.

CHAIRMAN CASTRO: You say that as a lawyer and a former bureaucrat?

MR. CLEGG: I do. I do, absolutely. I remember this about the Fair Housing Act one time, and you all know about the Fair Housing Act too. And I remember we were in a meeting and it was just what I described, Mr. Chairman, it was a bunch of us bureaucrats sitting around. And we were writing regulations for — I don't remember if it was the

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Fair Housing Act or the housing part of the Americans with Disabilities Act— but anyway, we were there and we were deciding what the rule should be for builders when it came to ramps and doorknobs and sunken living rooms and all kinds of stuff like that. And it was appalling.

You know, none of us at that table knew anything about the business of how to build an apartment complex. Why were we sitting around making up all these rules? It was just very scary.

Here's another part.

CHAIRMAN CASTRO: Did you say earlier in your testimony that you didn't have to have a familiarity with something in order to be able to do the job?

MR. CLEGG: Well, no, no. I didn't say that. I said that I didn't --

CHAIRMAN CASTRO: I swear that you did.

MR. CLEGG: think that you had to be — I mean, to put it bluntly — I don't think that you have to be a black person in order to be able to sell Pepsis to a black person. And this notion that only members of a particular group can effectively market to members of that group is something that I have a problem with.

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But that is --

CHAIRMAN CASTRO: But you were a non-disabled person trying to figure out how a disabled person would be able to interact with their surroundings. Isn't --

MR. CLEGG: It wasn't that we weren't disabled -- although that's also, I think a fair point. The problem is we didn't know anything about *building*. That's the point that I'm making here.

And the point in, you know, likewise, we're not people in, say, the care giving business, okay -- the hypothetical that I gave about a care giver and whether people might have preferences about who is going to bathe them? I think that those kinds of decisions should be made by people who are in the care giving business -- not by a bunch of bureaucrats.

Here's another part of ENDA. And you tell me whether this belongs in the U.S. Code.

"Nothing in this Act shall prohibit an employer from requiring an employee, during the employee's hours at work, to adhere to reasonable dress or grooming standards not prohibited by other provisions of Federal, State, or local law,

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provided that the employer permits any employee who has undergone gender transition prior to the time of employment, and any employee who has notified the employer that the employee has undergone or is undergoing gender transition after the time of employment, to adhere to the same dress or grooming standards as applied for the gender for whom the employee has transitioned or is transitioning."

I don't think that that's the kind of micromanagement that Congress should be putting into the U.S. Code. To govern the grooming standards and dress standards that hundreds and thousands of employers in hundreds of thousands of different workplaces have to implement every day—I think that that's a decision that ought to be left to individual employers and businesses.

CHAIRMAN CASTRO: Just like you said earlier though, you know, people should be allowed to figure out what they do with their own private property. Let's let the market decide.

If we adhere to that, there would still be people today who would be considered property. And we wouldn't have fought a civil war to change what the market was.

So, I think there is an important role

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that government has to play in the regulation of how we interact with one another and the rights that afforded to individuals in the workplace.

MR. CLEGG: Absolutely. And I agree and I talk in my written testimony about that and Commissioner Kirsanow, I think, alluded also in his question.

I think that the situation that was presented and is presented by race discrimination in this country is special and different. And I think that it makes all the sense in the world to draw distinctions between what was going on in this country with respect to racial discrimination and things like sexual orientation and gender identity.

Racial discrimination presented an extraordinary situation justifying departure from the usual free market presumptions. It was widespread, blatant, and often governmentally --

CHAIRMAN CASTRO: Your mic went off.

MR. CLEGG: Racial discrimination presented an extraordinary situation justifying departure from the usual free market presumptions. It was widespread, blatant and often governmentally codified and mandated.

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It was irrational and dictated, at least in the 20th century, by no non-fringe religious or moral convictions. It was a historic problem national in scope, which was clearly not susceptible to State, local, or private resolution.

And discrimination against homosexuals is simply not in this league.

CHAIRMAN CASTRO: Okay, I'm going to --

COMMISSIONER KLADNEY: Mr. Chairman?

CHAIRMAN CASTRO: Yes?

COMMISSIONER KLADNEY: I was wondering if anybody else on the panel would like to respond to Mr. Clegg's partial reading of ENDA and the dress code and things like that?

MS. KENDELL: Well, I just have one quick response. Well, I guess two quick responses. The first is, you know, even as a lawyer, I would love nothing more than if we could just pass a bill that said don't be mean.

And that would be sufficient to treat people fairly and with a sense of dignity and a recognition of their humanity. But obviously, we don't have that in our history. With race discrimination is a perfect example of that.

But I also think we're not dealing with

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a blank slate here. We have a number of States that have passed laws that prohibit discrimination based on gender identity using something like the definition that Mr. Clegg read.

And there hasn't been some -- there hasn't been a huge flood of litigation, nor has there been inane interpretations. What these laws do, is they set a tone for how we think people should be treated on the job.

And by existing, they stop the very discrimination that they're meant to redress. And then in extreme cases, people then are free and have the ability to bring cases. The ability to answer the question, what kind of country do we want to live in?

With the statute that says, we want to live in a country where people, all sorts of people, including people based on sexual orientation or gender live free, honored for who they are and able to do their jobs to the highest of their ability. And their ability is what matters, not who they are.

That seems to me to be a good thing for this country to do.

CHAIRMAN CASTRO: Anybody else?

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MS. WARBELOW: There's also a dramatic difference between regulating bad business decisions that impact only the employer. Right? An employer who is foolish enough to require all of their employees to wear chartreuse uniforms. That's a bad employment decision that the government should not be engaged in.

It's radically different when we're talking about bad employment decisions that have negative lifelong consequences for the individuals that they are choosing to fire, refuse to hire, or fail to promote. There should be in our laws a do no harm principle.

And that's what non-discrimination laws in employment attempt to do. To create a level playing field that ensures that employment decisions are made on the basis of an employee's merit, talents, skills and background, rather than on who they are.

MS. STACHELBERG: The only thing I would add is -- and I know this is a different context, not Congress passing a law. But companies implementing their own non-discrimination policies as they relate to sexual orientation and gender identity.

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I'm often frustrated not when people disagree with me, because that happens all the time. I have twin boys who are 12 and a half and they disagree with me all the time. That's okay.

But it's when there are these sort of spurious arguments about why someone would disagree with me. That's what I find somewhat unnerving.

And so to go back too not again the legislative language that Mr. Clegg referenced, but just the business practices that large, medium and small businesses today have adopted for good business reasons because it makes sound sense to have a non-discrimination policy based on non-discrimination based on sexual orientation and gender identity. Those business policies often mirror the language that Mr. Clegg referenced in terms of the Employment Non-Discrimination Act.

That is what a business used to describe and to define gender identity in that case. And what we see is not businesses falling all over themselves and not being able to figure out what the policy means. But rather, providing a level playing field for all employees.

That those gay, lesbian, bisexual and transgender employees, it doesn't just benefit

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them, but it benefits the entire culture of the large, medium and small business. Because it says to any employee that you're here to work. And we're going to judge you on your skills and that's it. Nothing irrelevant but your job performance.

And so I think again, the employment practices and the employment policies, those non-discrimination -- and they're by private companies, that they have to set their own playing field for their own companies, often mirrors the language.

And what we don't see in those companies from major Fortune 100 companies to small businesses around this country, is we don't see the kind of interpretations that Mr. Clegg says will happen.

COMMISSIONER KLADNEY: Is that like a meritocracy?

MS. STACHELBERG: Kind of something like that.

MR. CLEGG: See again, I think the problem though is that, you know, to the extent that that's true, you know, you've undercut the argument for the necessity to pass this bill in the first place. And you know, if the rational thing

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for all companies to do is to do the kinds of things that this bill requires, then you don't need to pass the bill.

Not passing it is not going to have a substantial effect on interstate commerce. Discrimination is not going to be having a substantial effect on interstate commerce because companies are going to be taking steps to get rid of it anyway.

And I think that there are going to be situations where taking sexual orientation into account is going to make sense. It may not be common. It may not be something that involves what most companies do.

This is another problem with passing one-size-fits-all federal legislation. It may be that people who make airplanes have no reason to consider sexual orientation. But people who are in the care giving business might want to consider sexual orientation. It just depends.

There are thousands of businesses out there. They're all different. And I don't think that we should be passing a federal one-size-fits-all bill in that situation.

CHAIRMAN CASTRO: Title VII is a one

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size fits all and it seems to work. Ms. Stachel-Stachelberg?

MS. STACHELBERG: Well, I was just going to say, some similar arguments to that were raised when President Obama decided that he would consider lifting, you know, lifting the ban on gays and lesbians serving openly in the military, one of our nation's largest employers.

And people said this should be a one size fits all. We have men and women in foxholes together. This is not exactly what we should have. We have people on submarines and sexual orientation will absolutely undermine moral and unit cohesion. And we haven't seen that come to pass.

CHAIRMAN CASTRO: I'm going to move on now. We've got several Commissioners who do want to ask questions. Commissioner Heriot, Kladney, Achtenberg and Narasaki. Commissioner Heriot?

COMMISSIONER HERIOT: Thank you Mr. Chairman. I guess I want to ask about this notion of whether or not ENDA can be interpreted in unpredictable or counterproductive ways?

You mentioned for example that some corporations have adopted very similar language, but they get to interpret their own policies. And

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they won't have that luxury if there's actually a Congressional enactment.

The Chairman just mentioned that Title VII has worked out well. I guess I would disagree with that. We need Title VII, but there are lots of ways in which it has been interpreted in unpredictable and counterproductive ways, such as the difficulty now that employers have in taking into consideration felony convictions by job applicants.

And I don't want that sort of problem to occur here if ENDA is passed. Because of the way that gender identity is defined in the current version, ENDA prohibits discrimination on the basis of "gender related characteristics."

Can you give me some help on what that might mean? For example, in the Price Waterhouse case, we had a plaintiff who argued that she had not been promoted because she was, I guess we could call it, you know, she was pushy as a female. And she says, you know, that same characteristic would be regarded as assertiveness in a male.

So, is assertiveness versus non-assertiveness, is that a gender related characteristic? Is it long hair versus short?

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What is a gender related characteristic?

Employers are going to look at that and they're going to want some guidance as to what that means. Anyone?

MR. CLEGG: Well, if gender related means gender correlated, which I think is certainly one way you could interpret this, then I agree that this is opening a real Pandora's Box. You could probably find social scientists or statisticians that could find all kinds of characteristics to have some kind of correlation with gender, with sex.

And if all of those are now characteristics that you can't discriminate on the basis of, then you've made it very hard for employers to make decisions on the basis of any characteristics at all. I mean, for instance, just to give you an example, criminal behavior.

CHAIRMAN CASTRO: Your mic went off again. And I promise you, I'm not turning it off. So, the mic was --

MR. CLEGG: I wouldn't blame you.

Criminal behavior: I think that everybody would agree that men are more likely to commit crimes than women are. Okay? So, is

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criminal behavior a gender related characteristic?

Well, it's certainly a gender correlated characteristic. So, does that now mean that employers can't discriminate at all, not just on the basis of the disparate *impact*, but that it is disparate *treatment* now to discriminate against somebody on the basis that they have murdered their last employer?

Sounds like a reasonable interpretation of the definition of "gender identity" to me.

CHAIRMAN CASTRO: But not a very reasonable example, so.

MS. KENDELL: Yes. I feel -- I think --

CHAIRMAN CASTRO: Panelists, let the panelists --

MS. KENDELL: I think that's a little bit ridiculous.

COMMISSIONER HERIOT: But that actually means that --

CHAIRMAN CASTRO: Go ahead Ms. Kendell.

MS. KENDELL: I mean, I think what it means in terms of how we've seen it interpreted, what I understand that it means, I wasn't involved in the drafting. But what I understand that it

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means, is it's very much along the PriceWaterhouse.

It's dress. It's presentation. It could be interpreted as characteristics involved in the PriceWaterhouse case. A woman that does not use makeup, is not sufficiently feminine. A man that is too feminine --

COMMISSIONER HERIOT: Well, pushiness, assertiveness as two sides of the same coin. Would you say that that's part of gender related characteristic that men tend to be more assertive in certain situations? Women are sometimes less assertive in situations?

CHAIRMAN CASTRO: I'd say you're very assertive Commissioner Heriot.

COMMISSIONER HERIOT: People don't always conform to gender.

(Laughter)

MS. KENDeLL: Yes. And well, I mean, I feel like that's what this is trying to get to. Is that when one doesn't conform, I mean, PriceWaterhouse stands for the theory. And I feel like the language that gender related characteristics is about ensconcing that, is that if someone either conforms to or does not conform to gender stereotypes, they will be protected.

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COMMISSIONER HERIOT: Well, it doesn't say anything about gender stereotypes here. This is not Title VII. See, that's the problem here.

If assertiveness is something that is considered to be a more masculine characteristic and you know, calmness, you know, less assertiveness, something that's considered to be more feminine, it looks to me that under ENDA, it doesn't matter who, you know, which person has the problem.

A male job applicant could say I was rejected because I do conform to gender stereotypes. I'm especially assertive, hyper masculine. And yet there are lots of jobs for being hyper, you know, where being hyper assertive would be a very bad thing.

MS. KENDELL: I understand the hypothetical. It's not something that we've seen in States that have had similar language.

COMMISSIONER HERIOT: On the other hand with Title VII, you know, it takes 50 years sometimes for these things to work themselves out. That's the thing about passing language. It becomes part of the law. It doesn't go away.

MS. KENDELL: Well, but you do have

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case interpretations of State law language that is similar to this that can be used to rebut a nonsense claim for example. Because it's not -- again, it's not as if -- the good news is this isn't a blank slate. It's not as if this is the first incursion into understanding how would we protect transgender or gender non-conforming employees.

We do have a body of law in certain States. And we do have several years at least of experience. And in some states we have a great deal of experience.

COMMISSIONER HERIOT: But you're acting like Title VII has just been worked out just perfectly. But in fact, very, very controversial.

MS. KENDALL: Oh, I under --

COMMISSIONER HERIOT: There are millions of things that develop quite late. Sometimes 50 years after its passage. For example, right here, you know, we've been told that Title VII can be used in terms of sexual orientation and gender identity.

Nobody would have thought that in 1964. And maybe that's the right way to interpret it or maybe it's the wrong way. But it's wrong to

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suggest that the language is not going to be a problem, because it's not a problem now. That's not the way statutes work.

MS. KENDELL: I understand that. But I think it's more important in your considerations to address what is the real problem now that we are trying to ameliorate rather than --

COMMISSIONER HERIOT: Yes, I think that's just the wrong approach. The notion of, we've got a problem we've got to deal with right now. So let's go with whatever language we have.

We want good language. We want language that won't be abused in the future. We want it to only cover the things that we want it to cover. Do we have that now? I would say no.

I think we have language here that is extremely vague. We don't know what gender related characteristics are going to mean. Don't we need to develop that?

MS. WARBELOW: We have over 20 years of experience. Minnesota adopted a non-discrimination law that includes both sexual orientation and gender identity more than 20 years ago.

And the reason that you're seeing sexual orientation and gender identity being

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incorporated into an interpretation of Title VII, is because the similarity between sex discrimination and gender identity discrimination is inexorably bound up with one another. What is discrimination on the basis of sex is also discrimination on the basis of gender identity.

COMMISSIONER HERIOT: 20 years in a small state like Minnesota is nothing. Very, very, very small. When you multiply that over the population of the United States of America and you've run it for 50 years, there are going to be a lot of cases. We want to get this right the first time.

MS. WARBELOW: We've also been, you know, looking at legislation for more than 20 years to address discrimination. In Congress there's been ongoing conversations. This is not a new topic, not a new idea.

We have changed language over time. Hashed things out based on best practices that we have seen in States and municipalities. And laws are not static. They don't exist forever.

While Title VII has not been amended, certainly Congress has gone in and changed other statutes to deal with changes in interpretation,

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bad Supreme Court decisions. Addressed additional statutes to rectify those situations. It is not a static and permanent forever.

MR. CLEGG: As, again, a former bureaucrat, I will point out that, when I was in the Civil Rights Division at the Justice Department, it was rare that we looked at how analogous State statutes had been interpreted in State courts.

I think that Commissioner Heriot is right that the notion that you're going to be able to fix vague or ambiguous or problematic language in a federal bill by saying, "Oh, well, here's how a statute that was kind of worded the same way was interpreted by State courts in Minnesota," is being way too optimistic about how this process works.

CHAIRMAN CASTRO: Ms. Kendell?

MS. KENDELL: Well, I think what you're faced with is, do you respond to what you know and what we have experience with? Or do you respond to what you fear? And there is a body of law. There is experience with cases that have been brought under the law. And there is a problem that needs to be addressed.

I am perfectly willing, given my own

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organization's position on ENDA, to have another, you know, go at language that could be more clear or that could be more specific. But I feel like the language that you've got is based on significant experience of individuals who have been involved in litigating. And involved in these cases and involved in this area of law for several decades.

CHAIRMAN CASTRO: Okay, I'm going to move onto Commissioner Kladney. And then if I have some time at the end, I'll come back. Because I still have three other Commissioners that want to ask questions.

Commissioner Kladney followed by Commissioner Achtenberg and then Commissioner Narasaki.

COMMISSIONER KLADNEY: Well, I guess I won't ask Mr. Clegg all the questions I had.

(Laughter)

COMMISSIONER KLADNEY: But I will ask you, it seems to me that your agreement with Commissioner Heriot regarding language means you're trying to craft a bill under which there will be no litigation or definitions. When in fact, our entire judicial system continuously on a day to day

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basis issues decisions and looks at statutes and defines them every day.

I mean, statutes that have been around 50 years or 100 years. I mean, not just discriminatory statutes, but labor law, tort law, contract law. I don't understand the objection I guess. I mean, verbiage is verbiage and I understood when you were talking about the dress and all that, it wasn't that difficult for me.

But, that's what we do have courts for. And from your document, you obviously don't trust courts. You think they're liberal. I guess the Roberts' court must be too liberal for you.

But, my point being, is, don't you think that that's what lawyers and courts are for? I mean, the legislative process to be perfect is, I mean, they talk about stuffing a sausage.

So, I just ask you to define why you think that we shouldn't litigate these things and define them over time?

MR. CLEGG: Well, I don't want to fix the statute. I don't want to pass the statute at all.

COMMISSIONER KLADNEY: Well, that I understand.

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MR. CLEGG: And I don't think that the reason that we have courts and lawyers is to figure out how companies ought to deal with employees who have this or that sexual orientation. I think that that should be left to companies to do.

I think there are some extraordinary situations where we have to have laws that tell employers things that they can do and can't do. I think we had to have a federal statute that told employees that they could not discriminate on the basis of race.

But those instances are rare. And I --

COMMISSIONER KLADNEY: But aren't we actually protecting 5.4 million workers here? As opposed to the 600 complaints?

I mean, who are we protecting? The 5.4 million LGBT workers? Or are we just protecting the 667 complaints or whatever it was?

MR. CLEGG: Well, you know, the question is whether this legislation is going to have -- whether the problem being addressed here has -- a substantial effect on interstate commerce. And actually, the number of employees who are going to be protected by this law is *all of them*.

Because it's not just discrimination

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against homosexuals. Sexual orientation is de-described as being homosexual, bisexual, or hetero-heterosexual. So anybody can sue under this statute.

If you're straight and you want a job in a gay bookstore and you don't get hired and you think that the reason that you weren't hired is because you were straight, you've got a lawsuit too.

So, I don't think you can really put it in terms of the number of employees who are being protected from discrimination. Potentially all employees are being protected from discrimination.

The question is whether the underlying problem here is one that has a substantial effect on interstate commerce. And then whether the circumstances are such that the only way to address this problem is through federal legislation. And I think the answer to both of those questions is no.

COMMISSIONER KLADNEY: Well, clearly when corporate America institutes their guidelines and rules and regulations, that's not really enforceable by the employee in most cases. Is it?

MR. CLEGG: Well, why does that matter? I mean, if the problem is discrimination against

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gays, if that's what's being asserted as the prob-
problem that is substantially affecting interstate
commerce, and if that problem is being alleviated
by companies, you know, enacting unilateral
policies, then what difference does it make whether
there's a private right of action under it or not?

COMMISSIONER KLADNEY: Well, it's not
enforceable by the employee. I mean, you can have
a rule and ignore the rule.

MR. CLEGG: Well, you can have a law
and ignore the law too. I mean --

COMMISSIONER KLADNEY: Yes, but then
there's a remedy.

MR. CLEGG: Well I --

COMMISSIONER KLADNEY: I mean, we talk
about remedies in the law, we don't just talk about
rules.

MR. CLEGG: Right. Well, my point is
that there is slippage in both instances. You
know, just because you have a statute doesn't mean
magically that you're not going to have any more
discrimination. Even if you can bring lawsuits.

And different companies may structure
these guidelines differently. If you were a
company you could structure it so that here is our

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policy: If you're an individual and you think that you're immediate supervisor has discriminated against you on the basis of sexual orientation, you can file a complaint with the HR department.

Things similar to that are done in this area all that --

CHAIRMAN CASTRO: Your mic went off again.

MR. CLEGG: Okay, so here we go. Thank you. You know, -- with sexual harassment. If you are sexually harassed by your immediate supervisor, most companies now have mechanisms where you can complain about that to some person other than your immediate supervisor.

So I think if a company wanted to, it could set up protections against sexual orientation discrimination the same way.

CHAIRMAN CASTRO: And yet you have many of those cases still end up in the courts.

MR. CLEGG: Yes.

CHAIRMAN CASTRO: So. Commissioner Kladney, do you have any more questions?

COMMISSIONER KLADNEY: I pass.

CHAIRMAN CASTRO: Okay. Commissioner Achtenberg?

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COMMISSIONER ACHTENBERG: Ms. Warbelow and others who care to comment, it's been asserted by some who oppose a uniform federal standard that the adoption of same will lead to sexual harassment in the workplace as opposed to redress sexual harassment in the workplace. Is it your interpretation of this proposed federal standard that this would be the case?

And if you would comment as well on the issue of whether or not the existence of a uniform federal standard would prevent persons with a particular religious point of view from expressing that point of view in the workplace. Because such a thing would then become defined ipso facto as creating a hostile work environment as some opponents have argued.

MS. WARBELOW: Sure. So there's absolutely no evidence, despite the fact that we have 21 States and the District of Columbia, that have non-discrimination laws on the books that prohibit discrimination on the basis of sexual orientation that has led to any rise in sexual harassment. Sexual harassment is a very real and pervasive problem.

It is something that disproportionately

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affects women in the workplace. You know, I did not come prepared with those statistics in terms of what we're discussing today, but would be happy to get those to you.

To the extent however that someone who is straight is experiencing sexual harassment from a colleague who is gay, lesbian or bisexual, they have remedy currently under Title VII. And any addition of protections on the basis of sexual orientation as Mr. Clegg pointed out, covers not only LGB people, but straight people as well.

So those individuals would have a remedy not only through their employer, but also in the courts if it were a persistent problem.

COMMISSIONER ACHTENBERG: Does it legalize any sexual harassment that isn't otherwise being addressed through existing law? Is that correct?

MS. WARBELOW: That's correct. The United States Supreme Court has already addressed the issue of sexual harassment between people of the same sex. On the Oncale decision more than two decades ago.

And those are remedies that exist currently for individuals. And this will not

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change those, access to that remedy.

COMMISSIONER ACHTENBERG: If they're the same sex or opposite sex, or if they're gay or straight, adoption of a uniform federal standard has no impact. Is that correct?

MS. WARBELOW: That's correct. With regards to sexual harassment. Which I do want to, you know, sort of tease out is a little bit different from harassment on the basis of sexual orientation. Right.

So, someone who's engaging in the behavior based on the sex of the individual. And in the sexual terms and sexual nature, as opposed to an employee who's harassing another employee who is gay and using derogatory terms for someone who is gay in an attempt to drive them out of the workplace.

COMMISSIONER ACHTENBERG: And it would be use of derogatory terms that would be addressed if we were to adopt a uniform federal standard?

MS. WARBELOW: That's right. So the uniform standard would erase or at least give people remedy to address harassment that is based on the sexual orientation of the individual rather than harassment that is just sexual in nature and

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happens to occur between two people who are of the same sex.

COMMISSIONER ACHTENBERG: But calling someone a dike or a fag in the workplace?

MS. WARBELOW: That's what this law would allow people to have a remedy for if their employer refused to address such bad behavior.

COMMISSIONER ACHTENBERG: Okay. And you don't have -- and the relationship if any, between that and the assertion that persons of a particular deeply held religious belief would be -- have their First Amendment rights circumscribed in these workplaces if there were the adoption of the uniform federal standard to protect LGBT people?

MS. WARBELOW: Sure. So religious employees are already protected under Title VII and have the ability to make assertions about their religious beliefs in the workplace.

I will say that there is a huge difference between asserting within the workplace an employee's opposition to marriage for same sex couples or a belief that homosexuality is immoral and calling someone dike or fag. That we can make distinctions between what is assertion of a person's religious beliefs and what is harassing

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behavior.

Now, certainly if an individual, post-passage of a national federal standard for non-discrimination in the workplace were to target an LGBT individual, to enter their workspace on a daily basis or a routine basis, and say to them, I think you're going to burn in hell because you're gay, that would create liability for the employer. And the employee would have ability to sue for harassment and discrimination in the workplace.

But I think that we can draw, and certainly the courts have shown, the ability to make distinctions between what is an individual's assertion of their religious beliefs. And where that steps into harassment and abuse of another employee.

And we see this in the context of sex as well. We do have many individuals throughout the United States who have sincerely held religious beliefs that women don't belong in the workforce. That only certain types of activities are appropriate for women. That men deserve higher pay because they are head of household.

We allow for religious individuals to express those views in limited ways in the

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workplace. But when they are targeting and individual, or they are acting in such a way such as actually providing women with lower salaries, that results in harm to the individual, that is where we draw distinctions.

MR. CLEGG: Commissioner Achtenberg, if I could just note that on pages seven to eight of my testimony, I talk about some of the ways that I think ENDA would complicate the sexual harassment issues. And the two appendices I have are pieces by Hans Bader at the Competitive Enterprise Institute and Professor Eugene Volokh on some of the First Amendment issues.

COMMISSIONER ACHTENBERG: I know you do. And I thoroughly reject the rationale proffered in those statements.

(Laughter)

COMMISSIONER ACHTENBERG: Thank you very much, sir.

MR. CLEGG: Now everybody else knows that, too.

CHAIRMAN CASTRO: Yes. Okay, thank you. Commissioner Narasaki?

COMMISSIONER NARASAKI: I join

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Commissioner Achtenberg in her thorough rejection.

CHAIRMAN CASTRO: Well, add me as well then if you want to put it on the record.

MR. CLEGG: Why are you having a briefing?

COMMISSIONER NARASAKI: Because there are some actual serious issues about you know, how you best implement this. And as you and I, who have debated many of these issues know, there are a lot of gray areas that even if you disagree on some things, hopefully we can find some common grounds on others to improve the entire framework. So, I think this is in fact a very important enterprise.

I want to start by addressing Commissioner Kirsanow's concern regarding the makeup of the panels. I believe that staff did invite a broad group of views to be present. And in fact all Commissioners are invited to present ideas for staff of people to be invited and to help staff actually recruit people.

And of course, we ask many groups who are interested and stakeholders who may be watching on air, to know that they have -- that they have -- is it 30 days?

CHAIRMAN CASTRO: Yes.

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COMMISSIONER NARASAKI: I'm having trouble with this thing.

CHAIRMAN CASTRO: Here. Do we have another? Use this one for now.

COMMISSIONER NARASAKI: Thanks. To have -- that we have 30 days for people to submit written comments. So, if you are out there and you have a different view and you want to make sure that the Commissioners and staff take that into account, please avail yourself of that opportunity.

Second, I know that there is joking about this, but I am concerned about disparagement of the dedicated staff at civil rights agencies as being nothing but ignorant bureaucrats. Many come with a lot of life experience.

And of course we also have a process of consultation when we do regulations. And we propose new policies that take into account input from employers and effected communities.

So, I don't want to leave the general public with the view that somehow bureaucrats put together laws that really are not based on any kind of reality. That is far from the case. As Mr. Clegg knows, doing regulations is a very long and painful process.

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So, that is actually an oversimplification and a view that I don't subscribe to about how the government actually tries to play a helpful role on the issues that are important to everyone's day to day livelihoods. And nothing could be more important than in the employment context.

So, Roger, I'm just curious, because your argument against covering the LGBTQ people seems to also apply to religious discrimination. So is it the view of the Center for Equal Opportunity that Title VII should in fact not be trying to stop discrimination based on religion?

MR. CLEGG: No. I'm not sure how that follows. No, the Center for Equal Op --

COMMISSIONER NARASAKI: Well, because you argue that you know, that LGBTQ status is not immutable, which I actually don't necessarily agree with. You argue that it impacts a small amount of people.

MR. CLEGG: When did that -- I did not say that.

COMMISSIONER NARASAKI: Well, in your comparison with LGBTQ status and race, you try to draw this distinction about how race is very

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different. But Title VII covers more than race.

So, I'm just trying to understand the boundaries of your argument. Because you try to make the point that we should not burden --

MR. CLEGG: And I'm trying to make sure that you accurately characterize what I said.

COMMISSIONER NARASAKI: Yes. That's -- well, that's why I'm asking you.

MR. CLEGG: Okay. Well, no. I --

COMMISSIONER NARASAKI: So please clarify where I've gone astray.

MR. CLEGG: Well, the Center for Equal Opportunity does not object to the fact that Title VII makes it illegal to discriminate against employees on the basis of religion. And I don't see how there's an inconsistency between thinking that that kind of prohibition is acceptable and saying that we should not add an additional prohibition against discrimination on the basis of sexual orientation and gender identity.

That the reasons that I give for being opposed to ENDA I think would not apply to discrimination on the basis of religion. So I'm --

COMMISSIONER NARASAKI: I mean, I want to be clear that I think it's appropriate to cover

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religion. And the reason I'm asking you is because you put enormous trust in markets, in free markets to do the right things. And that you've made the statement that it's very clear in the case of race to you why Title VII is important.

And I'm trying to -- and the reasons you give are because of the long history that we've had with discrimination, which we've also had against LGBTQ people about -- but you make the argument that you know, race is not an immutable characteristic, where it's more difficult --

MR. CLEGG: I don't think I used the word "immutable" in my testimony.

COMMISSIONER NARASAKI: Well, that's how I interpret it. So, I'm just trying to interpret why race -- why race is different from LGBTQ status. And also -- but yet, the basis on which it's different is the same reasons that you could look at religion, you know, in terms of the smallness of the numbers of impact.

Whether or not government should be involved in that. So, I just want to make sure I understood where you were coming from.

I wanted to ask you whether if ENDA were to happen, so you've raised the issue of bona

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fide occupational qualifications, right? And so I want to --

MR. CLEGG: Not in those terms. No, I did not raise that.

COMMISSIONER NARASAKI: You did not raise -- I thought you did in your testimony?

MR. CLEGG: I don't think so.

COMMISSIONER NARASAKI: No. Okay.

MR. CLEGG: But I'm happy to talk about it.

COMMISSIONER NARASAKI: So, you don't -

-

MR. CLEGG: And I agree with the point that I think was made in the previous panel, which was discussing the fact that there is no BFOQ in ENDA. I'm familiar with that.

COMMISSIONER NARASAKI: Yes. Maybe it was in the attachments to your testimony. But -- so, okay, let me just ask the question. So do you feel like there should be BFOQs for ENDA? Or not?

MR. CLEGG: Well, and again, I'm not particularly interested in fine-tuning ENDA to make it a better statute. Because I think it's a bad statute from beginning to end. I don't think Congress has authority to pass it. But I suppose

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that if ENDA were passed, I would want a BFOQ in it. Yes.

COMMISSIONER NARASAKI: And what would that look like to you?

MR. CLEGG: Well, I think it would be parallel to the BFOQ language in Title VII, which follows the prohibition in Title VII of discrimination where it lists that the kinds of discrimination that are illegal.

But then it says that this is 703(e)—there's an exception where "religion, sex, or national origin is a bona fide occupational qualification, reasonably and necessary to the operation of that particular business or enterprise."

COMMISSIONER NARASAKI: And what kind of religious accommodation if any, would you think would be appropriate?

MR. CLEGG: Well, again, it would not be limited to religious contexts. I think that there could be other instances where there would need to be a BFOQ for discrimination on the basis of sexual orientation. And I describe some of those in my oral testimony.

For instance, if you had a care giver

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and the customer who was being given the care giver said, "I'm really not comfortable. You know, this is a very intimate situation. I'm going to be getting a, you know, a bath by this person. I don't want the care giver to be somebody that I think is going to, you know, where sex is going to be an issue. You know, where there's any likelihood of sexual attraction, you know, by the individual to me. And so, you know, I'm a straight male. Therefore, I don't want women to be -- I mean, basically I want a straight male to bathe me. And I don't want, you know, women to bathe me because, you know, for privacy reasons. And also, because I don't want them to be attracted. And I don't want a gay man to bathe me either." Now, there's nothing religious about that.

COMMISSIONER NARASAKI: Can I tell you -- do you have aging parents?

MR. CLEGG: Yes.

COMMISSIONER NARASAKI: I have a very aging mother. And if we dealt with all the people that she didn't want touching her, she would get no help at all. I mean, this is a --

MR. CLEGG: So you don't think there should be a federal law that requires your mother

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to have to hire whomever --

COMMISSIONER NARASAKI: Well my question is, would you -- my question is, would you say if someone said, you know, it's very intimate that gee, I don't want a white person touching me. Would that -- would you feel like that was okay?

MR. CLEGG: Well, that's a good question. And of course there is no BFOQ for race in Title VII. And the --

COMMISSIONER NARASAKI: So can I ask --

MR. CLEGG: -- reason that there is no BFOQ for race, is because the people at the time that the statute was written were afraid that that exception would swallow the rule. And I think that at the time that was a reasonable call.

But, you know, there is a cost to that.

COMMISSIONER NARASAKI: And that's the point I'm actually trying to make here. Can I ask the other --

MR. CLEGG: I don't --

COMMISSIONER NARASAKI: Other panelists to answer the question about what kind of BF -- do they see where there's any room for a BFOQ? And what kind of BFOQ would you think was appropriate if you felt one was going to be necessary?

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MS. WARBELOW: The only BFOQ that we think would be appropriate would be a BFOQ applied continuing to sex. But where gender identity is treated consistent with the person's actual gender identity.

So, if for example you have a BFOQ for prison guards that requires only men to be staffing male prisons, then you would need to hire a transgender man to staff -- or permit a transgender man to be a male prison guard --

COMMISSIONER HERIOT: Can you clarify, for the record, what you mean by a transgender man?

MS. WARBELOW: Sure. An individual who was assigned female at birth and transitioned to male at some point later in their life.

COMMISSIONER HERIOT: Could you tell me in what way, just to clarify for the record.

MS. WARBELOW: Sure. People transition in multiple ways. But frequently individuals who are transgender take hormones consistent with the sex that they have transitioned to. And some, but not all individuals, also have surgery on their bodies to conform their bodies to the new presentation.

COMMISSIONER HERIOT: So some that you

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would consider to be transgender would not have any surgery, would still have the biological equipment that they had at birth?

COMMISSIONER YAKI: I can't hear Commissioner Heriot's questions. Your mic is off.

COMMISSIONER HERIOT: Sorry, it won't go on. It goes on sporadically. It went on that time.

I just want to clarify for the record. You would be talking about a transgender man, may be someone with female -- a female body, that has female organs, but has taken hormones to make them, is that correct?

MS. WARBELOW: Yes. So, they may have had some surgeries. They may have had surgeries to have their bodies changed so that all of their genitalia now appears male. Others may have had some surgeries and not others. It varies a little bit from individual to individual.

And it, you know, in terms of medical best practices, it is absolutely best for individuals to be able to determine what level of surgery is right for them.

COMMISSIONER HERIOT: And again, just to clarify for the record, would you also include

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someone who has not had hormonal treatment, who has not had surgery, but dresses and otherwise identifies with the sex that they were not born with? Would that person be transgender too?

CHAIRMAN CASTRO: And Commissioner Heriot, after that, I'll ask you not to ask any more questions because we're already over the panel time. And I just want the panel to --

COMMISSIONER HERIOT: Yes. I just want to make sure I understand what's -- what the terms mean here.

MS. WARBELOW: So, going back to the original question. You know, we would support a very limited BFOQ.

COMMISSIONER HERIOT: Wait, did you answer my question?

MS. WARBELOW: I believe that I have. That explaining what it means to be a transgender.

COMMISSIONER HERIOT: But could someone be transgender who has had neither hormonal treatment nor surgical treatment, but in other ways they have expressed their gender identity as different from the one they were born with?

MS. WARBELOW: So typically we understand that to be gender nonconforming.

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COMMISSIONER HERIOT: Okay.

MS. WARBELOW: But different individuals do identify a little bit differently.

COMMISSIONER HERIOT: But for the purposes of the law, which way would you?

COMMISSIONER NARASAKI: I'm sorry, could I get my question done?

CHAIRMAN CASTRO: Let's just finish with the question from Commissioner Narasaki. And then any panelist who wanted to answer that question and then we're going to wrap it up.

MS. WARBELOW: So we would support a very limited BFOQ. It does not seem that there is an appropriate arena in which someone would be rejected based on their sexual orientation or gender identity from engaging in an employment context.

You know, the very, very narrow instance, even with sex, there are very few legitimate BFOQs.

COMMISSIONER NARASAKI: What about religious accommodations?

MS. WARBELOW: With the BFOQ?

COMMISSIONER NARASAKI: No, religious -
- with any, I mean, exemption or accommodation of

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religious views?

MS. WARBELOW: Right. So, you know, as I put it my both oral and written testimony, the Title VII standard is an ideal model. It allows religious employers, so those who are religious organizations, to provide preference to individuals of their own religion.

In addition, we have very robust case law around the ministerial exemption for religious organizations as well.

CHAIRMAN CASTRO: Ms. Simmons or Ms. Stachelberg, any additions?

MS. LONG SIMMONS: No, that was the only point I was going to make with respect to the ministerial exemption.

CHAIRMAN CASTRO: Okay.

MS. STACHELBERG: The only thing that I would add is, I think it's something that Mr. Clegg said earlier about working with young children. I wasn't quite sure whether the comment meant to suggest that --

MR. CLEGG: I did not say that. I said adolescents.

MS. STACHELBERG: I'm sorry. With adolescents, okay. Whether the comment was meant

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to suggest that someone's sexual orientation had something to do with one's ability or inability to work with adolescents. I think that --

MR. CLEGG: I think my only -- I said -

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MS. STACHELBERG: I think that the medical profession and those who work with children from the pediatricians to the American Psychological Association to the American Medical Association and all that, have put those doubts to rest.

MR. CLEGG: All I was saying was that straight men are more likely to be attracted to adolescent females than gay men are. And that gay men are more likely to be attracted to adolescent males than straight men are.

CHAIRMAN CASTRO: Well, I think Ms. Stachelberg refuted that point. But thank you all. It was a very robust panel. We learned a lot. And especially about Mr. Clegg's preferences for individual care for himself at some point.

So -- but thank you all. And we're going to take a break now for lunch. We will return at 1:00 p.m. with Panel Number Three. Thank you.

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(Whereupon, the above-entitled matter went off the record at 12:06 p.m. and resumed at 1:02 p.m.)

CHAIRMAN CASTRO:: So we're coming back into session for the afternoon. We're starting with a couple of our commissioners en route so they will be arriving but we have a quorum to continue.

IV. PANEL III: ECONOMIC ISSUES

CHAIRMAN CASTRO: So we are now going to begin with our afternoon panels. I don't know if all the panelists were here earlier today but we have a system of warning lights here. Everyone will have seven minutes to make your presentation.

Red -- well, green, obviously means go, red stop, and when you see the yellow light that means get ready to wrap it up and then we're going to have a series of questions from our commissioners.

So let me introduce the panelists for everyone. Our first panelist is Ms. Selisse Berry, founder and CEO of Out and Equal. Our second panelist is Ms. Lisa Howe, executive director of the Nashville LGBT Chamber of Commerce. And we also have with us Sylvester Mendoza, corporate director for Global Inclusion and Strategic

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Alliance with Northrop Grumman.

I want you to each raise your right hand and swear or affirm that the information that you are about to provide us is true to the best of your knowledge and belief. Is that true?

(Whereupon, the panelists were sworn.)

Okay, great. Ms. Berry, you have the floor, and you need to turn your mic on. There you go. Thanks.

MS. BERRY: Thank you. Great.

Well, good afternoon, Mr. Chairman, and members of the commission. I'm honored to be part of this extremely important conversation today.

My name is Selisse Berry and I'm founder and CEO of Out and Equal Workplace Advocates based in San Francisco. Out and Equal is the world's largest nonprofit organization committed exclusively to lesbian, gay, bisexual and transgender workplace equality.

You know, we live in an interesting time. LGBT people can now be married in 37 states and we can still be fired in 29 states simply because of who we love and who we are.

Today, it's possible for a lesbian couple to get legally married on Saturday and then

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be fired on Monday for putting a wedding picture on their desk. I'm fortunate to live in California where marriage equality is legal and LGBT people are protected in the work place.

But several years ago I had my own experience of workplace discrimination and was not allowed to follow my chosen career path simply because of who I love.

I spent four years training to become a Presbyterian minister and, regardless of my abilities, my passion and my commitment, when I came out as a lesbian I was not allowed to follow that dream and was not allowed to be ordained.

So after a lot of pain and a lot of soul searching I eventually started Out and Equal Workplace Advocates because I believed then as I do now that no one should ever have to choose between a career we love and the person that we love.

So fast forward 20 years and Out and Equal now convenes the world's largest gathering of LGBT employees and allies, and this past November the Out and Equal Workplace Summit brought together 3,300 people from over 600 corporations and government agencies from 30 countries around the globe to share best practices for creating LGBT-

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friendly workplaces.

Last year, we held our first LGBT workplace roundtable in Bangalore, India and have convened LGBT employees and our allies in Brazil, Mexico, Italy, Spain, Poland, the U.K. So our work really has become a model for workplaces globally.

When I started Out and Equal in 1996, it was clear that without a federal law that protects LGBT employees from discrimination the burden of protecting our own employees had to fall on the companies themselves.

So we began working with LGBT employees within the Fortune 500 companies to create LGBT employee resource groups and we worked with HR and diversity professionals to ensure that equal policies and benefits were in place so that people could come out and bring all of who they are to work every day.

When I started Out and Equal, only 5 percent of Fortune 500 companies included sexual orientation in their non-discrimination policies and today I'm very happy to report that over 91 percent of Fortune 500 companies include sexual orientation and 60 percent include gender identity.

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So we've certainly come a long and it's clear that corporate America is really leading the way around LGBT workplace equality. And still, many employees are afraid to be honest about who they are.

The fact that we have no federal law to protect our community is, in my opinion, appalling and it not only threatens people's lives -- livelihoods but it can threaten lives.

George Kalogridis started his career as a busboy at Disney and today George is the president of Walt Disney World Resorts. Several years ago, when George was the vice president he was pulled out of a very high-level meeting by the president of Disney and he learned that an extreme right group, an employee that was a member of this group, had posted an online message advertising the fact that George was gay and giving people directions to get past security and into his office.

As he recounts that extremely painful story he said of course he was concerned for his own safety but he said that his absolutely worst fear was that he would be fired because he's gay.

Well, fortunately, the president of

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Disney said to George very emphatically, we are going to stand behind you 100 percent. So George's story has a happy ending for both George and his employer.

George has a great job and Disney has an amazing leader. But, of course, not everyone has that same support from their boss and their colleagues.

Studies have shown that nearly one in four lesbian and gay, bisexual and transgender employees has experienced workplace discrimination in hiring promotions and pay, and one in two transgender employees have experienced discrimination.

So it's not surprising that 83 percent of employees today are not fully out at work. When people are not out when they're not putting their energy -- or when they're putting their energy into hiding who they are and to changing pronouns when they talk about their weekend then they're not putting that same energy into their jobs and to being successful in their careers or into helping their company be successful.

And oh, by the way, if they're not out they're also not likely to fill out diversity

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surveys and participate in data collection as freely.

So every LGBT employee should be able to bring all of who they are to work every single day and know that they will be treated with dignity and respect -- every LGBT employee, including the lesbian who was happily married over the weekend and chose to put her wife's picture on her desk.

Thank you so much for the opportunity to present here today.

CHAIRMAN CASTRO: You're welcome, Ms. Berry.

Ms. Howe?

MS. HOWE: Commissioners, thank you for inviting me and having me here today and it's an honor to be alongside expert panelists -- Selisse and Sylvester.

My name is Lisa Howe. I'm the executive director of the Nashville LGBT Chamber of Commerce. We are a 17-year-old chamber who advances common business interests, economic growth and equality in the workplace.

This is my third year in the position and my third year in this line of work. Prior to

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this, I had a successful -- I would say, successful 17-year career as a collegiate women's soccer coach.

In December 2010, I came out at work by announcing that my partner was expecting our first child. So with Christmas on the way and a baby on the way, I mutually separated from my employer.

When you have families whose financial planning goes very much into their family planning, the lack of employment protects affects children and families.

There's research that says children and female same-sex households have a poverty rate of 41 percent. As the director of the chamber, I receive communications and phone calls from people who were fired, maybe contracts went unfulfilled, they were denied service and even sometimes denied housing just for being gay.

And recently for the first time I just had communications from a straight person who thinks they were fired because they were perceived to be LGBT, and that was a first for me.

When I get these communications I do two things. I look at our chamber directory and I look at their employer's non-discrimination

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policies, and if I can find sexual orientation or gender identity in those policies I know that I can refer them to one of our attorneys and our labor attorneys.

But if I don't find sexual orientation or gender identity in that policy, then sometimes I have to be the first person that says well, they're within their rights to fire you for being gay, and maybe I get to refer them to the Tennessee Equality Project or the National Center for Lesbian Rights - - somewhere where they might have some opportunities. But they have no legal protections in their workplace. It's hard to be that person telling someone for the first time.

So and I hope it's not presumptuous. I don't think I'm the first person up here today -- I hope it's not presumptuous but I anticipate full marriage equality in June, and while this won't be a big issue for our inclusive LGBT chamber members, we anticipate Tennesseans getting married and getting fired based on the fact that their honeymoon was with someone of the same sex. And having a patchwork of laws like this is why we really need protections in the workplace.

The LGBT communities need a fully

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inclusive non-discrimination protections and not a patchwork of freedoms.

I'm happy to answer any questions as we go along and thank you very much for having me today.

CHAIRMAN CASTRO: Thank you. Mr. Mendoza?

MR. MENDOZA: Good afternoon, Mr. Chairman and members of the commission.

I'm the director of Global Inclusion and Strategic Alliances for Northrop Grumman, one of the major aerospace defense companies in the world, located in Falls Church, Virginia, and I want to thank you for the opportunity to participate in this important briefing that will examine workplace discrimination against lesbians, gays, bisexual and transgender Americans.

Northrop Grumman sees this panel and the commitment to the LGBT community as critical to the success of our company and the nation.

Discrimination has no place in the workplace and we believe in doing everything possible to eliminate discrimination against any employee including members of the LGBT community.

Our zero tolerance policy clearly

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protects our employees from discrimination based on sex, gender, gender identity, expression and sexual orientation, among other protected classifications.

We recognize the importance in having the full support of our leaders and employees in celebrating and recognizing the diversity of our workforce. We strongly believe in diversity and inclusion and in order to be the global security company we need to make sure that we not only have a diverse workforce but also have a work environment in which all individuals are treated fairly and respectfully.

We believe in equal access for every individual to opportunities and resources that will enable them to fully contribute to the organization's success.

Northrop Grumman remains committed to providing an inclusive work environment that allows employees to bring their whole authentic selves to work every day, contributing diverse ideas, perspectives and talents to solve our customers' toughest challenges.

We want all Northrop Grumman to feel welcome, respected, included and valued in a culture where each of us can contribute in a

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meaningful way to achieve top performance and innovation.

Over the years, Northrop Grumman has developed key programs and initiatives to ensure that our LGBT community and others feel welcome and valued.

This includes our Pride and Diversity Alliance called PrIDA, a very active employee resource group across the company.

PrIDA is open to all employees, both those in the LGBT community and their allies. It is a diverse community that builds and sustains an inclusive environment for all employees regardless of gender identity, thereby enabling Northrop Grumman and our employees to maximize engagement, innovation and performance.

The mission of PrIDA is to foster an inclusive environment for all employees, make a difference in the quality of life at work for LGBT workers and allies, increase awareness of the importance of diversity and inclusion in the workplace, promote professional development, develop cultural competency and support employees in the recruiting and attraction of quality workers to Northrop Grumman.

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PrIDA takes the lead in developing our LGBT Pride Month celebration held each June. At one of our locations here in northern Virginia they invited the nonprofit organization Parents, Families and Friends of Lesbians and Gays to discuss corporate best practices for supporting LGBT employees and family members, how allies can support LGBT individuals, tips for parents of LGBT children, specifically how to handle bullying, and issues affecting LGBT parents.

In addition, PrIDA has been instrumental in developing policies and procedures which affect the LGBT community across the company. For example, they were critical in the design of our transgender toolkit which we developed to provide managers with a set of resources to assist them in supporting employees who are transitioning.

They also develop our Allies at Work program. Northrop Grumman partners with several organizations that help to address, advance and eliminate workplace discrimination against the LGBT community as well as promote the hiring, retention and recognition of this critical community.

Some of these organizations include the Human Rights Campaign, Out and Equal, Out of Work

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and GLAAD.

In addition, we signed on to the recent amicus brief to the U.S. Supreme Court requesting that they uphold same-sex marriages. Our LGBT community is mission critical to our advancement, innovation and to being a responsible global corporate citizen and global security company.

I thank you for the opportunity to participate in this important session. If I can provide any additional information please be free - - I=ll be happy to answer your questions. Thank you so much.

CHAIRMAN CASTRO: Thank you, Mr. Mendoza.

Commissioner Yaki has the first question. Commissioner Yaki?

COMMISSIONER YAKI: Yes. Thank you. Sorry about that.

This question goes to Ms. Howe and also to the gentleman from Northrop Grumman, and it follows up on the question that I asked of the first panel earlier, which goes to the allegation made by Mr. Clegg that there is insufficient or no real economic impact that would trigger the protections of or implications of the Commerce

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Clause with regards to ENDA.

And I guess I want to -- I wanted to get from Ms. Howe sort of her experiences and knowledge on this area, and then with -- and then simply with regard to Northrop Grumman I'm interested to know how many states you're located in that do not have ENDA protections and whether you have suppliers and contractors who are not direct employees of Northrop Grumman who are not part of the protections that your company offers but who might have employees who would be vulnerable to discharge because of their sexual orientation by virtue of their location in a state where you do business or you have economic relationships with those companies.

Because to me that sounds to me like another reason why the importance of the economic impact is absolutely there because it has an impact on where you work, how you work, what protections you have at work, how -- what kind of contribution you can make to your company and to the economic lifeblood of this country because, as was noted by Ms. Howe, of the patchwork of laws that exist out there where you could be married today and fired tomorrow.

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So, Ms. Howe and the Northrop Grumman representative, if you could take that I'd appreciate it.

CHAIRMAN CASTRO: Go ahead, Mr. Mendoza.

MR. MENDOZA: Thank you for the question, Commissioner.

Northrop Grumman is located in all 50 states. Our policy applies globally throughout the -- all states and within terms of our supplier contractor we are heavily engaged in working with the LGBT supplier community and to ensure that they have equal opportunity to bid on contracts within our organization.

CHAIRMAN CASTRO: Ms. Howe?

COMMISSIONER YAKI: I want to ask Mr. Mendoza, what I was asking for though is Northrop has a huge supply of vendors, specialists, what have you who do work for Northrop, and I guess what I was just simply saying is that would you agree that it would be important from your point of view that those companies also not be -- and I understand you have no control over those particular companies.

But wouldn't it make your life easier

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in terms of the workforce and the supplier chain and what have you that you rely on if those companies also had -- whether they were done internally or by federal law -- protections for LGBT employees?

MR. MENDOZA: My understanding of the compliance regulations regarding supplier diversity as well as a government contractor that all suppliers must have an anti-discrimination and affirmative action policy, and therefore we would require them to uphold the same policies that we have at Northrop Grumman.

We believe that the supplier community plays an important role to our success and it comes in from all groups throughout the country.

COMMISSIONER YAKI: Okay. Thank you.

CHAIRMAN CASTRO: Ms. Howe?

MS. HOWE: We have very few protections in Tennessee for contractors or anything like that. So in Nashville the metro government did pass a policy to extend sexual orientation, gender identity onto the employment -- the discrimination policies for their contractors and the state overturned it and said that local governments do not have that authority.

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We also have people who are married in a different state and when they come to their workplace they don't get partner benefits and they're not considered married in the state of Tennessee so they don't have any type of benefits.

We just had a member refinance their house and they went to the bank -- they were married in California -- they went to the bank, signed all their paperwork that they're married and it got sent back to them that they're not married and they had to redo their paperwork.

And all of these things affect the economy and, certainly, they affect equity within how our citizens are treated and their dignity and respect.

CHAIRMAN CASTRO: Ms. Berry?

MS. BERRY: Thank you. Out and Equal did a study with Marsh & McLennan and looked at the cost of inconsistency of the patchwork of laws around the country in terms of civil unions versus marriage, et cetera, and within one year businesses are paying \$1.4 billion extra in terms of administrative costs and tax implications to compensate currently in this current patchwork of inconsistent laws.

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CHAIRMAN CASTRO: Okay. Madam Vice Chair?

VICE CHAIR TIMMONS-GOODSON: I thank our panelists for joining us today.

Ms. Berry, you provided a number of statistics early on and many of them appalling and in fact you said that 83 percent of employees are not out at work.

It led me to wonder what other kinds of information or data that's not currently available or that we haven't collected but it's out there that might help us understand the broader picture and the pervasiveness of the LGBT workplace discrimination and its effect on our economy.

MS. BERRY: Yeah, there's -- there are many studies that are being done by companies themselves trying to increase the data because corporate America loves data, and so we are continuing to gather that.

A lot of the work that we've done with Harris Interactive is to survey Americans on their beliefs and we've seen an increase of numbers of people that really believe that LGBT people or that, I guess, employees in general should be judged on their performance and not on their sexual

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orientation or gender identity.

And so that's a helpful tracking. I think the other thing in terms of surveys what's so difficult, and we've talked about data collection, I've heard people -- former panelists talk about it because it's -- it can be a hidden part of who we are and many people choose, because there's no federal law to protect us and for all kinds of reasons many people choose to hide who they are at work.

And so when companies are talking about increasing diversity within their employee base, they're talking specifically about race and about gender and they're not talking about sexual orientation or gender identity or counting LGBT people because we're not -- we're not being counted. We're not being asked to self-identify who we are within companies or within workplaces at all.

And so that's a whole lack of data collection that we really need to put a spotlight on.

CHAIRMAN CASTRO: Anyone else want to comment? Mr. Mendoza?

MR. MENDOZA: Northrop Grumman recently

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enacted a self-ID identification for new hires who are members of the LGBT community. Our plans are to go forward and collect data for our current workforce sometime in the future.

But right now, we are currently collecting new hires and their self-identification.

CHAIRMAN CASTRO: Okay. Commissioner Achtenberg?

COMMISSIONER ACHTENBERG: Mr. Chairman, this is for Ms. Berry and Mr. Mendoza.

We heard earlier expressions of concern that when there's anti-discrimination protections in place in a work -- in a workplace that benefit -- that protect LGBT people there may be a corresponding infringement on the rights of religious persons to express their religious, perhaps, disapproval of the gay or lesbian or transgender person's identity or presumed activity or what have you.

I'm wondering of the 90 percent of Fortune 500 companies that you have worked with to adopt these policies has it been their experience, at least to your knowledge, that there has been a corresponding rise in complaints by religious employees that somehow the workplace that was

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created now infringes upon their freedom to express their religious beliefs.

And the same question, first, to you, Ms. Berry, and then Northrop Grumman's experience now that you've become an employer that protects LGBT rights.

MS. BERRY: What we have heard from people, for one thing, when we talk about LGBT diversity within the context -- a broader diversity around workplace issues, we're talking about treating people with dignity and respect.

And so people, regardless of their religious background or beliefs, understand what that means -- that when they walk in the door of their company they are expected to treat their colleagues with dignity and respect.

And it sometimes feel like this rule, but what happens often -- and we've seen time and time again and I think, frankly, the reason that the workplace is leading the way around LGBT issues is because people are sitting in cubicles next to people that are of different races, of different genders and of different sexual orientations than they are themselves and they get to know Maria, who's this fabulous marketing person and oh, by the

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way, she has a woman partner, and it demystifies what it means to be an LGBT person.

And so Christians and Jewish people and pagans and Buddhists are all working together and they're also -- all of those LGBT people across all racial ethnic lines and all beliefs lines and so many are -- can find camaraderie and similarities as well as differences, and the whole point is that we embrace both in the workplace.

COMMISSIONER ACHTENBERG: So it has not been reported to you that a result of not --

MS. BERRY: Not in a broad sense but individuals have come forward and have had conversations with HR and the answer typically is that we treat people with dignity and respect. But I haven't seen that at all in a broad stroke.

COMMISSIONER ACHTENBERG: And you, Mr. Mendoza?

MR. MENDOZA: The issues come up primarily around Gay Pride Month in June when we celebrate and make it visible to the entire company about our support for the LGBT community, and we do have some employees who write to our CEO or to some of the executives in our office regarding their religious beliefs and what they felt about it.

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Our response usually is that we support diversity and inclusion in the company and support the members unequivocally for members of the LGBT community.

And I think that with regards to issues and concerns we have an alternative dispute resolution in the company for employees who feel -- who feel that they've been unfairly treated on both sides of the issue and we address those, try to resolve them in a fair and reasonable manner.

COMMISSIONER ACHTENBERG: But, certainly, no one is retaliated against for expressing a contrary viewpoint, I'm assuming. Is that the case?

MR. MENDOZA: No. In fact, we respect their views and opinions and make sure that they're acknowledged as well.

COMMISSIONER ACHTENBERG: Thank you.

CHAIRMAN CASTRO: Commissioner Kladney?

COMMISSIONER KLADNEY: Mr. Mendoza, is it possible for you to provide us with your toolkit that you use at your company?

MR. MENDOZA: Sure. Be glad to, Commissioner.

COMMISSIONER KLADNEY: Thank you. And

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then I have -- following up on Commissioner Achten-Achtenberg's question, these Fortune 500 companies that have put the -- and this is for anybody who wants to answer, particularly all three of you -- that have put these non-discrimination rules in place, earlier I had asked Mr. Clegg -- I said there was no remedy for the employee if an employer absolutely wanted to discriminate.

Is that true or not true? Would my statement be true, in other words, if an employer had a -- had discriminated against LGBT even though they had a rule in place? Are there remedies -- I guess you have a procedure that --

MR. MENDOZA: Right. Alternative dispute resolution and we also have an ethics hotline that catches those kinds of issues that are brought to our attention because both -- our employees utilize both avenues to get their issues to the right people in the organization.

COMMISSIONER KLADNEY: And of all these companies that have the non-discrimination policies, have you found and have you heard of hostility continuing in the company from one employee to another -- interactions between employees -- that kind of thing?

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MR. MENDOZA: Not to my knowledge.

MS. HOWE: I would say in Metro Nashville the government added sexual orientation and gender identity to the non-discrimination policy in 2009 and there's been -- I've only read of one suit.

COMMISSIONER KLADNEY: Okay.

MS. HOWE: And this is a pretty conservative place.

COMMISSIONER KLADNEY: So do you think the employees are -- I mean, are accepting of --

MS. HOWE: I think a lot of times when these policies are added then the companies do a lot of inclusion training from leadership on down to begin those good working relationships.

MS. BERRY: Yeah, because I would have said that 20 years ago, definitely, just putting sexual orientation in your EEO policy or your non-discrimination policy did not mean that that kind of discrimination stopped.

But over time, as Lisa said, that there have been lots of opportunities for diversity training and, as I was saying before, people get to know colleagues, you know, that are -- they're working with day in and day out. So it -- just in

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terms of building a relationship it makes a big difference.

But our work is to help companies understand that the very first important step is to put a policy in place and to spell it out that we do not discriminate based on sexual orientation.

And then recognize that the culture is not going to just change overnight -- that people need to not just talk the talk but walk the walk and then begin to have those deeper conversations with people, and there are companies that have an ombuds team in place and it's similar to what Mr. Mendoza is talking about at Northrop Grumman, that there are zero tolerance policies and people get that message clearly.

MR. MENDOZA: And I might want to add on Ms. Berry's comments is that just because a policy exists sometimes the right words don't match with the behaviors, and we believe that reinforcement is constant about our policy and that the strongest intervention is leadership by example.

And I think that our leaders, especially our CEO, has done the right thing. He's brought all his direct reports to the Out and Equal

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conference in Dallas, Texas, which shows us a strong sign to all our employees about how important this community is to Northrop Grumman.

COMMISSIONER KLADNEY: Thank you very much.

CHAIRMAN CASTRO: Commissioner Heriot?

COMMISSIONER HERIOT: Thank you, Mr. Chairman.

I'm just wondering where the line ought to be drawn here. Interested in your perspective on this. I think at least one of you mentioned the notion of no one should be dismissed from a job or should fail to get a job because of whom they love.

But there are a lot of other reasons that employers are sometimes arbitrary and unfair. Sometimes, for example, you have an employee who, on his own time, goes to a topless bar.

The employer doesn't like it. Doesn't interfere with the job in any way but they get fired for it. There are people, for example, who get fired because of their political views -- the boss doesn't agree so they don't get the job or they don't get the promotion or they get fired.

I read in the paper recently about people who go to conferences where they dress up

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like colorful ponies -- My Pretty Pony or something like that.

I don't know of any particular cases but I suspect that an employer finds out that an employee dresses up as a colorful pony and decides that's just weird, even though it has nothing to do with their job performance, and so they get fired. You know, and if the guy wants to dress up as a horse, fine.

Should there be a law that simply says that employers cannot act arbitrarily in hiring or firing employees? Let's start with that. Should there be?

MS. BERRY: Well, some of the things that you're describing or all of the things that you're describing are behaviors versus identity. So I -- you know, my -- I'm not behaving like a lesbian -- I am a lesbian and that's who I am. And so people --

COMMISSIONER HERIOT: That's in the eye of the beholder. I mean, somebody can say, you know, I don't believe like a Marxist -- I know I am a Marxist -- that's part of my identity. And for all I know, the pony people feel very deeply about their ponies.

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I don't see how you can simply assert that it's an identity and tell somebody else that it's not their identity. When it's central to somebody's personality it's up to them, isn't it?

MS. BERRY: I certainly see a difference between being part of the lesbian, gay, bisexual and transgender community and being a lesbian than dressing up a certain way.

So I think that, you know, employees -- we're all trying to, you know, create a level playing field and a diverse workforce and recognize that there are lots -- there's lots of diversity and being LGBT is of them.

COMMISSIONER HERIOT: So only LGBT people get to -- people get to decide what their identity is? I don't -- I don't understand that concept.

I mean, don't people have a right to define their identity? And if you're going to do that, then don't you have to be a bit more inclusive, and if you're going to be that inclusive then you got to start worrying about what kind of decisions get second guessed in what situations.

COMMISSIONER KLADNEY: I thought people's sexual identity was what they were -- what

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they are and what they're born with.

COMMISSIONER HERIOT: What people's identity is I assume they define for themselves, don't they? I mean, isn't that what we mean by identity?

COMMISSIONER NARASAKI: People get to decide what religion they are and what religion is. So I'm confused. I'm sorry. I'm not quite sure what you're asking.

COMMISSIONER HERIOT: I think that we're talking about --

COMMISSIONER NARASAKI: -- you're talking about, religion and we don't say it has to be a certain kind of religion. There are religions that aren't necessarily held by a lot of people but --

COMMISSIONER HERIOT: This seems to me the basis of the argument here is that this is arbitrary to interfere with something that's very important to someone, right? Very important, and a lot of things are important.

Do we want to protect all important things that go to the identity of the person or just some?

MS. HOWE: I believe there is research

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saying that LGBT people are born LGBT. Enough -- like the religion, you're not born a certain religion.

I would -- and I would agree with Selisse about going to a topless bar -- on the most simple level going to a topless bar is a choice and being a lesbian is not.

COMMISSIONER HERIOT: Well, you know, there's also research showing that a lot of attitudes and personality characteristics are inborn. So that's not a distinction that just goes to LGBT, is it?

MS. HOWE: No, but I was just going on that choice of the topless bar.

COMMISSIONER HERIOT: Okay.

MS. HOWE: Making that choice.

COMMISSIONER HERIOT: So is -- should anything that is an inborn trait be protected against?

MS. HOWE: I can only speak to sexual orientation and gender identity. I don't have the background on the inborn trait.

COMMISSIONER HERIOT: Okay.

MR. MENDOZA: Well, Northrop Grumman is guided by its values as its guiding principles and

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we also have a code of conduct, and so that code of conduct with regards to your question about how they dress, how they behave, how they look needs to comport with the code of conduct that we have in the organization, which is -- which is based on good business interaction or relationships.

And so we're not being arbitrary about the dress or the way the person looks unless it conflicts with our code of conduct and our values within the organization.

COMMISSIONER HERIOT: Could you be a bit more specific? What would conflict with it? Give me some examples.

MR. MENDOZA: Well, for example, if I'm going to a business meeting and I came in with a tee shirt, that wouldn't be comporting with our code of conduct of good business relationships.

And so it would be --

COMMISSIONER HERIOT: So you're talking about things on the job then?

MR. MENDOZA: Yeah. And it wouldn't be arbitrary.

CHAIRMAN CASTRO: Commissioner Narasaki? Oh, and then after Commissioner Narasaki, Commissioner Kirsanow. Unless you want

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to let him go -- go ahead, go ahead, Pete.

COMMISSIONER KIRSANOW: I need a few seconds to formulate my question. Thanks very much to the panelists.

I guess my question is to Mr. Mendoza. Just want to get a little bit more clarity on the policy. If you have individuals in your company who regularly say things such as, I'm opposed to same-sex marriage -- I think that homosexual conduct is immoral -- my religion tells me that this is not something that the state should countenance or the company should countenance.

Let's say they do that on a regular basis. Is there any kind of sanction applied to such individual if other employees are offended by those comments?

MR. MENDOZA: The only way that that would occur is if it interfered with their job performance and if the individual is so disruptive in the workplace that requires counseling, then that would probably be the remedy for that particular situation.

And if it escalates to another level that he or she couldn't do their job and disrupts others from doing their job then we would have to

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look at it a little bit more sternly.

COMMISSIONER KIRSANOW: And what would be considered disruption?

MR. MENDOZA: It would seem to me that it would be something that the individual would talk about it every day at the office that disturbs the performance of others in the organization, that words that he or she may say that may be offensive to other individuals in a workplace that disrupts their job performance and, I would think, other things that lead to the deterioration of the whole particular team in general.

COMMISSIONER KIRSANOW: And, conversely, if a gay employee regularly refers to the fact that he or she may be gay, regularly talks about other matters that would indicate that they are gay or what their behaviors have been outside the office, let's say that offends other employees. Is any sanction applied to that individual?

MR. MENDOZA: I think that under those circumstances if it interferes with the job performance. That would be the guiding light under which we would examine the situation -- if it disrupts the performance of the individual, other individuals in the workplace.

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COMMISSIONER KIRSANOW: Thank you. No further questions.

CHAIRMAN CASTRO: Ms. Narasaki?

COMMISSIONER NARASAKI: Thank you, Mr. Chair.

So Roger Clegg testified earlier today that he doesn't view discrimination against LGBTQ employees as affecting interstate commerce.

When I was a corporate attorney representing major corporations, I found that my clients actually found it difficult when there's a patchwork of laws and regulations that affect their employees and actually preferred to have a standard that could cut -- that could cut across the different areas that they might have staff because otherwise it means that they have to have a lot of different training materials, it confuses supervisors.

So I'm wondering what your response is to Mr. Clegg's contention that in fact LGBTQ discrimination does not affect corporate's abilities to work in interstate commerce.

MS. BERRY: Well, the majority of companies that we work with, like Northrop Grumman

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and others, are in most states in the United States -- in fact, in most countries.

We work with many multinational companies that are -- they're struggling with rolling their policies out globally because we talk about a patchwork in the United States and, of course, there are, you know, 17 countries where we can be married but close to 80 where we can -- we are arrested or even killed.

So people are trying to figure that labyrinth out. But many employees that we work with in an ongoing basis looking at that patchwork of laws both in terms of protection for LGBT people and, of course, as I was talking before about marriage equality and civil unions versus domestic partners, et cetera, so that the cost to the companies is significant.

MR. MENDOZA: As a company that does business in California, we always have to do something different in California, and as a result of our experience with the requirements from state to state we're able to comply with the full extent of the law.

MS. HOWE: I would say in Nashville and in Tennessee we need the Employment Non-

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Discrimination Act because we will be the last to adopt policies and our people always have to worry about inter commerce clause because there will be protections in other states.

There will be marriage equality in other states, and we will be lagging behind. And there comes that cost again. We just signed the marriage amicus brief and it was said in that brief that it's a \$1.3 billion cost to companies just to do the paperwork between different policies.

COMMISSIONER NARASAKI: Thank you.

Ryan Anderson, who's going to be testifying later today in his written testimony, he asserts that employees' assertions about sexual orientation and identity, somewhat to what Commissioner Heriot was saying, is, you know, wide open to abuse and that ENDA will dissuade employers from hiring because they're going to be afraid of spurious litigation. I'm wondering whether that's actually happened in any of the states that have, in fact, adopted non-discrimination laws or in companies who have taken that position.

Have you found, like, you're all of a sudden battling a flood of fraudulent assertions about identity?

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MS. BERRY: I think we're still trying to get LGBT people to come out. So we haven't really seen straight people, except in movies, apparently, but pretend that they're LGBT.

But no -- I mean, I don't think that that has been a problem and, of course, you know, there is this assertion that suddenly everybody has to go out and hire a bunch of LGBT people.

But it's really about the LGBT person that's already there that needs to continue to be there and not be fired or demoted simply for coming out at work.

MR. MENDOZA: At Northrop Grumman we haven't experienced a floodgate of those sorts of issues over a period of the eight years I've been at Northrop Grumman.

COMMISSIONER NARASAKI: So I did do a stint in the private sector at both a large corporate law firm and in a management consulting firm, and I always find it curious when I hear people saying that somehow they're concerned about employees' First Amendment rights at work because I was never under the impression that I had the freedom to say whatever the hell I wanted to say as an employee in a company.

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I was always very clear that there was a corporate culture and there were things that you -- that were not appropriate in the workplace. So that seems like a mythical workplace somehow where everybody gets just to say whatever they feel about whoever they work with.

I'm wondering, though, whether you feel like there needs to be some kind of accommodation for either BFOQs -- bona fide occupational qualifications -- or for just accommodation and how you've handled those issues.

MR. MENDOZA: Well, with regards to reasonable accommodations, we have a policy addressing issues around people with disabilities as well as for religious purposes. We have a culture that is collegial and consensus building.

But when the boss says go we go. But we have an opportunity to express ourselves within the decorum of the business setting. So to say that it's a democracy in the corporation would probably not be it.

COMMISSIONER NARASAKI: And I also -- I keep coming back to religion as a comparison because Title 7 does cover discrimination based on religion, and you often have, I think, as one of

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you pointed out, in the workplace with very different-different religious views that sometimes do conflict on certain religious practices. And yet, people have managed to mediate those and survive in the workplace.

So I wonder how you -- you know, whether you see issues in accommodating religion and trying to protect people from discrimination of religion and whether you see this as any, really, significantly different from those kinds of conflicts.

MR. MENDOZA: Well, at Northrop Grumman the issues come up during the Christmas holidays where religious ornaments are displayed in our lobbies and workplaces.

And there are those who are not affiliated with religion who feel that they are offended by all these symbols.

I think in addition to that, one of the looming issues for Northrop Grumman is Islam in the workplace, since we're going global and we're heavily into the Middle East and people from the Middle East are coming to Northrop -- what are we doing to accommodate their religious practices in the workplace like a meditation room, diet, so on

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and so forth.

So we are, obviously, sensitive and constantly reminded that we live in a global world, that people come from different places, different cultures, different backgrounds and that we need to be sensitive to all those that come in through our doors.

COMMISSIONER NARASAKI: Well, I just want to commend your CEO for really trying to be a leader in the industry. Thank you.

MR. MENDOZA: Thank you.

CHAIRMAN CASTRO: Any other questions? Commissioner Kladney?

COMMISSIONER KLADNEY: I just have a question. I think it's -- to clarify because this is what I think I heard -- that the patchwork of conflicting policies around the country, these individual non-discrimination clauses and the one -- states where they aren't, that's pretty expensive for an interstate company to comply with. Is that correct? I mean, there's a cost to that?

MS. BERRY: There's a cost to the -- I'll jump in -- to the different -- the patchwork of laws around workplace discrimination -- employment discrimination.

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The study that we did with Marsh & McLennan was really looking at the patchwork of current laws around marriage equality and how that -- because so many of the companies, in order to have equal pay for equal work for LGBT people recognized early on that they needed to provide domestic partner benefits even though they were taxed and it still wasn't equal pay but it was moving in the right direction.

And now with marriage equality, domestic partner benefits are no longer -- I mean, they're still being offered in certain circumstances but there's now certain states with marriage, certain states with civil unions, certain states with DOMAs.

So that patchwork of laws where the HR professionals are having to deal with all those different laws is costing companies between \$1.3 billion and \$1.4 billion a year.

COMMISSIONER KLADNEY: And you would suspect -- I guess this is speculation but you would suspect that that's the same type of situation here with non-discrimination laws because we have 23 states with non-discrimination laws that are all different as we saw, like, with Utah this

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morning --

MS. BERRY: Right.

COMMISSIONER KLADNEY: -- and they all have different little twists and turns to them and so you would -- is that your testimony?

MS. BERRY: Yes, absolutely, that the same kind of level of administrative costs and recognizing what's possible in different states is creating also a cost to those companies.

COMMISSIONER KLADNEY: So that would have an effect on interstate commerce?

MS. BERRY: Absolutely.

COMMISSIONER KLADNEY: All right.

MR. MENDOZA: And the same here with the -- Northrop Grumman with regards to health care, joint survivor benefits. There is a cost and when companies like us and others that have gone that route the costs may be de minimus in a -- to a large extent and then the question of transgender or a sex reassignment there is costs there, and some cap it at a certain amount.

Others have it unlimited. So large companies are willing to see that this is good for business and that that is the cost of doing business with a diverse and inclusive society.

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COMMISSIONER KLADNEY: Thank you.

CHAIRMAN CASTRO: Any other questions, Commissioners? Commissioner Heriot?

COMMISSIONER HERIOT: I guess I just want to clarify the record on the First Amendment issue here. You know, it's absolutely true that a private employer is within its rights to have certain controls over what employees say.

But the issue that's coming up here is not that. This is can Congress pass a law that requires employers to so that -- can Congress pass a law that says employers must limit their employees' political speech.

No, they can't. Can they do that here in the situation with ENDA? You know, it raises real serious First Amendment problems and it's not at all analogous to a situation where it is the employer itself that is doing so.

And that's not just me speaking. That's constitutional scholars of many kinds.

(Off-mic comments)

COMMISSIONER HERIOT: And it raises problems. That's why constitutional scholars are so concerned.

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CHAIRMAN CASTRO: Commissioner Achtenberg?

COMMISSIONER ACHTENBERG: Some, and not others. I mean, that's terrific. They're not lawyers. That's your view and others hold a contrary view.

CHAIRMAN CASTRO: Any other questions?

If not, I want to thank the panelists. We appreciate your time and your effort, and we will keep you apprised of our report. So thank you.

MS. BERRY: Thank you.

MR. MENDOZA: Thank you.

CHAIRMAN CASTRO: And I'll ask the next panel to begin to work their way up. Well, we'll go ahead and start. I'll swear in separately when she arrives. Okay.

V. PANEL IV: TRANSGENDER ISSUES

CHAIRMAN CASTRO: So this is our fourth -- this is our fourth panel for the day.

We will begin now. I'm going to introduce Ms. Turner when she arrives. But Ms. Gina Duncan is one of our panelists from the transgender inclusion -- she's transgender

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inclusion director at Equality Florida.

We have Mara Keisling, executive director at the National Center for Transgender Equality, and we have Mr. Kylar Broadus, senior public policy counsel of the Transgender Civil Rights Project for the National LGBTQ Task Force.

And just arriving is Ms. Ilona Turner, legal director at the Transgender Law Center.

If you would each raise your right hand and say if you are willing to swear and affirm that the information that you are about to provide us is true and correct to the best of your knowledge and belief. Is that correct?

(Whereupon, the panelists were sworn.)

Yes? Okay. Ms. Turner, you have the floor for seven minutes.

MS. TURNER: Thank you so much.

As you just mentioned, I'm Ilona Turner, legal director at Transgender Law Center based in Oakland, California. We are the country's largest transgender rights organization.

As has been well documented today, transgender and gender nonconforming people face widespread discrimination in the workplace as well as most other areas of life including, just for one

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example, by regulation being expressly barred from open service in our nation's military.

All of this leads to epidemic rates of unemployment and poverty and, unfortunately, only a minority of states currently have clear laws that prohibit employment discrimination on the basis of gender identity or expression and there is no federal law that explicitly states that an employer may not discriminate based on an individual's gender identity or gender expression.

Transgender and gender nonconforming litigants have found significant protection under existing non-discrimination laws that prohibit sex discrimination.

But to truly benefit from these legal protections, explicit statutes must be enacted to make sure that the law is clear to everyone including employers, workers and courts.

Title VII of the Civil Rights Act of 1964 makes it unlawful for employers to discriminate on the basis of sex, and following the Supreme Court's decision in Price Waterhouse v. Hopkins, as has been discussed today, courts have recognized that Title 7's prohibition of discrimination based on sex necessarily also bars

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discrimination based on sex stereotyping -- that is, the perceived failure of an individual to conform to stereotypically male or female gender norms.

Most courts to consider that issue in the last 15 years have also concluded that transgender employees are therefore protected from discrimination under Title 7.

For example, in 2011 the Eleventh Circuit noted in Glenn v. Brumby that since the decision in PriceWaterhouse federal courts have recognized with near total uniformity that transgender employees can find protection under sex discrimination laws.

In 2012, Transgender Law Center brought a case to the EEOC called Macy v. Holder. Our client was Mia Macy, who had a job offer pulled after she shared that she was going through a gender transition and would be showing up for work as a woman rather than a man.

The EEOC took that opportunity to issue a historic ruling that for the purposes of Title 7 discrimination based on sex includes discrimination based on gender identity, gender transition and transgender status.

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The EEOC's ruling left no doubt that from any viewpoint discrimination against a transgender worker is always a form of sex discrimination regardless -- this is a quote -- "regardless of whether an employee discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another or because the employer simply does not like that the person is identifying as a transgender. Any way you look at it, it's somehow related to that person's sex.

Now, thanks to that ruling and a series of other recent executive branch decisions and determinations, federal employees and contractors are unequivocally protected from workplace discrimination and harassment, including guidance from the U.S. Office of Personnel Management from 2011 regarding transgender federal employees, the executive order issued in June of last year that explicitly prohibits discrimination based on gender identity and sexual orientation in both federal employment and government contracting.

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And in December of this past year, just a few months ago, Attorney General Eric Holder issued a memo to the Department of Justice affirming that as far as the department is concerned in all litigation that they undertake, Title 7's prohibition against sex discrimination includes discrimination based on transgender status.

However, despite these developments, for the majority of the private sector workplace -- workforce, there is no real guarantee that these rights will be respected or that transgender employees will be entitled to fair treatment in court.

While the EEOC often mediates discrimination claims between employers and employees, as we've heard, and EEOC attorneys can prosecute employers in court, courts are not strictly bound to follow its interpretation of the law, although we argue strenuously to them that they should find its interpretations persuasive.

In other words, a private employer that does not agree with an EEO decision can refuse to abide by it, in which case the employee or EEOC must pursue the case in federal court.

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And despite the very strong trend of recent court decisions, some outlier courts may still suggest that transgender people are not protected under laws that prohibit discrimination based on sex.

So because of this, we believe strongly that explicit non-discrimination laws remain critical to provide the protection that our communities need to begin fighting back against this still pervasive discrimination, harassment, unemployment and poverty that we face.

Thank you for your attention to this important issue.

CHAIRMAN CASTRO: Thanks. Ms. Duncan?

MS. DUNCAN: Chairman Castro, Commissioners, good afternoon. My name is Gina Duncan and I'm the statewide transgender inclusion director of Equality Florida, the state's largest LGBT advocacy organization with over 200,000 members and corporate allies.

In my role, I do a great deal of public policy work in the area of workplace LGBT protections and I also work with major employers across the country to craft and implement transgender inclusive workplace policies.

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Equality Florida has worked to pass fully inclusive human rights ordinances across the state and we're proud to say that today over 55 percent of the population of the Sunshine State is now protected against discrimination in the areas of employment, housing and public accommodations.

And currently, backed by Florida's major employers we are working to pass statewide legislation, Florida's Competitive Workforce Act, to provide consistent and equitable protections for all LGBT Floridians.

CHAIRMAN CASTRO: Hold on there, Ms. Duncan.

Commissioner Yaki, could you mute your phone, please? Thank you.

MS. DUNCAN: This legislation would alleviate the patchwork of ordinances across our state which, while effective in their own right, are inconsistent in usage and in enforcement.

Unfortunately, the Competitive Workforce Act has been introduced since 2010 and has yet to get out of committee. We need this law in Florida to protect all LGBT employees until we have adequate federal legislation.

The gender identity and expression

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piece of most legislation passed and pending has come under the most scrutiny and opposition and, frankly, the understanding of the transgender community is minimal among our elected officials, locally and at the statewide level.

In lobbying in Tallahassee for legislation, I am often told I'm the first transgender person a lawmaker has ever met and I say, that you know of.

The issue of public accommodations, i.e. public bathrooms, as they relate to transgender citizens is always the baseless point of opposition that we must overcome to pass fully inclusive laws in Florida and it states across the country.

For example, just this past month House Bill 583, which has now been deemed the Transgender Discrimination Bathroom Bill, was introduced in the Florida House.

This bill, under the smokescreen of public safety, openly discriminates against transgender Floridians. If passed, this bill would require transgender people to use the bathroom of their birth sex unless they can prove that they were transgender by producing a driver's license or

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birth certificate altered since their gender transition.

Worst of all, this absurd legislation seeks to criminalize transgender Floridians for simply going about their daily lives.

This is my driver's license. If my gender marker was not changed and this bill was passed, this bill would require that today I use the men's room or face harassment, costly litigation or even arrest.

This bill is flawed in structure, intent and enforceability and is vigorously opposed by Florida's employers. This bill places undue burden of business -- places an undue burden on businesses, subjecting them to costly litigation and disrupts workplace harmony by forcing employers to discriminate against their own employees.

This bill leaves schools and businesses open to costly unnecessary litigation and would require them to police and monitor restrooms and incur additional costs.

Human rights ordinances for LGBT people exist everywhere. Nineteen states and 28 municipalities in Florida have passed and successfully implemented these HROs with no

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increase in public safety incidents whatsoever.

Transgender Floridians, like all Floridians, care about safety and privacy in bathrooms and need to use them without fear for their safety or security.

LGBT anti-discrimination progress has been made by actions of the EEOC, DOJ and DOE based on Title 7 and numerous high court rulings in this area supported by Attorney General Holder.

Without question, uniform federal legislation provides the optimal platform for clarity, consistency and national enforceability.

The need for the passage of the Employment Non-Discrimination Act has never been more relevant or important in protecting transgender Americans and the entire LGBT community. State, cities, local governments, school boards and businesses are looking for the federal government to provide national policies and national guidance.

Our country is united by a fundamental principle that we are all created equal and every American deserves to be treated equally in the eyes of the law.

We all believe in the American dream,

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and that's why, for instance, Americans can't be fired from their jobs just because of the color of their skin or for being Christian or Jewish or a woman or an individual with a disability.

That kind of discrimination has no place in our nation and yet right now in 2015 in many states, like Florida, a person can be fired simply for being lesbian, gay, bisexual or transgender.

As a result, millions of LGBT Americans go to work every day fearing that without any warning they could lose their jobs not because of their work performance but simply because of who they are or who they love.

That's why Congress needs to pass ENDA, which would provide strong federal protections against discrimination, making it explicitly illegal to fire someone because of their sexual orientation or gender identity, and corporate America agrees.

America is at a turning point. Marriage equality is sweeping our nation. The transgender community is rapidly emerging and we should not only become more accepting and loving as a people -- we as a nation should be embracing the

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beauty and power of that diversity.

Just as we see the need for the Supreme Court to settle the issue of marriage equality on a national scale, we see that the same need for national legislation to protect LGBT citizens in the workplace.

Passing ENDA would eliminate the patchwork of differing state and often absurd state legislation and provide consistent workplace protections across the country.

Lastly, to paraphrase President Obama, in America, of all places, people should be judged by their merits, on the contributions they make in their workplaces and communities and not what -- and on what Martin Luther King called truly the content of their character.

That is what ENDA helps us do, and our nation will be fairer and stronger for generations to come. Thank you.

CHAIRMAN CASTRO: Thank you, Ms. Duncan.

Ms. Keisling?

MS. KEISLING: Good afternoon, Commissioners.

Thank you so much for having me here

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today. NCTE has submitted written testimony that describes the state of transgender people in the United States and what we think should be done to improve that.

I want to talk to you as a person, however, today and not as a --

CHAIRMAN CASTRO: Turn your mic on.

MS. KEISLING: But I want to talk to you today as more of a person than as a policy person and then I'm, certainly, happy to take questions as a policy person.

But what I think is important for everybody to understand that right now in 2015, more than at any time in my 15-year career in this moment, transgender people are traumatized.

They are traumatized economically, they are traumatized culturally and they are very much traumatized physically. I struggled over whether to use the word traumatized. I thought on the -- feeling on edge was way too weak. I thought about under siege or feeling in danger, and I just have to go with traumatized.

I've never seen our community this way and I want to tell you about that. We are really a resilient and determined people.

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You have to be when you are as marginalized as transgender people are, and specific to the work of the commission our testimony shows how transgender people are under siege and traumatized economically with an unemployment rate twice the national average or four times likely than non-trans people to live on less than \$10,000 a year.

But it is more than that and for transgender people who live at the intersections of transphobia and another kind of marginalization like racism or ableism or ageism, it can be even so much worse.

I'd like to make sure you understand, though it is not specifically your purview, about why transgender people are feeling unsafe physically. There's been a dramatic increase in violence in the last six months.

For the 15 years I've been in this work we've always said that about one transgender person per month is murdered in the United States which, I think you'll all agree, is way too much.

That number has tripled in the last four or five months. We don't exactly know why but it unquestionably has and particularly if you're a

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trans woman of color.

That's who most of our murder victims are. There is a real palpable fear and trauma out there right now. Another reason people feel very unsafe is -- my colleague, Gina, just talked about a disrespectful bill in Florida.

We actually have bills like this in nine states right now, bills where state legislatures are very specifically challenging and disrespecting the humanity of transgender people, saying we don't deserve to play on high school sports teams -- we don't deserve to be in the same spaces as people -- we don't deserve to use the restroom at work.

This has a really harsh psychic impact on real people, and while it might be a useful thing for fund-raising or demagoguery, as I'm sure it is, it is a real attack on real people and we feel it that way.

And we don't know why it's happening. Part of it may be that there's just more of us out there. Part of it might be the last twitching of bigoted ignorance. But I think also we know that some of it is demagoguery and fund-raising. It just is.

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We knew a backlash would come eventually and it does seem to be here, and I think we gain heart a bit in knowing that this backlash is not because we're losing. It's actually because we are winning.

It's actually because people are recognizing our humanity and we are getting out there and educating our classmates and to people we go to mosque with and the people we go to church with, and we're winning and that's causing some backlash, which is really hurting people.

And we know that as we win policies and we make policy advances that my colleagues have talked about, we also know though that every day real tragedies are happening to lots of real people.

People are dying. Judges are taking people's kids away. People are being fired. People are not being allowed to use the restroom at work.

We currently believe at NCTE that it is illegal, and I want to say this very clearly -- it is illegal everywhere in the United States, state or territory, to discriminate against a transgender person in employment, housing, education or health

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care.

What we know, however, is that not -- it is not settled. It is not 100 percent settled. There are still employers that don't know it and housing providers and et cetera, and we need that clarification to happen.

But what we also need is an understanding that it has to be real. If you're allowed to have a job and you can't be fired but they don't have to let you use a bathroom at work, you can't work.

And if you have a job but they're allowed to sell you a discriminatory health insurance policy like the federal government does to its federal employees, you cannot bring your whole healthy self to work. You cannot sometimes even work at all.

So we need to figure out how to not just to solidify these understandings -- these legal interpretations and actual laws but we need to make them real with a real understanding of what it takes to bring yourself to work and what kind of things you need to -- need at work.

What we need is pretty simple, and Ilona and Gina have both just touched on it.

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Number one, we do need federal, state and local officials to really focus on the physical violence, the dramatically high murder rates and, by the way, apparently increasing suicide rates against transgender people who already had a 23 times higher suicide rate than the general public.

We need more focus on that from the government. We need the federal government to stop the discrimination that it personally or that it does as an entity, as an employer, and we need further sex discrimination clarification from the commission and from other federal government entities.

And finally, we need to pass a federal comprehensive anti-discrimination law. We are very hopeful that this spring Congress will be introducing a bill to replace the old Employment Non-Discrimination Act, which will include anti-discrimination provisions in housing, credit, education, jury service, federal funding and some other areas.

That's not up to us, obviously. It's up to Congress. But what I really want you to understand today is that transgender people in 2015 are under siege, are on edge, are traumatized, and

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I thank you very much for having us here today.

CHAIRMAN CASTRO: Thank you.

Mr. Broadus?

MR. BROADUS: Thank you, Chairman and commissioners. Thank you very much for having us here today, the National LGBTQ Task Force. I can't say that too fast.

And I know you've heard a litany of testimony today. I've also submitted written testimony. Mine did get to you late. I do apologize. I was out on medical leave so the commission could not reach me.

So I got it to you today. But I'll just save that for your reading because I'm also going to talk to you today.

I'm going to not throw a bunch of facts and figures at you either. I'm going to basically share with you that I have been a transgender person that's been discriminated against.

But I was basically going to talk to you about the crisis that the community faces and the reasons why it's been in crisis and continues to be in crisis. And Mara is correct in that we have 12 reported murders already this -- beginning of the year and you can't separate societal issues

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from workplace issues.

They intertwine, and as we know, that the landscape of culture impacts our employment places.

And so while we have documented 12, I'm sure there are more. I know there are more. We've started to train ourselves to count them and it's really egregious that transgender people are in fear and some of these murders are caused because people are marginalized -- extremely marginalized -- and some of it comes as a byproduct of unemployment.

Most people, when I came out, were unemployed. Most people don't have the privilege I have of what you would say as I appear male -- I am male. But other people -- even I was terminated for being transgender even when I announced my transition in the workplace even though it was a no brainer.

I looked the same, I walked the same, I dressed the same and my work product was the same. But when I went to make the legal changes and it then became an issue in the workplace.

So for people that are less fortunate than me that were born with a medical condition,

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which this is considered a medical condition, that don't have this privilege or walk in this privilege, then it's not the same for them.

And so they suffer all the atrocities that society has structurally engaged and then are not able to make a living for them and their families, which is basically the only thing any of us want to do at the end of the day.

So the community is at a crisis, and as you've heard, the income level is below poverty for those that can even get a job because of the issues of IDs if they don't match and even mine didn't match because I couldn't get the gender marker changed because I was too -- you know, if you can't afford it -- many places you can't afford it.

If you don't have a job how can you afford it? You have to have legal representation to afford it in many places. And again, these all connect together with employment issues.

Health issues then become an issue and then we begin to cost society money, which then impacts us all.

So I think these are all very important issues and they do become crisis issues for our health, our families and society as a whole.

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I didn't want to go into all of my testimony because it's still heart wrenching for me to share. But bathroom issues were mentioned and, you know, what would I look like walking into a women's room and actually when I did -- I didn't go to the bathroom for years because I would be accosted by police at every place and thrown out of the women's room.

So it was pointless to go to a public bathroom. So can you imagine not going to a bathroom?

So I want to bring these human issues and elements to all of the facts, figures and things that you've heard today because, one, it does me no good to repeat them, two, you've read them and you've heard them from multiples of us today, and my colleagues have presented those well.

But I think it's important to bring that human element for those that don't know transgender people or have not been disclosed to one because you do know them and it does make a difference if you know somebody that's a family, friend or colleague, and we all do whether we think we do or not.

The bottom line is that it boils down

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to we're all human beings on this planet and that in the United States you have to have a job to survive and that protections are needed.

And that while we worked hard, all of us, to provide protections there are not enough protections and they're slim, particularly for transgender individuals, and that there are unclear directives.

And as we've seen with past laws enacted in the United States, when there are unclear directives to employers then the laws that are there become very murky and we've seen that with affirmative action, for example, in this country, which is very murky, and then becomes a bad doctrine when it's intended to be a good doctrine and becomes bad to many.

And so we do need explicit and clear federal protections. While we have the patchwork, we've heard, our business people say it does impact in their state commerce, it's costly to business when we have this unclear patchwork going on from state to state and jurisdiction to jurisdiction.

We need clear expressed federal protections for transgender Americans. After all, we are people and we are human beings and we

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deserve the right to make a living.

Thank you.

CHAIRMAN CASTRO: Thank you, Mr. Broadus. Commissioners? Commissioner Achtenberg, would you like to --

COMMISSIONER ACHTENBERG: First, I want to say thank you very much for bringing your authentic selves to the hearing. We aren't always privileged to be an audience to such a meaningful sharing of personal history. So thank you very much for that.

In workplaces where protections for transgender persons have worked, and I'm certain you know of many such workplaces given your positions in the advocacy community, could you talk about what practices in place in those workplaces made for a smoother transition, if you will, to a protected workplace from an unprotected workplace?

MS. DUNCAN: I'll take a first shot at it because that's -- a great deal of my job responsibility is corporate training, and it really boils down to education.

Number one, I think it's important the foundational pieces that major employers want to be educated, they want to be inclusive, they want to

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be able to provide a welcoming and open workplace so that they can indeed recruit the best and the brightest.

Corporations -- a good example is Sodexo. They're one of -- I've done work for Sodexo all across the country and Sodexo implemented step by step protocols.

They instituted checklists. They educated layers and layers of their employees from recruiters to management to people that checked their legal aspect of what they're doing, et cetera. So we're finding that corporations -- number one, there seems to be an impetus that they want to be on the leading edge of this.

They see more and more visible transgender people on the workplace -- in the workplace who want to transition so how do they create a win-win.

And based on the guidance of the EEOC and Title 7, et cetera, we've seen that these employers then want to put together real equality protocols to assimilate that person in the workplace and it involves everything from the communication, how do we communicate this effectively, bringing in people like me to offer

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training at a very personal level.

When I transitioned I was the regional manager with Wells Fargo overseeing 26 branches, 250 people, a multimillion dollar budget, and Wells Fargo told me I was the seventeenth person to transition on the job.

So I was just chopped liver. It was -- I thought it was some big deal but really they had been through this over and over again and they were kind of the template for doing it right.

So employers, number one, are wanting to do it right, and then secondly, they are modeling after each other policies and protocols to be able to communicate and then effectively put a transition plan in place for that employee.

COMMISSIONER ACHTENBERG: My colleague commented earlier on the vague nature of the definitions involved and are you finding that employers are having difficulty in understanding who is and who is not a transgender person and how policies can be shaped properly without being over broad or infringing on the rights of others in the workplace?

Are you seeing that kind of thing taking shape and is there some guidance you can

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give us about how that most successfully manifests itself?

MS. KEISLING: Yeah. If I could address that, Commissioner.

You know, I was speaking once to the International Association of Official Human Rights Agencies and I got done with my presentation and somebody who ran a big-city human rights commission said, what do you do if an employer says the co-workers just don't feel comfortable.

And I said, what do you tell them if the co-workers don't feel comfortable having a woman boss or working with a black person or they don't feel comfortable around somebody in a wheelchair.

And this person who oversaw the enforcement of these laws in a big city said this is -- trans people are different. And I said, no, they're not, and she said, yes, they are and you know it. Now, she was right in this one respect.

We are new. That's why we're different and that's the only reason we're different. Ultimately, we would hope that in the decades there won't be trans policies in the workplace just as -- this is -- this notion that you can't tell who's a

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real trans person is also true about who gets to take Jewish holidays off -- you know, who gets to wear a head scarf -- who gets to -- there's a million of these kinds of things that people don't fake and if they do fake it they're in violation of the rules.

There are not a lot of people out there claiming to be transgender who are not transgender. There are a lot of societal and workplace reasons why people wouldn't do that.

It is really a non-issue. Employers aren't having problems with it.

COMMISSIONER ACHTENBERG: Do others have comments? Ms. Turner?

MS. TURNER: This one's tricky -- the microphone. I totally agree with what my colleagues have said. It's really not super complicated.

I am not transgender myself and I do a lot of trainings speaking to people in the private sector companies and other places, talking to other people about how not to engage in discrimination against transgender people and all they have to do is think about basic principles of, really, respect and manners that we all already know but that for

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some reason fly out of our heads when faced with something that seems new and scary like transgender people.

So treating somebody as you would like to be treated, calling them by the name and pronoun that they go by, respecting a person's identity, not -- you know, not allowing co-workers to ask one another inappropriate questions about their bodies or about what medical treatment they might have undergone.

If that's considered inappropriate for other types of, say, medical conditions or where you wouldn't allow employees to gossip about one another or share confidential medical information, it shouldn't be shared about transgender employees.

So it's simply a matter of kind of remembering those basic lessons of how to treat one another decently and applying them to this, you know, new situation.

MR. BROADUS: And I'll weigh in as well. I served as a human rights commissioner for the city of Columbia, Missouri for several years -- at least six years or so -- and, you know, I just echo everything my colleagues said, and it was, like, one of our trainers said to me when she spoke

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to me, because it was initially a hard sell for my fellow commissioners and they suspected me when I came on the commission as to what my plot was. And my plot was to, you know, effect human rights for everybody. That was my plot. That was my devious plot.

And she said, you know, it's just no different than disability. You know, she had been -- started in the disability movement era and which is analogous to, you know, the examples given.

You know, when the disability was new and I remember I started in the workplace and everybody was suspect and what was weird about that. I was, like, nothing. It's just like we integrated workers into the workforce and she used the same analogy as Mara used here and folks are using.

And so eventually our commission embraced it and I have to say I was happy to be in town a few years ago when it finally went through the new commission with the new mayor and I can't tell you -- I never thought I would sit in a meeting, and I was asked to speak and I didn't -- not that that was the decision for me not to speak -- that's not what I meant -- but that how much

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validation it meant to have that law passed -- how emotional that made me feel to be validated and as a human being to be respected.

And my fellow commissioner had asked me to speak and I just couldn't. Tears just took over me for the validation to be respected as a human being by my city, which I still am a part of that city, and to be respected and actually for an ordinance that I put into effect at the time.

But at any rate, for them to get it was just amazing and they didn't understand that the council -- this current council why it took so long.

CHAIRMAN CASTRO: Commissioners?
Questions over here? Commissioner Narasaki?

COMMISSIONER NARASAKI: Thank you.
Thank you.

I also share Commissioner Achtenberg's appreciation for sharing your personal stories because it really is, I know, difficult and yet that's the way we, as human beings, learn compassion.

And I learned that from a friend of mine, Sandra Imante*, who passed away way too young and I didn't know she was a transgendered person

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until she asked me -- she was thinking about applying for a presidential appointment and she was asking me whether she thought she should disclose that up front before the process began and I said -- I was, like, disclose what.

So I know how difficult it is even when you're friends with people to share everything about yourself when you feel vulnerable. So thank you for that.

So I find this a very interesting point in time. I've been working on this issue for a couple of decades and I remember for the civil rights community the transgender issue, because it was new, was a very challenging issue, and as we all discussed earlier, only recently got added actually to ENDA.

And I know that was a very difficult point and it was an effort to educate the civil rights community as to why that was really important.

But now we find ourselves with transgendered role models on "Glee" and "Orange is the New Black" and the Academy Award-winning portrayal of "Dallas Buyers Club." So, clearly, we're making some progress on at least

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acknowledging that transgender people exist and are human beings like the rest of us.

I'm wondering -- it's been argued earlier today by some opponents of ENDA that, you know, this -- these are all things that are evidence that in fact discrimination is not prevalent or that it's declining -- that it doesn't need federal government help.

But I was really struck by the data, particularly for transgender people, about the level of discrimination. So I just wanted for the record what your response would be to the earlier testimony that, you know, federal government -- that the problem is going to go away on its own.

MR. BROADUS: Well, I'll jump right in. I don't see that happening. The story I told you for my discrimination experience was 20 years ago in corporate America, and that story still holds true for many transgender Americans -- it does hold true today.

The same fact scenarios, the same fact patterns that occur and for those that don't live in alcoves of respite where there are protections, for those of us that travel the land we see these experiences. We work with people on the front

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lines every day that are in dire need of protections.

They are living hand to mouth. They don't have jobs and they can't get a job, no matter what they try or what they do, and, you know, they don't conform to any stereotypes of a box nor do most people, I might add, and as hard as one might try to get a job.

And even I, when I speak, once people - - you have the patchwork of your resume, patching that together, that's a gap, just for one example. Go back to one of my references I'm going to be outed.

There are things -- all sorts of ways that we can be outed as transgender Americans -- from IDs to that patchwork of that to somebody coming along that I meet on a new job that says hey, you look kind of familiar.

I do get that all the time, quite frankly, even when I taught school. They're like, oh, I took your sister, you know. And so all of those sorts of things and, you know, I just got back from a gathering of kids in Miami literally just a few hours ago, which is why my voice is sort of hoarse because it's tired, of folks that are

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weaving the patchworks trying to find jobs and these are younger people.

They still are having the same problems -- homelessness, and we have the prison, the pipeline issues, because you can't stay in school, you can't get a job and all of these problems, and I'll let my colleagues continue. But we are just chipping away at the issues.

MS. DUNCAN: And it's a great question, Commissioner, and thank you for that.

It's kind of a catch 22 in the fact that in -- at Equality Florida we have an adage where we believe the success for the transgender community is through visibility, and with visibility comes awareness, with awareness comes education and with education comes equality.

But that visibility does not come without a cost in the fact that the violence against trans people we've already enunciated quite a bit. But the visibility that we see on a national scale, the visibility that we see at a statewide scale, et cetera, is increasing every day and it is a good thing and we are making progress in reference to having major employers understand.

There are huge gaps in the medical

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community. There are gaps in our school boards, who absolutely do not understand transgender protocols when it comes to allowing a young lady -- transgender young girl to use the proper restroom, example.

So the discrimination is exacerbated by the visibility. But we can't move forward without that visibility. So it's kind of a catch 22.

MS. KEISLING: May I say that part of the reason why corporate America is so strongly on our side about the need for legislation is because corporate America likes certainty.

They believe there is not enough certainty here. They are afraid of running afoul of the law. They may make a decision based on making sure they have the right people. But it's still possible for them to not quite understand what the law requires of them and they look for certainty.

We're seeing more and more school districts run afoul of Title 9 and lose money over it, and a school district right now in our current context losing \$50,000 or \$100,000 is absolutely catastrophic for a community and that's why the Department of Education needs to clarify Title 9

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better and it's why we need federal anti-discrimination legislation -- one of the reasons -- so that employers can be certain about what their responsibilities are and so that employees can be certain about what their rights are.

It just isn't firm enough right now and vague notions of things being too vague aren't going to cut it for what real people and real employers need.

COMMISSIONER NARASAKI: So one of our responsibilities at the commission is in fact to provide oversight to federal agencies on what they're doing on anti-discrimination. Clearly, this administration has been moving forward with the EEOC, DOL, OPM guidance and trends.

Thank you for noting what the Department of Education might be doing. One of our jobs is to make recommendations. So I want to ask you, what are some things that the commission should be recommending to agencies that they could be doing that they're not already doing or something you want to lift up that you think they're doing well?

And it seems like there's a lot on their plate. I'm wondering if you feel that they

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have enough resources -- if Congress is appropriating enough money for them to be doing the kind of education and outreach that sounds like might be necessary in this situation.

MS. TURNER: Well, I think it's absolutely the case that the agencies that enforce these civil rights laws need more resources to do so. They are woefully underfunded and can't pursue more than a fraction of the meritorious cases that come before them.

I mean, we also know that simple education both to the community and to employers, as we've been discussing, is critical for these legal protections to have any meaning.

As was discussed, the rates of discrimination, particularly against transgender and gender nonconforming people, are absolutely astronomical. Yet, we've heard that the EEOC only receives under 200 complaints in a year from folks claiming that sort of discrimination.

And that's not because the discrimination isn't happening. It's because people don't know that these legal protections exist -- that they have any recourse. They just

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take for granted that they have no protection.

And so what does it even mean to say that we have legal protections when nobody -- if legal protections fall in a forest and there's nobody to know that they exist.

Yeah, it really is ultimately -- has very little meaning or impact on people's lives. So that would be one role that these agencies could be taking on more forcefully is the educating the public and particularly employers and schools and hospitals and all other institutions that discrimination of this kind is wrong and it's illegal.

MS. DUNCAN: And I would say the -- even though the rulings of the Department of Education have been quite clear, we're still finding that either due to the lack of teeth in those -- in those guidelines or the lack of enforceability, at least in the state of Florida -- I'll speak from my world -- but we find school board after school board who absolutely does not follow the guise or the guidelines that someone should use the restroom that aligns with their gender identity.

You know, being transgender is not a

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choice. Being able to use the restroom which aligns with your gender identity is absolutely a must. And to bring it down on the human level, there's a young man in a county just north of Orlando who -- we'll call him Kyle.

Kyle is a trans man and he is a big strapping young man. Transitioned two years ago from female to male. Kyle has this fabulous beard going. Kyle is big and brawny. Kyle is being still required by the school board to use the bathroom of his birth sex.

So Kyle, this big strapping young man, should be using the ladies' room. In lieu of that, they gave Kyle the option, even though the DOE has said that you should use the restroom that aligns with your gender identity, Kyle has to go to the faculty bathroom and ask for a key every time he has to use the restroom.

So he's being outed. He's being othered. He's being marginalized. And to compound things and just to emphasize the absurdity of not having consistent policy enforced, Kyle was asked by the football coach to come out this year because he needed a fullback. But Kyle should be using the ladies' restroom.

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MS. KEISLING: To be very specific, Commissioner, some things that would be particularly helpful is it would be really wonderful if the EEOC issued guidance so employers understood what Title 7 job discrimination looks like in the context of gender identity.

It would be extremely remarkably helpful if HHS would issue proposed rules on Section 1557, the Affordable Care Act. Five years after the signing of the law, there's still no implementation regs. That's kind of outrageous.

We need HUD to clarify its equal access policy or equal access rule that says you can't discriminate in federally funded housing programs based on sexual orientation or gender identity.

We need to clarify specifically what that means in terms of gender identity in homeless shelters and we need it -- they have clarified it in guidance. We need them to clarify it in the actual rule.

We need the federal government -- I hinted earlier the ways in which the federal government was discriminating against trans people. Just very briefly, what they are -- one thing is, I think, way out of your realm which is the U.S.

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military still denies trans people the right to serve openly.

I think that's falling apart now very quickly. The Defense Department knows they have to start allowing it. They just keep saying, we have to study it. We need that to move along.

The federal government needs the Office of Personnel Management to stop selling FEHB policies -- Federal Employee Health Benefits policies -- to federal employees that the federal government knows are illegal sex discrimination policies.

We need the federal government to think about the other health insurance programs that it controls -- Medicare, Tricare at the Defense Department, Veterans Administration care, to eliminate what they know and we know and the medical community knows are discriminatory exclusions for transition-related care. Those, I think, would be remarkable starts.

COMMISSIONER NARASAKI: Thank you.

MS. KEISLING: Sure.

CHAIRMAN CASTRO: Commissioner Yaki, then Commissioner Kladney.

MR. BROADUS: Well, I just had mine --

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CHAIRMAN CASTRO: Oh, I'm sorry. Go ahead, Mr. Broadus.

MR. BROADUS: -- which was data collection. Data collection -- we are not counted. We need to be counted from the census because if we're not counted we're not included, and so that is a big deal and that would be a great thing if we could be counted.

CHAIRMAN CASTRO: Thank you. Commissioner Yaki?

COMMISSIONER YAKI: Thank you very much, Mr. Chair.

I just wanted to follow up briefly on the -- on the health care issue. I'm curious to sort of know how or what impact the Affordable Care Act has had on the provision of adequate health insurance for the transgender community and especially whether you see any instances where employers are off loading their policies or are trying to offload any -- some policy regarding the transgender person onto the state exchanges or the market or what have you and how also the provision of full benefits and within the health care menu is affecting the transgender community.

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MS. KEISLING: I don't think we're seeing anything negative from the ACA at all. It certainly hasn't helped enough.

There have been now ten state insurance commissions that have ruled that having insurance exclusions in private plans that are regulated by state governments that in those ten states they are saying that exclusions for transition related care are illegal. It doesn't cover ERISA-regulated self-insurance plans within those states. But two of those states did cite the ACA Section 1557 -- the anti-discrimination provisions -- as a reason why that had to happen.

Most of the rest of them have tied them to the state's own public accommodations anti-discrimination laws. But we have not -- to answer your question very directly, no, we haven't seen -- I haven't and, Ilona, your organization where you actually serve clients you probably have not yet seen anybody.

What employers are -- what we are seeing is employers are suddenly realizing that covering transition-related care gives them healthier employees, gives them happier employees and doesn't them anything.

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The costs have been so dramatically over expressed. People aren't finding people are just coming to work for companies so that they get care. It has been a real win-win.

I was talking to a surgeon recently who's -- well, that's not important. But more -- we are going to have all these insurance exclusions eliminated in the next few years because employers don't see any need for them.

Insurance companies don't see any need for them, other than the fact that insurance companies see their job as trying to suck every penny out of America that they can.

MS. TURNER: I agree --

CHAIRMAN CASTRO: Your mic.

MS. TURNER: There we go. I agree, and following on what Mara was saying earlier as well, it would be extremely helpful for the EEOC to clarify that these kinds of exclusions are a form of discrimination that is prohibited under Title 7 and that kind of clarification would apply not just to the federal workplace but to -- and not just to these ten states that have enacted these kinds of rulings about insurance sold in their states but to all the ERISA-governed plans across the country.

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CHAIRMAN CASTRO: Commissioner Yaki, was that your only question?

COMMISSIONER YAKI: That=s it, and I just want to thank -- I want to thank them for their forthrightness and courage in coming here today.

CHAIRMAN CASTRO: Commissioner Kladney?

COMMISSIONER KLADNEY: Thank you, Mr. Chairman.

Commissioner Yaki, if you could put your phone on mute I'd appreciate it.

If you all don't --

COMMISSIONER YAKI: Wait a minute. I just want to -- my phone has been on mute. If there's been another phone that you've been hearing it's not mine.

COMMISSIONER KLADNEY: I personally apologize to you, Commissioner Yaki. Mea culpa.

So if no one wants to answer this question this is okay. But someone's going to testify here today that there's no clear scientific evidence that sexual orientation and gender identity are biologically determined.

And I was involved in a complex matter years ago regarding transitioning and if I can say

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this -- I mean, this was years ago -- the folks I was involved with were desperate to transition and some bad things happened.

But I'd like you to comment on, you know, gender that is assigned at birth versus your gender, if I may say, and how that -- how that is.

MS. DUNCAN: That's a tough one to address.

COMMISSIONER KLADNEY: If you don't want to do it --

MS. DUNCAN: No, no. It's certainly something that needs to be said because I think that's a foundational aspect of understanding what it means to be transgender and the only way, I think, we can do that is by somewhat telling our personal stories. And so I'll be brief.

But I remember at six years old being drawn into a dress-up party with my sisters and donning that little dress and having lipstick dabbed on my lips and fingernail polish and for the first time I felt I could breathe, and that never left me.

However, in living for 50 years as a male I excelled in that world. I was captain of an undefeated state championship football team. I was

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the middle -- all-state middle linebacker. I was homecoming king.

I went to college on a football scholarship and played under Pat Dye at East Carolina University. I was in senior management at Wells Fargo.

I had this Currier & Ives life built -- two kids, beautiful wife, houses, cars, money, everything -- when I decided on this whim to make this radical right turn and change my life and become a woman.

I think nothing speaks more to the fact that it's a pervasive -- gender is perhaps your most pervasive trait. When you look at all of the things that make up who you are, your gender is one of the most important things.

And in transitioning, all of those things within your life that you perceive to be what brings you joy every day, what gets you up in the morning from -- you know, is it your wife, is it your kids, is it your job -- all of those things are affected if you transition.

So number one, you can see that it certainly wouldn't be a lightly taken decision and it absolutely is something that when you are born

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with gender dysphoria it's something that does not go away.

The only choice really that's involved is when and if, through your lifetime, you make a decision to deal with that and in what manner.

MS. KEISLING: I would just like to challenge the premise. I think it is absolutely wrong but science does not -- however you said it, and I appreciate the question. I -- pardon me? No, no, no. It's okay.

But the medical community very clearly and virtually unanimously now does agree that sexual orientation and gender identity are both core parts of human identity. They just are. And people can say that they aren't and that's okay.

However, what I will also add is neither is religion. You know, we believe that people should be able to select their religion. In fact, that's the beauty of religion. You have to really come to it.

You really have to make the decision. It is not born to you. You may be born into a religion. But we still want to protect people's religions. We still want to respect people. We

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still want them to be able to have jobs, and it does not matter that religion -- you're not born with your religion. But you know what? You just are born with your gender identity and you are born with your sexual orientation and saying not doesn't make it not.

MR. BROADUS: And I just have to echo Mara's comments here. You know, the American Medical Association, the American Psychological Association all back these are medical conditions or that gender identity is a medical condition and that there's no, you know, I just decided that I'm going to go out on a limb and just do this for fun or dress up or makeup or that sort of thing.

You know, I could do other things for those sorts of things and rights and -- yeah, the question -- yeah, the issue with that question or the thought -- that thought process behind that.

I don't think that's what people do. So thank you. I just wanted to add that.

MS. TURNER: I'll just chime in. I'll chime in as well that it's frequently raised in these kind of conversations, you know, what about people pretending to be transgender.

It just simply does not happen in

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decades of experience in the private sector work-
workplaces, in school districts that have had non-
discrimination policies in place for years and
years.

No one pretends to be transgendered.
There's simply too much bias and discrimination
that still persists, as we've discussed, that no
one wants to willingly take that on unless that's
really deeply at a fundamental level who they are.

And similarly, I think there is a great
growing body of scientific evidence that gender
identity does have a biological basis. But
regardless, as my colleagues have said, sexual
orientation and gender identity are a fundamental
part of who we are and something that people should
not have to change and that, as Kylar was
mentioning, the scientific community broadly
recognizes cannot be changed -- that people have
tried for years and that's why we're seeing a
growing movement across the states and it would be
great to see this enacted at the federal level as
well to ban so-called conversion therapy because
it's simply bad science. It doesn't work.

CHAIRMAN CASTRO: Okay. Any other
questions, Commissioners? Okay. Any over here?

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We want to thank you all. This was a very fascinating panel. Thank you for the recommendations as well, and we're going to take a five-minute break and we'll be back shortly with the next panel. Thank you all.

(Whereupon, the above-entitled matter went off the record at 3:06 p.m. and resumed at 3:11 p.m.)

CHAIRMAN CASTRO: All right. We're going to get started in the interest of time while other Commissioners will join us.

VI. PANEL I: GOVERNMENT ISSUES

CHAIRMAN CASTRO: We had a panelist who wasn't able to join us this morning, but thankfully is here with us now, Congressman Jared Polis, Second District of Colorado, and one of the chief original sponsors of ENDA, and he's here to give us some remarks. I understand you said you'll speak for about five minutes, and then we'll ask you some questions. And now we know you've got limited time with us, so may I very quickly ask you to raise your right hand.

(Whereupon, the panelist was sworn.)

CHAIRMAN CASTRO: Thank you.
Congressman, please proceed.

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HON. POLIS: Thank you. I'd like to thank USCCR and the Chair and the Members for having me here this afternoon, and for convening this very important discussion on preventing workplace discrimination against LGBT Americans.

I've been working on this issue since I came to Congress in 2009. With the retirement of Barney Frank, I became the lead sponsor of the Employment Non-Discrimination Act in Congress, which last session passed the Senate but was not allowed a vote in the floor of the House.

As someone who is gay myself, I'm fortunate not to have been significantly hindered in my own career path by discrimination, but there are millions of hardworking people throughout this country who do experience discrimination, career setbacks, harassment, and poverty simply because they are lesbian, gay, bisexual, or transgender. In 2015 in the United States of America, that's simply unacceptable.

Even during my six short years in office there's been a significant shift in public opinion on the issue of LGB discrimination and how people view it. Overwhelming majorities of Americans now believe that workplace discrimination

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based on sexual orientation or gender identity should be against the law. Unfortunately, what matters to far too many LGBT Americans is what their boss thinks rather than what an overwhelming majority of Americans think.

While we celebrate these historic victories we still need to realize how far that we need to go. And even in the past two years the number of states that have marriage equality has more than quadrupled from 8 to 37, it's important to point out, not to confuse the growing support for marriage equality with actual protections in the workplace. In 15 states, gay and lesbian Americans can get married, but at the same time they can be fired from their job just because of who they're married to perfectly legally. And it's still legal in an additional 18 other states to fire a person because they are perceived to be transgender. And while we are making steps forward, including the landmark EEOC Macy case that will interpret Title 7 of the Civil Rights Act to prohibit employment discrimination based on gender identity, we still have a long way to go to protect hardworking Americans from being fired simply because of who they love.

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The refrain we often hear from opponents of federal non-discrimination statutes is that they aren't needed. While explaining why he wouldn't bring ENDA to the floor last session, in spite of the fact that it had passed the Senate with 64 bipartisan votes, Speaker Boehner infamously said, "People are already protected in the workplace."

Unfortunately, in 31 states that simply isn't the case. It's far more than a theoretical consideration. It's a bread and butter issue that leads to real hardship and real adversity for LGBT families across our country.

Forty-two percent of LGBT Americans have experienced mistreatment or harassment on their job just due to their sexual orientation. Ten percent of LGBT Americans report having been fired from a recent job in the past five years just because of their sexual orientation. Nearly a third report having been passed over for a promotion because of their sexual orientation.

According to a study by the Williams Institute, gay and bisexual men make up to 32 percent less than straight men working the same jobs with similar backgrounds. For transgender

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employees, the disparities are even sharper. More than three-quarters of transgender employees report experiencing discrimination and harassment based on their gender identity. Nearly half have reported being fired or denied a promotion. Transgender women may see a salary decrease of up to one-third on average when they transition from male to female according to a recent study in the Journal of Economic Analysis and Policy.

These barriers to employment and career advancement don't exist in a vacuum. They are an enormous contributing factor to poverty among LGBT Americans, as well. LGBT Americans are far more likely to live below the poverty line, as by extension are the children of same sex couples.

The level of income inequality fueled in great part by the lack of statutory protections for LGBT Americans fuels all manner of other disparities that poverty creates, like decreased educational achievement, less access to health care, increased likelihood of becoming the victim of violent crime, and lower income potential that can last through a child's lifetime, so the need for federal workforce protection is clear.

In 2013, the GAO issued a report

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surveying the number of claims filed in states that have statutes barring employment discrimination and they found that relatively few employment discrimination complaints based on sexual orientation or gender identity had been filed, meaning that they had served their deterring effect and had an impact on preventing actual employment discrimination without leading to additional litigation costs for companies.

It's time for the ---

(Automated message)

CHAIRMAN CASTRO: Sorry about that.

HON. POLIS: Do we have people with us on the phone?

CHAIRMAN CASTRO: We have one Commissioner, yes.

HON. POLIS: Well, I've nearly concluded my remarks here. I just wanted to conclude by saying it's time for the federal government to follow the lead of the states that have successfully enacted these statutes to prohibit the workplace discrimination that weighs down so many LGBT Americans and families throughout the country. I look forward to continuing to work on this important issue in the 114th Congress, and I

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particularly appreciate the interest of the United States Commission on Civil Rights to be briefed more fully on the extent and remedies for workplace discrimination, and I conclude my remarks. Thank you.

CHAIRMAN CASTRO: Thank you, Congressman. We'll open it up to the Commissioners for questions. How much time do you have with us?

HON. POLIS: About five more minutes.

CHAIRMAN CASTRO: Okay, great. Commissioner Achtenberg.

COMMISSIONER ACHTENBERG: As you know, Congressman, and as the lead sponsor of this significant statute, the Commission will be in the position once it issues its report to make recommendations to the President and to the Congress about significant civil rights issues, including this issue, I'm wondering what you see as the most helpful thing that we could take note of in making our recommendations to the Congress?

HON. POLIS: I think it would be helpful to look at the effects, the intended effects that have worked in the states that have provided these kinds of protections, the lack of the unintended consequences that opponents of these measures at

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the federal level cite, and some of the data that I presented and that you have had presented by others regarding the urgent need to protect LGBT Americans and the realities of workplace discrimination today.

COMMISSIONER ACHTENBERG: Thank you.

CHAIRMAN CASTRO: Commissioner Heriot.

COMMISSIONER HERIOT: Thank you. I'm looking at the version of ENDA that I've got with me. It's actually S-815, but what I would like is a little sense of what you think of, you know, how you are defining gender-related characteristics, because that's not one of the defined terms in here. What counts as a gender-related characteristic? Are we talking like PriceWaterhouse with sort of assertiveness as being associated with males and not with females? Are we talking about hair length? What counts as a gender-related characteristic?

HON. POLIS: It's my understanding that that relates to physical characteristics, not behavioral characteristics.

COMMISSIONER HERIOT: Is there any reason you can't put that in the statute?

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HON. POLIS: We can absolutely look at that. We plan on introducing in the next month or two, and we will be happy to take a look at further elaboration of that phrase.

COMMISSIONER HERIOT: Okay. What about the attorney's fees issue in ENDA? It looks to me like it tracks the language from Title --- this applies to Title 7, as well, which as you probably know has already been interpreted in Christiansburg Garment v. EEOC, I think it is, to really not be what it seems to be on its face, rather than an attorney's fees provision that goes both ways, whoever loses ends up paying. It, in fact, only applies to plaintiffs. It has to be an extraordinary case. Shouldn't that be clarified?

HON. POLIS: We can certainly look into clarifying that, as well. I would point out that with regards to dispensations for attorney fees, it also often becomes an intensely political issue separate from the merits of any ---

COMMISSIONER HERIOT: You are a politician.

HON. POLIS: But we will be happy to take a look at that, as well.

CHAIRMAN CASTRO: Okay, thank you.

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Commissioner Narasaki.

COMMISSIONER NARASAKI: Yes. Roger Clegg testified earlier today that he believes Congress does not have authority under the Interstate Commerce clause to even pass ENDA, so I'm assuming you believe that Congress does have authority, and I'd like to for the record understand what that belief is.

HON. POLIS: I'm confident that this measure, just as measures to protect Americans on the basis of their gender and their race had been allowed, that this, too, would survive a challenge to it, and we'd be happy to submit arguments to that effect for the record.

COMMISSIONER NARASAKI: Thank you.

CHAIRMAN CASTRO: Commissioner Kladney, and that's probably going to be the last question because I think you're close to your time. Commissioner.

COMMISSIONER KLADNEY: Congressman, thank you for appearing here today.

Can you talk somewhat about the exemptions in ENDA, and what you believe are the most important items and work your way down?

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HON. POLIS: Exemptions meaning allowed forms of discrimination?

COMMISSIONER KLADNEY: Yes.

HON. POLIS: Yes. The goal with ENDA was effectively to mirror the Title 7 exemptions, and to do so in a way that would not, for instance, force the Catholic faith to hire a gay priest any more than it would to hire a female priest. So, if it a requirement for a ministerial position there would be an exemption. For lay positions for which the doctrine does not prescribe the particular gender or sexual orientation, discrimination would not be allowed to occur.

CHAIRMAN CASTRO: Thank you, Congressman, unless you have a little more time.

HON. POLIS: I thank the Commission.

CHAIRMAN CASTRO: Thank you. We appreciate.

HON. POLIS: And we'll be happy to --- do you accept, if we follow-up with ---

CHAIRMAN CASTRO: Yes.

HON. POLIS: Ten days?

CHAIRMAN CASTRO: Thirty.

HON. POLIS: Thirty? Oh, plenty of time.

CHAIRMAN CASTRO: Yes.

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HON. POLIS: We will follow-up then with the legal defense of ENDA. Thank you.

CHAIRMAN CASTRO: All right, thank you. Appreciate it. Thank you for your time.

Now we will have the next panel begin to step forward, the last panel.

VII. PANEL V: RELIGIOUS EXEMPTION ISSUES

CHAIRMAN CASTRO: We are now beginning our final panel of the day involving Religious Exemption Issues, and I believe most of you might have been here earlier, but just in case, everyone has seven minutes to make your presentation. There's a series of warning lights here, green, yellow, red means stop, of course. Once we're done with the presentation, the Commissioners will ask each of you questions.

I want to introduce our speakers today. Aubrey Thonvold of Reconciling Works: Lutherans for Full Participation; Alan Brownstein, UC Davis Law School, and Ryan T. Anderson of the Heritage Foundation. I'll ask each of you to raise your right hand to be sworn.

(Whereupon, the panelists were sworn.)

CHAIRMAN CASTRO: Okay, great. Thank

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you. Please proceed, Ms. Thonvold.

MS. THONVOLD: My name is Aubrey Thonvold, and on behalf of Reconciling Works, I want to thank you, the Chairman and Commissioners for having me here to talk about the expanding religious exemptions, allowing discrimination against lesbian, gay, bisexual, and transgender Americans.

As a lifelong Christian baptized and confirmed in the Evangelical Lutheran Church in America, as a seminary graduate, as a lesbian, and as the Executive Director of Reconciling Works for Full Participation, I know that this issue of religious exemption is critical.

Reconciling Works is a national nonprofit who spent the last 41 years partnering with Lutheran ministries as they strive to live out the gospel message of inclusion and equity. Reconciling Works' mission is shaped to create communities where LGBT people and families can worship and thrive. Our work is driven by three core values of our Lutheran faith. The first is that God values and embraces each person as a beloved child of God. The second is that the Holy Spirit gives a diversity of gifts for the common

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good. And the third is that Jesus Christ calls us to work for justice and for equity.

Freedom of religion is one of our most fundamental rights as Americans, and this is why it is protected in the First Amendment. However, up and coming expanding religious exemption laws as they make their way into states across the country would put individual's religious beliefs ahead of the common good. Protecting people from discrimination, including people who are gay and transgender is about treating others as one would want to be treated.

Gay, lesbian, bisexual, and transgender people are our friends, our families, our neighbors, and our coworkers. Gay and transgender people work hard and they serve our country in the military, the workforce, and they pay their taxes. When lesbian, gay, or bisexual, transgender people walk into a business or a government office they should be treated like everyone else, and not discriminated against because of who they are, or who they love.

Currently, in over half of the country, and as stated earlier today, 28 states for lesbian, gay, and bisexual people, and 32 states for

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transgender people, they do not have the protected right for housing and employment. It's alarming to think that discrimination is expanding in the name of religion, including the denial of goods and services, and public accommodations.

As this harmful discrimination law makes its way into states, currently 20 states around our country are looking at multiple bills. It has the potential to allow individuals to claim that any number of laws, including but not limited to domestic violence and non-discrimination laws do not apply to them. A hotel owner could object to cohabitation outside of marriage, and can refuse to provide a room to any unmarried couple. A landlord who believes a man should be the head of the household could refuse to rent to a single mother. A guidance counselor could refuse to help a gay teen by saying it goes against their religious belief. An abusive spouse could claim that domestic violence laws do not apply to them because their religion teaches that a spouse has the right to discipline their family, their spouse, and their children as they see fit. It could also allow employees with deeply held religious beliefs to go

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against a corporate policy.

The language of religious exemption laws are written with wording that's differing state by state, and with loopholes that open the door for dangerous and harmful unintended consequences for people across the country.

Currently in Texas, I know some of the language that's in there is the current language states that you have to show significant burden for someone. They're hoping to remove the language of significant, and ask people to vote, and that would just be based on burden. You have to show proof of burden for discrimination. How will this be measured, and how will it be defined?

I'm concerned about where these religious exemption laws will go, and I know that I'm not alone. I and Reconciling Works are part of a coalition of national religious nonprofit organizations working to provide outreach and education about the harms these laws will bring. Stopping these laws matters because of the effect it will have on people of faith around the country, but it also matters to me as a person. Growing up in rural Minnesota as a gay teen I learned quite soon that I lived with a glass ceiling. But when my

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wife, Heather, and I got married in January in Washington State, for the first time in my life it felt like that glass ceiling was removed, but reality was soon to come.

When I came out to my parents in my mid-20s, my mom's first concern was not that I was gay, but she was concerned that I would be treated differently because of who I am, and who I love. Her concern is valid and is true.

While Heather and I are blessed to be married, we know it still has limits, and that in our country depending on where we live, what state, or what county, we might not have the rights that we currently have living in Minnesota. And now to think that we could be limited to what stores we shop in, where we buy groceries, and where we are able to travel is hard to grasp.

Reconciling Works has encountered countless LGBT people and families whose lives have been affected by discrimination in the name of religion. As a Christian, I am called through scripture to love God and to love my neighbor. As an American, I have the right to liberty and the pursuit of happiness. Freedom means freedom for everyone, and that includes me, and people like me

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and my family all around the country. Thank you for your time.

CHAIRMAN CASTRO: Thank you. Mr. Brownstein.

MR. BROWNSTEIN: I want to thank the Commission for inviting me to participate in today's briefing, I'm speaking today in my personal capacity, not as a representative of the University of Davis California School of Law.

The question of religious exemptions requires us to take into account and balance two very important interests, religious liberty rights and the right of the LGBT community to be protected against discrimination in the workplace. I come at this issue as someone who very strongly supports the adoption of civil rights laws and regulations to protect members of the LGBT community against employment discrimination, but I've also spent the last 25 years writing about and advocating for religious liberty.

Now, what I'm going to try to do in my presentation today is to describe the legal landscape on which a discussion of religious accommodations has to be based. I'm not going to get all that far in my five and a half minutes that

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are left. I've submitted written testimony and I'd be happy to answer questions based on the written testimony that goes into far more detail than I can do in my oral presentation.

Both constitutional and statutory law may mandate or limit religious exemptions from laws that prohibit discrimination against the LGBT community in the workplace. Two constitutional lines of authority are relevant here. First, some exemptions are constitutionally required. The ministerial exemption which was recognized by the United States Supreme Court in Hosanna Tabor case immunizes the decision to hire or fire clergy from employment discrimination laws. And while the Court's holding in Hosanna Tabor was deliberately narrow, the scope of the ministerial exemption may extend beyond clergy to include other positions involving the performance of spiritual or theological duties. But the precise contours of the ministerial exemption remain uncertain today.

Second, some exemptions are constitutionally prohibited. The Court has stated repeatedly that at some point the establishment clause prohibits accommodations that favor some religions over others, or that extend too far by

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imposing unfair burdens on third parties. Unfortunately, here again the Court has given us little guidance in determining when this establishment clause limit has been breached.

In *Corporation of Presiding Bishop v. Amos*, the Court did uphold a statutory exemption from Title VII which allows religious organizations to discriminate on the basis of religion in hiring. However, the decision was limited to discrimination on the basis of religion and discrimination by a nonprofit religious organization. A broader exemption might well violate the establishment clause.

This is particularly true when one recognizes the value of employment in our society, and the Commission has been hearing about that during the entire proceedings today. But a job provides more than an individual's livelihood, although that's certainly of great importance. It's also a primary source of dignity and status. Employment also determines where we live, we live where we work. And our workplace provides a location where we can meet others, and develop personal bonds. And most importantly for the purposes of anti-discrimination laws, it gives us

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an opportunity to dispel stereotypes about members of our class.

Because exemptions from laws prohibiting employment discrimination impose such serious costs and harms on third parties, at some point these exemptions should raise establishment clause concerns. But, again, there simply is no certainty in the case law as to the location of this constitutional boundary line.

Now, in addition to these constitutional constraints, a federal statute, RFRA, the Religious Freedom Restoration Act, arguably requires exemptions from some anti-discrimination laws. The Supreme Court's decision in *Burwell v. Hobby Lobby* last year held that RFRA applies to non-profit closely held business corporations, but it remains unclear whether RFRA requires exempting any for-profit corporation from federal regulations prohibiting discrimination in employment.

The Court explicitly stated in *Hobby Lobby* that RFRA would not mandate exemptions from laws prohibiting racial discrimination in employment. Still, the Court's language leaves open the possibility that RFRA might require exemptions

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from laws prohibiting discrimination based on other characteristics, such as gender or sexual orientation. Justice Alito's opinion only spoke explicitly about race discrimination.

What can be said with certainty is that Hobby Lobby doesn't compel the conclusion that RFRA requires any exemptions from federal laws prohibiting discrimination in employment. The Hobby Lobby case, as I'm sure you know, involved employers who objected to providing insurance coverage for certain medical contraceptives to their employees. And what was critical in this case is that medical insurance coverage for employees is a fungible good. It can be effectively provided by any of several possible sources, the employer, the government, or insurance companies themselves. So, in Hobby Lobby the Court could hold that the federal government had less restrictive alternatives available to it in order to achieve its goals of making sure that these women received the insurance coverage they needed. The insurance coverage cost could be shifted to insurance companies, or it could be borne by the federal government itself.

If we're talking about the loss ---

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thank you.

CHAIRMAN CASTRO: We'll delve into more of that during questioning, I'm sure.

MR. BROWNSTEIN: Okay.

DR. ANDERSON: Thank you for the invitation to testify today. My name is Ryan Anderson, and I'm the William E. Simon Fellow of the Heritage Foundation. I testify only on my own behalf today.

As I explained in one of the two reports that I submitted to the Commission, all citizens should oppose unjust discrimination, but the Employment Non-Discrimination Act is not the way to achieve that goal. ENDA threatens fundamental First Amendment rights. It creates new subjective protected classes that will expose employers to unimaginable liability, and ENDA would increase government interference in labor markets in a way that could harm the economy; yet, ENDA's damage is not only economic. It would threaten the freedom of citizens and the associations they form to affirm their religious or moral convictions, such as that marriage is the union of one man and one woman, and that maleness and femaleness are not arbitrary constructs, but objective ways of being

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human. ENDA would treat expressing these beliefs in an employment context as actionable discrimination.

ENDA does not protect equality before the law. Instead, it creates special privileges that are enforceable against private actors. Employers should respect the intransitivity of all their employees that ENDA is bad public policy. It threatens our freedoms, unit civil libertarians concerned about free speech and religious liberty, free marketers concerned about freedom of contract and government interference in the marketplace, and social conservatives concerned about marriage and the culture.

Martin Luther King Jr. was entirely right in his dream that his children would be judged by the content of their character, not the color of their skin. One's character is comprised of one's voluntary actions, and it is reasonable to make judgments about actions. While race implies nothing about one's actions, sexual orientation, and gender identity are frequently descriptions for actions; where gay denotes men who engage in voluntary sex acts with other men, lesbian denotes women who engage in voluntary sex acts with other women, and transgender denotes a biological male

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who voluntarily presents himself to the world as a female, or a biological female who voluntarily represents herself to the world as a male. Race and sex by contrast clearly refer to traits, and in the vast majority of cases denote no voluntary actions.

ENDA would ban discriminations based on moral views common to the Abrahamic faith traditions and to great thinkers from Plato to Kant as unjust discrimination. Whether by religion, reason, or experience many people of goodwill believe that our bodies are an essential part of who we are. On this view, maleness and femaleness are not arbitrary constructs, but objective ways of being human to be valued and affirmed. Thus, our sexual embodiment as male and female goes to the heart of what marriage is, a union of sexually complementary spouses.

It is important to stress how different the religious liberty concerns are with sexual orientation and gender identity than with race. The religious liberty concerns focus on the nature of marriage and the virtue of chastity. Many religions quite reasonably teach that we are created male and female, and that male and female were created for each other in marriage. Nothing comparable exists

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with respect to race.

As I explained in the second report submitted to the Commission, great thinkers throughout human history in every political community up until the year 2000 thought it reasonable to view marriage as the union of husband and wife. Indeed, support for marriage as such a union has been near universal. Bans on interracial marriage and Jim Crow laws, by contrast, were aspects of a much larger insidious movement that denied fundamental equality and dignity to all human beings, and forcibly segregated citizens. When these interracial marriage bans first arose in the American colonies, they were inconsistent not only with the Common Law inherited from England, but also with the customs of prior world history which had not banned interracial marriage.

Commenting on these prohibitions, Harvard University History Professor, Nancy Cott, explains, "It is important to retrieve the singularity of the racial basis for these laws. The English colonies stand out as the first secular authorities to nullify and criminalize intermarriage on the basis of race or color designations."

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America's history of race-based slavery explains the origins of these laws. This history shows that bans on interracial marriage had nothing to do with reasoning about the nature of marriage itself. Anti-miscegenation laws were part of a larger regime that denied equality to people in a condition of economic and political inferiority in servitude. They had nothing to do with marriage.

Sexual orientation and gender identity, however, are conceptually different than race, and beliefs about marriage, the union of a man and a woman are both conceptually and historically different than beliefs about interracial marriage. So, too, the need for anti-discrimination laws on sexual orientation and gender identity are different than those needed on race.

Before the Civil War, a dehumanizing regime of race-based slavery existed in many states. After Abolition, the law enforced race-based segregation and even after the Supreme Court struck down Jim Crow laws, integration did not come easily or willingly. The Civil Rights Act of 1964 barring discrimination on the basis of race was a proper response.

America has no similar history of

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society-wide legal prohibition on employment based on sexual orientation or gender identity. While racial integration might not have been forthcoming apart from the Civil Rights Act, in the case of sexual orientation voluntary actions and market forces have emerged that undermine the clamor for federal action. For example, the financial company, Prudential, reports that, "Medium LGBT household income is \$61,500 versus \$50,000 for the average American household." The Human Rights Campaign reports that 88 percent of Fortune 500 companies voluntarily prohibit considerations of sexual orientation in employment decisions.

As Hans Bader points out, "Since American businesses seldom discriminate based on sexual orientation, the potential benefits of ENDA are limited, at best, but ENDA would impose real and substantial costs on business, and it could trigger conflicts with free speech and religious freedom."

While ENDA provides some religious liberty protections, they are inadequate and vaguely defined. ENDA does not contain a bona fide occupational qualification exemption. The religious liberty language used in ENDA has been subject to

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repeated litigation with conflicting rulings by different courts as to which religious institutions are considered religious enough. And as religious liberty protections extend only to businesses directly run by a church or a religious organization, the bill would not protect those who wish to run their businesses and other organizations in keeping with their moral or religious values. To adequately protect religious liberty, ENDA must not be made law. Thank you.

CHAIRMAN CASTRO: Thank you, Mr. Anderson. I'm always amused when I hear colleagues of yours from the Heritage Foundation, although I know you're here in your personal capacity, and others use Dr. King's quotes to try to make your point. I would venture to say if Dr. King were sitting in that chair next to you, he would dispute how you used that term. That's certainly an aspirational goal that we all want to get to. We're not there yet; and certainly on LGBT issues we are far from that. So, you know, the content of our character one day will determine all those things, but until that day arrives, we're having discussions on these issues. But I just wanted to mention, because I always find it amusing that Dr.

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King who was very radical is someone whose conservatives like to quote. Commissioner Achtenberg, would you like to lead off the panel of questions?

COMMISSIONER ACHTENBERG: Thank you, Mr. Chairman, and thanks to the panelists. Very interesting and provocative testimony.

I'm wondering, Dr. Brownstein, on the issue of religious exemption and the current version of ENDA; actually, we heard Congressman Polis was here just a few moments ago as one of the lead authors of the last iteration of ENDA. I'm wondering if you think they got it right, over-broad, or too narrow last time around when it comes to making sure that the deeply held religious beliefs of persons in the workplace were properly respected when it comes to an anti-discrimination regime to protect LGBT people in the workplace?

MR. BROWNSTEIN: It's my understanding that the most recent version of ENDA tracks the language from Title VII, that exempted religious organizations from the burden of the Title VII requirement that you couldn't discriminate on the basis of religion in hiring, and that it based its exemption on that language in Title VII. So, if the

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question is, do I think that's the appropriate place to draw the line so that religious organizations ought to be able to discriminate both on the basis of religion and on the basis of sexual orientation, but that would only apply to those religious organizations that were recognized to be religious organizations under Title VII case law, then I think that is the right line for normative and policy reasons.

I've written that there's a parallel between religion and sexual orientation both because there's a conduct dimension to both religion and sexual orientation, because both are relational and involve obligations based on relationships, because the protection of both religious liberty and the rights of the LGBT community are usually challenged by the same kind of slippery slope arguments that have been used to defeat both. So, I think there's some basis for saying not that discrimination against LGBT people is somehow sui generis and unique, and we need a separate regime of exemptions for the LGBT community. But I think one could argue that there's an analogy and a parallel between religion and sexual orientation so that the same religious

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exemptions that would apply with regard to discrimination on the basis of religion in hiring ought also to apply with regard to discrimination on the basis of sexual orientation.

COMMISSIONER ACHTENBERG: If I might just point out that with regard to those religions that adhere to tenets that cast judgment or adverse judgment on sexual orientation and/or gender identity which is not to say all religions, far from it, so a point of clarification. I'm assuming you concur with that.

MR. BROWNSTEIN: Clearly. Yes. I'm a Reform Jew, and we do not discriminate on the basis of sexual orientation.

COMMISSIONER ACHTENBERG: I'm a Reform Jew, too. I used to be much more --- now I'm reform.

MR. BROWNSTEIN: That's true with regard to discrimination on the basis of religion, as well. Some religious communities discriminate on the basis of religion in hiring people to work in their organizations and others don't.

COMMISSIONER ACHTENBERG: Yes. Thank you.

CHAIRMAN CASTRO: Madam Vice Chair.

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VICE CHAIR TIMMONS-GOODSON: Thank you very much, Mr. Chair, and thank you again to our panelists for taking your time to be with us.

I wanted to ask Mr. Anderson to explain his notion that the --- that ENDA weakens the freedom of citizens and their associations to affirm their religious or moral convictions. Help me grasp that notion.

DR. ANDERSON: Sure. As a part of the legal regime coming out of Title 7 is in the Hostile Workplace Doctrine that would entail that any speech in the workplace that would be affirming one's religious or moral convictions about the nature of marriage as a union of a man and a woman, or the nature of the virtue of chastity reserving sexual activity for such a marriage could be interpreted as creating a hostile workplace towards lesbian, gay, transgender Americans.

VICE CHAIR TIMMONS-GOODSON: I'm not sure that I'm there yet, my understanding of what it is that you're offering. Perhaps I can get at it, or clear up my understanding, or get some understanding this way. We have the right to have our religious views and moral convictions affirmed by others?

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DR. ANDERSON: No, that's why I'm against ENDA. I mean, it strikes me that what ENDA is doing is trying to have religious or moral views affirmed by others. I'm in favor of a live and let live regime in which no viewpoint would be mandated by the government.

ENDA makes private actions illegal by employers, so it seeks to force employers to affirm certain non-discrimination statute which may conflict with their beliefs. I'm in favor of leaving employers free from government coercion.

VICE CHAIR TIMMONS-GOODSON: I'm still not there. Thank you. Come back to it ---

MR. BROWNSTEIN: Could I add something on that?

VICE CHAIR TIMMONS-GOODSON: Yes, please, Professor.

MR. BROWNSTEIN: I think part of the problem here is that ENDA would prohibit discrimination against people based on sexual orientation, and then the question becomes what constitutes the kind of discrimination? And under Title VII, sometimes a hostile workplace environment, which is often created by speech, is construed to be essentially a speech act. It's

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construed to be discrimination, and I think that's what Mr. Anderson is referring to. Now, where that line is, when speech actually becomes a discriminatory act, the courts struggle with that. But I think that's what --- the point that he was trying to make.

DR. ANDERSON: Yes, but I could point to page 6 of the report that was submitted to the Committee, the section entitled "Silencing Speech," goes through that.

VICE CHAIR TIMMONS-GOODSON: All right, thank you.

CHAIRMAN CASTRO: Commissioner Kirsanow.

COMMISSIONER KIRSANOW: Thank you. Professor Brownstein, could you tease out a little bit --- you were about to get into an account ---

(Off-mic comment)

COMMISSIONER KIRSANOW: Okay. You were about to address conduct I think versus status. When you look at Title 7, with the exception of religion, everything is based on characteristic; that is, some status usually immutable characteristic of the individual as opposed to conduct of the individual. And it seems to me, as Mr. Anderson had indicated, with respect to

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religion and also sexual orientation there's a conduct component to the prohibition against discrimination. And to what extent do you think with respect to ENDA an employer may take into consideration conduct in making an employment-based decision?

MR. BROWNSTEIN: I think that's a really helpful question because as I ---

(Off-mic comment)

MR. BROWNSTEIN: I think there is a parallel between religion and sexual orientation with regard to the way Title VII would treat both characteristics. So, for example, I'm Jewish, and if an employer said I'm perfectly willing to hire you, notwithstanding the fact that you're Jewish, as long as you don't practice Judaism, I would consider that discrimination against me because of my religion. Because my conduct is so much a part of my faith, you can't separate my identity from my religious practice. And I think the same would hold true with regard to discrimination on the basis of sexual orientation. For an employer to say I'm willing to hire you even though you're a gay or a lesbian person, as long as you remain celibate, as long as you never express your sexual identity, I

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think that would constitute discrimination on the basis of sexual orientation.

COMMISSIONER KIRSANOW: Mr. Anderson, do you have a response to that?

DR. ANDERSON: Sure. I don't think you can draw a direct parallel between religion and sexual orientation or gender identity, partly because I think religion is one of those natural rights that goes back to our founding in a way that sexual orientation and gender identity is not. So, to quote James Madison in Memorial and Remonstrance, "We hold it a fundamental and undeniable truth that religion or the duty which we owe to our Creator and the manner of discharging it can be directed only by reason and conviction, not by force or violence. The religion, therefore, of every man must be left to the conviction and conscience of every man, and it is the right of every man to exercise it as these may dictate. This right is in its nature an unalienable right, is unalienable because what is here a right towards man is a duty towards the Creator. It is the duty of every man to render the Creator such homage and such only as he believes to be acceptable to him, the studious president both in order of time and in

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degree of obligations to the claims of civil society."

So, I think Madison's understanding of the nature of the good of religion and the right to religious freedom is that because of the duty that every citizen has to render the homage to the Creator that the citizen deems to be acceptable, and only that the citizen deems to be acceptable, that's what creates the right amongst men. So, that would then explain why we would want to take the conduct of religious liberty and to protect it, as the founders did in the First Amendment.

I don't see anything parallel with respect to sexual orientation and gender identity. I would say in this context, founders such as Madison probably would have come to the same conclusion that many of those people whose religious liberty is being violated in the United States today, that marriage is the union of a man and a woman, and that sexual relations are reserved for such a marriage.

COMMISSIONER KIRSANOW: To what extent do we consider we, as a society, want to make sure that everyone has an opportunity, that are inclusive, that everyone has an opportunity for

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work, for all manner of life activities. By the same token, we've got all other rights, too; for example, the rights of an employer. To what extent does an employer, for example, have the ability to exercise a right --- let me strike that.

We have a doctrine with respect to commerce clause cases, Heart of Atlanta Motel, other cases saying that, among other things, if someone seeks to patronage a motel, that person is harmed if he's being excluded on the basis of race, because he may not have anywhere else to go that implicates commerce. To what extent can an employer say I choose not to hire someone, or I choose to hire somebody based on religion or sexual orientation where their conduct for me crosses a certain line. Do we constrain the right of an --- we're talking about rights of employees, but what about rights of employers, does that enter into the mix at all? In a free society, do employers have any rights?

DR. ANDERSON: I would argue they do. I see religious liberty as a human right. I also see freedom of association and freedom of contract as civil rights, and that these are rights that should be protected, unless protecting them would cause

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harm to the common good. So, part of the justification, as I understand the Heart of Atlanta case, is that when it comes to certain truly public accommodations like hotels, if you were traveling to a different state, you're traveling to an unknown territory, it's part of --- it's a legitimate government interest to make sure that you have access to housing. And if you were going to have a monopoly perhaps in the South on hospitals or hotels that were going to be operating according to racist principles, that could justify government intervention into the marketplace to insure that African Americans had access to hotels, to hospitals, to things of that nature.

With competitive markets, as we see today with 88 percent of Fortune 500 companies voluntarily adopting non-discrimination policies on sexual orientation, it significantly undercuts the need for that government intervention into the market sphere. So, it strikes me that when we can allow freedom of religion, freedom of association, freedom of contract to operate, the burden is on the government to justify interference with liberty, so I think the balance that RFRA establishes, it needs to be a compelling state

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interest being pursued in the least restrictive means possible, is a wonderful test for most government interference. And the government needs to meet the burden of proof as to why it's going to disrespect the rights of employers.

CHAIRMAN CASTRO: Did you have something you wanted to add, Ms. Thonvold?

MS. THONVOLD: Thinking about the --- in the work that I do, I have encountered hundreds, if not thousands, of clergy and people of faith, and faith leaders, and I don't think that I've really -- the question has never been to what extent does my freedom go? They're all very clear on what they can and cannot do as a clergy person, and so I think what ENDA has done, and what is existing in ENDA is clear. And clergy understand that they don't have to marry a same gender couple if they do not want to. And in terms of hiring, who they hire in their congregations to do their work, and to be a part of their worship and their faith lives, I have really yet to really find people who are unclear about what their boundaries are, and what the law holds them to, or not.

CHAIRMAN CASTRO: Yes, Professor.

MR. BROWNSTEIN: Could I just add

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something on the rights of employers? If what we're talking about the way that civil rights laws currently balance the rights of employers against the rights of employees who are protected against discrimination, then I think it's clear that the rights of employers are subordinated to the rights of employees. And we're not talking about giant motels that are involved in interstate travel. We're talking about Ollie's Barbecue, a little joint in the middle of nowhere in Alabama which has very, very little to do with interstate commerce, and yet the court was clear that the civil rights laws extend to even that kind of an enterprise. So, with regard to both employment and public accommodations, we fought that battle and we've concluded as a society that the rights of employees, and the rights of people who seek public accommodations outweigh the rights of employers.

COMMISSIONER KIRSANOW: Could you address, though --- that's true. That was dealing with immutable characteristics, for example. To what extent does that apply when an employer decides --- makes a decision based on what he perceives to be conduct, as opposed to a characteristic?

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MR. BROWNSTEIN: Well, I mean, again, I think there are identities where the conduct of the individual and the identity of the individual essentially merge. I think that's true of religion. I think it's true of sexual orientation, as well. You simply can't isolate the identity from the conduct. And with regard to immutable characteristics, while it's true that most of the classes that we protect are defined by immutable characteristics, I also think that that's an under-inclusive understanding of the classes that we should protect by anti-discrimination laws, and religion is the best example. Unless one is willing to say that we will not protect religious minorities against discrimination, we have to agree that immutability isn't a required characteristic for the protection of anti-discrimination laws.

CHAIRMAN CASTRO: Mr. Anderson's description of liberty reminds me of a quote from Abraham Lincoln, "The shepherd drives the wolf from the sheep, for which the sheep thanks the shepherd as his liberator, while the wolf denounces him for the same act as the destroyer of liberty." Plainly, the sheep and the wolf are not agreed upon the definition of liberty, and I think your definition

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of liberty sounds a whole lot like the right to discriminate, the freedom to discriminate, but ---

DR. ANDERSON: My definition of liberty is J.S. Mill's definition of liberty. The thrust of my testimony this afternoon is straight out of J.S. Mill's "On Liberty."

CHAIRMAN CASTRO: Thank you. I read that when I was in college, but I'll prefer Abraham Lincoln's quote. Commissioner Yaki, followed by Commissioner Achtenberg.

COMMISSIONER YAKI: You know the world has changed when John Stuart Mill is now called J.S. My C- I guess I'm just old-school. I just wanted to --- I think that Professor Brownstein hit a lot of what I wanted to talk about, but I would just like him to elaborate a little bit more about how Hobby Lobby doesn't really present --- it doesn't present a deterrence to the enforcement of a law, such as ENDA?

MR. BROWNSTEIN: Hobby Lobby applies RFRA. RFRA requires that the government have a compelling state interest that can't be furthered by a less restrictive alternative. And in Hobby Lobby, there was a less restrictive alternative.

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Justice Alito actually suggested two less restrictive alternatives. One was you could simply shift the cost of providing the insurance from the employer, from the religious employer to the insurance company, and then you avoid any harm to the female employees who needed that insurance coverage, or Justice Alito suggested you could spread the cost of providing that insurance coverage to the public at large by the government taking on that cost and using tax revenue to pay for it.

There are no less restrictive alternatives for achieving equal opportunity in the marketplace. The government has no means available to it, no alternative means to provide new employment opportunities for people who are discriminated against and denied jobs in the community in which they live. So, the key thrust of the Hobby Lobby decision which was the existence of the less restrictive alternative simply doesn't apply in the employment discrimination context. You deny somebody their livelihood, you put them in a position where they may have to move from the community they live in, you deny them the status and dignity of performing at their maximum ability

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with the skills and the training that they have, how is the government going to make up for those harms and losses when someone is subject to that discrimination?

COMMISSIONER YAKI: Thank you very much.

CHAIRMAN CASTRO: Actually, Commissioner Achtenberg passes. Do we have any other questions here? Commissioner Narasaki.

COMMISSIONER NARASAKI: Thank you. So, I'm interested, because I just want clarification, Mr. Anderson. You noted that you were testifying on your own behalf and not on behalf of the Heritage Foundation, but what we received was actually a paper from the Heritage Foundation, so not quite sure.

DR. ANDERSON: It's an excellent question. On the first page of the report from the Heritage Foundation it states, "Nothing written here is to be construed as necessarily reflecting the views of the Heritage Foundation."

COMMISSIONER NARASAKI: So, they don't have C-the Foundation, itself, doesn't have a position on this issue?

DR. ANDERSON: Correct, so each one of us is, you know, an independent scholar.

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COMMISSIONER NARASAKI: Okay.

CHAIRMAN CASTRO: So, right under its logo it says it.

COMMISSIONER NARASAKI: It's very helpful to understand that. So, in the article you state that all citizens should oppose unjust discrimination, but obviously the article opposes the passage of ENDA. So, do you believe that anti-discrimination is actually fair and just?

DR. ANDERSON: In which context? So, like I tried to explain the testimony this afternoon and in the paper, I think in the context of race anti-discrimination provisions, it's an entirely just ---

COMMISSIONER NARASAKI: No, it's clear that you think race is unjust discrimination. I'm asking you do you feel that discrimination against LGBT people is, therefore, just?

DR. ANDERSON: No, so ---

COMMISSIONER NARASAKI: Because that's what it seems to imply.

DR. ANDERSON: No. So, I think what I tried to spell out here was that sometimes sexual orientation and gender identity will be understood as inclinations, attractions, sometimes it will be

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understood as actions, behaviors. It strikes me that as a political society we should respect the several million citizens that live in this country who hold to fairly orthodox Abrahamic beliefs about the nature of marriage and the nature of non-marital sex. And if they want to lead their lives in accordance with their beliefs, I don't think the government should be telling them that those beliefs are discriminatory.

COMMISSIONER NARASAKI: It seems kind of unfair to have it both ways, to say that lesbians and gays should not be able to marry, but then punish them for having sex outside of marriage. I just feel that that's a box, that's a little difficult that they're being put in.

DR. ANDERSON: I'd be happy to discuss the nature of marriage with you at some other time. I mean, I ---

COMMISSIONER NARASAKI: No, thank you. No, thank you. So, you raised concerns about groundless suits. Do you have evidence that there's somehow been a wave of groundless suits in the several states and cities that have adopted anti-discrimination against gay's laws on employment?

DR. ANDERSON: I'm not aware of those

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studies. I would just point within the employment context in general to the work of Richard Epstein and Walter Olson.

COMMISSIONER NARASAKI: Do you want to elaborate?

DR. ANDERSON: Sure. I believe one book was titled, "The Excuse Factory," and ---

COMMISSIONER NARASAKI: And they've had waves of false claims of being gay in order to ---

DR. ANDERSON: No, no, this was prior non-discrimination statutes within the employment context. I think the LGBT non-discrimination statutes are too new for there to be reliable studies ---

COMMISSIONER NARASAKI: So, they're talking about race, and religion, and gender?

DR. ANDERSON: Those sorts of things, yes.

COMMISSIONER NARASAKI: So, they would be against discrimination protection in those cases?

DR. ANDERSON: I don't remember if they went that far. They just highlighted there were costs. I think their analysis was that there is no free lunch, and that one of the negative costs of

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employment non-discrimination acts was that it caused frivolous lawsuits, and that it created economic negative consequences.

CHAIRMAN CASTRO: Okay.

COMMISSIONER NARASAKI: Can I just say one more thing?

CHAIRMAN CASTRO: Okay. The Professor looks like he wants to chime in on your question.

COMMISSIONER NARASAKI: Okay, go ahead, sir.

MR. BROWNSTEIN: Yes. I would just like to say that I've been arguing in favor of religious liberty bills for 25 years, and every time I advocate for such a bill, I'm always told well, if we accept the protection for religious liberty that I'm promoting that will create opportunities for sham suits. People will claim to be religious to try to get the benefits of the protection that the religious liberty bill provides.

I think those arguments are unfounded with regard to religious liberty. I think they're unfounded with regard to protecting the LGBT community against discrimination. There really aren't that many situations where people make believe that they're gay, or that they're lesbian

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in order to obtain protection of these laws, and that's true for religion, as well.

COMMISSIONER KIRSANOW: I would agree with that as somebody who's practiced labor and employment law for 35 years. It's not so much that people make up that they're gay, lesbian. Nobody is going to --- not too many people make up that they're black. It's that they take advantage of a particular protected class and expand it. They take advantage of loose definitions, they take advantage of inchoate or unclear jurisprudence, and file sham lawsuits all over the place, but I wouldn't be wearing this suit if it wasn't for that, frankly.

COMMISSIONER NARASAKI: But that, I think can agree, if we have a functioning Congress, eventually gets corrected.

CHAIRMAN CASTRO: I've never heard Commissioner Kirsanow commit --- confirm that he's filing sham lawsuits until now.

(Laughter)

COMMISSIONER KIRSANOW: No, the funding of them.

CHAIRMAN CASTRO: Oh, okay.

COMMISSIONER KIRSANOW: The funding of them.

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COMMISSIONER NARASAKI: So, can I just -
--

CHAIRMAN CASTRO: Yes, and once you're done with that question, I'm going to give ---

COMMISSIONER YAKI: You better testify on the suit before you make that statement, Martin.

COMMISSIONER NARASAKI: I don't know, Commissioners keep hijacking my questions, so I just have one final comment. So, Mr. Anderson, you were talking about the Founding Fathers, and where they are, and why you believe religion is different. And I just have to note that our Founding Fathers also supported slavery, and did not allow women to vote, so I think we hopefully can agree as a society that things evolve, and as we start to really understand challenges that vulnerable communities face, that hopefully we don't stay with the original Constitution as it stands.

One last thing. So, we've been talking about how religion compares to sexual orientation because religion is not immutable. You may be born into a particular faith, but many people change their minds about where --- as they become adults, so that's not immutable. Whereas, for example,

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sexual identity seems not to be immutable, so why would we not want to protect sexual identity?

DR. ANDERSON: I mean, I think the basic argument is one that I've mentioned now repeatedly this afternoon, is that many millions of our neighbors have sincere religious beliefs that marriage is the union of a man and a woman, and that ---

COMMISSIONER NARASAKI: Well, sexual identity is not about marriage between a man and a woman. Sexual identity is about what your gender identity is. it's not the same thing as being a lesbian or a gay person.

DR. ANDERSON: I thought you had --- I'm sorry, I misunderstood your question. You were asking about gender identity, you had said sexual identity.

COMMISSIONER NARASAKI: Yes, why --- because I --- in your paper you seem to lump the two groups together in ways that I'm not sure are clear to me are appropriate.

DR. ANDERSON: Sure.

COMMISSIONER NARASAKI: So, I'm trying to understand really why you do that.

DR. ANDERSON: Yes. I mean, I find that

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ENDA is general is unclear as to why it lumps sexual orientation and gender identity together, and how it defines those terms.

COMMISSIONER NARASAKI: So, do you feel ---

DR. ANDERSON: So, that's why I cite Dr. Paul McHugh from Johns Hopkins University School of Medicine and Gerry Bradley from Notre Dame's Law School repeatedly in the paper to highlight how sexual orientation and gender identity are incoherently defined ---

COMMISSIONER NARASAKI: So, I'm just trying to under --- it's not about the definition. What I'm trying to get from you is, do you think gender identity is different, because it is not immutable. So, would you treat it differently?

DR. ANDERSON: Differently than what?

COMMISSIONER NARASAKI: Would you have less issues with protection on gender identity and transgender than you would on the issues of lesbians and gays?

DR. ANDERSON: I've never done a comparative analysis. Actually, probably I would come down saying that gender identity raises more concerns, that it strikes me that having biological

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males who present themselves to the world as females raise actually an additional set of questions in the employment context.

COMMISSIONER NARASAKI: Is there a religious issue? I'm a Christian, but I don't recall seeing anything about that in the bible.

DR. ANDERSON: Sure. So, I mean, I think many Christians, many believers in general, my understanding of their faith is that we're created male and female, and that our biological realities embodied as male or female aren't arbitrary social constructs. But in the employment context, I think it raises concerns in terms of what happens with bathroom policies, what happens in educational settings? If Mr. Smith comes back after winter vacation as Mrs. Smith, would a principal be in violation of ENDA if they reassigned that teacher to a different classroom? And I think we all can agree that issues of gender identity are complex and complicated, and they need to be introduced at an age-appropriate setting. So, if you're the fourth grade teacher and you're Mr. Smith, and after winter vacation you're now Mrs. Smith, would that be a violation? Would that be discrimination on the basis of gender identity? ENDA seems to

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suggest that it would be, so it strikes me that it raises an additional set of questions in the employment context when you have biological identities being rejected in favor of ---

COMMISSIONER NARASAKI: It could also help a child in that class who themselves is questioning their gender identity to have a model figure that would help them figure it out, and help them make it feel it was okay.

DR. ANDERSON: I'm sure that there are probably good arguments on both sides of this, which is why I would like to let it reside with that school, with that teacher, with that principal, with that superintendent. Let this be decided at the localest level possible with the parents and not with the federal government. So, I would say --- you just highlighted that there are good arguments on both sides of this debate, and that's why preemptively resolving it through federal legislation would be a mistake.

CHAIRMAN CASTRO: Commissioner Kladney.

COMMISSIONER KLADNEY: Thank you. I was just wondering if Mr. Brownstein could submit his -- your script for your oral testimony. I think it was different than your written testimony. You

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didn't finish is what I was getting at.

MR. BROWNSTEIN: Yes, I'll be glad to do that. Could I have a day or two, because I ---

COMMISSIONER KLADNEY: Oh, you've got 30 days.

CHAIRMAN CASTRO: Yes.

COMMISSIONER KLADNEY: Mr. Anderson, I'm glad you finally brought it back to employment rather than dealing with marriage, because that's not what we're here today about. We're not here about marriage. Thank you.

DR. ANDERSON: Can I respond to that?

COMMISSIONER KLADNEY: Sure.

(Automated message)

CHAIRMAN CASTRO: Go ahead.

DR. ANDERSON: Sure. So, we are talking about employment, but I was addressing the concerns of employers who would have well-founded religious beliefs that the nature of marriage and about sexual morality that follows from that, that could implicate reasonable employment decisions. What I was highlighting is that unlike biological sex or race, because sexual orientation and gender identity are frequently cloaks for actions, it's reasonable for employers to make judgments about

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human action. That was the purpose of the Martin Luther King Jr. quote, that character is ultimately a reflection of actions, and so it's reasonable for employers to make employment decisions based upon the actions of their employees. And that the underlying belief that's most relevant and the focal sense here are beliefs about the nature of marriage and the nature of sexual actions.

COMMISSIONER NARASAKI: Can I just note, because that's the second time you referred to Dr. King. One of his close friends and lieutenants was Bayard Rustin, who was a gay African American at a time where I can't believe, you know, both of those things --- any one of those things alone was a challenge, and who helped lead the 1964 March on Washington, where King gave his very famous Dream Speech. So, I'm not sure that Dr. King would be on board with you on that.

CHAIRMAN CASTRO: Commissioner Kladney, did you have ---

COMMISSIONER KLADNEY: No.

CHAIRMAN CASTRO: You sure? Okay. Anybody else have any questions? Any other questions? No? Okay, well, thank you all. Again, another robust panel. We appreciate your participation today,

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as we do appreciate the participation of all of the panels and the panelists today.

This brings us to the end of our program. I want to once again thank our staff for putting together this very informative presentation for us. I also want to remind everyone that we have 30 days in which anyone here, any speaker, or anyone who's been watching us as a member of the public can send us their public comments. You can either mail them to the U.S. Commission on Civil Rights, Office of Federal Civil Rights Evaluation, 1331 Pennsylvania Avenue, N.W., Suite 1150, Washington, D.C. 20425, or via email to publiccomments@USCCR.gov. That's P-U-B-L-I-C-C-O-M-M-E-N-T-S@USCCR.gov. It is now 4:19 Eastern Time and this hearing is now adjourned. Thank you.

(Whereupon, the above-entitled matter went off the record at 4:19 p.m.)

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