LEGAL DEPARTMENT
LESBIAN GAY
BISEXUAL
TRANSGENDER&
AIDS PROJECT

September 23, 2009

The Honorable George Miller, Chairman
The Honorable John Kline, Ranking Member
Committee on Education and Labor
United States House of Representatives
2181 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Miller and Ranking Member Kline:

On behalf of the American Civil Liberties Union (ACLU), I write to share our view that the enactment of H.R. 3017, the Employment Non-Discrimination Act of 2009 (ENDA), which would prohibit employment discrimination on the basis of sexual orientation or gender identity and, in doing so, abrogate the sovereign immunity that States enjoy under the Eleventh Amendment, would constitute a valid exercise of Congressional power under Section 5 of the Fourteenth Amendment.

The ACLU is a non-partisan, non-profit, national legal organization, the oldest and largest of its kind, with a presence in every State. Its mission has long included the defense of the civil liberties, and the fight for the civil rights, of lesbian, gay, bisexual, and transgender (LGBT) individuals. Indeed, its advocacy on behalf of this population dates back to the 1930s. For over twenty-five years, the ACLU has housed a legal division that is specifically devoted to the advancement of the full range of LGBT rights, including those related to State employment. In light of its longstanding work with the LGBT community, the ACLU is well-positioned to speak to both the ongoing concerns that LGBT State employees face as well as the legal considerations that they implicate.

Section 11(a) of ENDA would provide as follows: "A State shall not be immune under the 11th amendment to the Constitution from a suit brought in a Federal court of competent jurisdiction for a violation of this Act." The Eleventh Amendment grants States immunity from suit by individuals in federal court:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

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U.S. Const. 11th Am. At the same time, the Fourteenth Amendment grants Congress authority to enforce, among other things, its prohibition of irrational discrimination by States against individuals:

> Section 1 . . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
>
> . . . .
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

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U.S. Const. 14th Am. The Supreme Court has articulated the proper balancing of these constitutional considerations where federal civil rights legislation provides enforcement mechanisms by individuals against States.

I. The Interplay Between the Eleventh Amendment and Section 5 of the Fourteenth Amendment.

In *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), the Court held that States are not immune from suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, *et seq.*, which prohibits, among other things, employment discrimination on the basis of sex. In doing so, the Court emphasized that Congress expressly enacted Title VII pursuant to its authority under Section 5 of the Fourteenth Amendment. *Fitzpatrick*, 427 U.S. at 452-53 & n.9. The Court explained the relationship between the Eleventh Amendment and the Fourteenth Amendment as follows:

> [W]e think that the Eleventh Amendment, and the principle of state sovereignty which it embodies are necessarily limited by the enforcement provisions of [Section] 5 of the Fourteenth Amendment. In that section Congress is expressly granted authority to enforce "by appropriate legislation" the substantive provisions of the Fourteenth Amendment, which themselves embody significant limitations on state authority. When Congress acts pursuant to [Section] 5, not only is it exercising legislative authority that is plenary within the terms of the constitutional grant, it is exercising that authority

> under one section of a constitutional Amendment whose other sections by their own terms embody limitations on state authority. We think that Congress may, in determining what is "appropriate legislation" for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against States or state officials which are constitutionally impermissible in other contexts.

Id. at 456 (citations, and footnote omitted). The Court thereby confirmed that Congress may abrogate sovereign immunity under the Eleventh Amendment where it acts pursuant to section 5 of the Fourteenth Amendment.

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In *City of Boerne v. Flores*, 521 U.S. 507 (1997), in the course of holding that States are immune from suit under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb, *et seq.*, which expressly overrides *Employment Div., Dep't of Human Res. v. Smith*, 494 U.S. 872 (1990), and requires that a neutral law of general applicability that substantially burdens religious liberty be narrowly tailored to further a compelling interest, the Court clarified the circumstances under which Congress properly acts to abrogate sovereign immunity. The Court began by confirming that, in enacting RFRA, "Congress relied on its Fourteenth Amendment enforcement power." *Boerne*, 521 U.S. at 516 (citations omitted). The Court then turned to whether RFRA was a proper exercise of Congressional power under Section 5 of the Fourteenth Amendment to enforce rights guaranteed by Due Process Clause, which include those guaranteed by the Free Exercise Clause.

The Court emphasized that Congress may enforce rights guaranteed by the Fourteenth Amendment, *as interpreted by the courts*:

> Congress' power under § 5 . . . extends only to "enforc[ing]" the provisions of the Fourteenth Amendment . . . . The design of the Amendment and the text of § 5 are inconsistent with the suggestion that Congress has the power to decree the substance of the Fourteenth Amendment's restrictions on the States . . . . Congress does not enforce a constitutional right by changing what the right is. It has been given the power "to enforce," not the power to determine what constitutes a constitutional violation.

Id. at 519. At the same time, the Court emphasized that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional." *Id.* at 518. To determine whether such legislation properly abrogates sovereign immunity, the Court set forth the following test: "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 519-20. Thus, in *Boerne*, the Court clarified that Congress properly exercises its power under section 5 of the Fourteenth Amendment to abrogate sovereign immunity either (1) where legislation enforces rights guaranteed by the Fourteenth Amendment, as interpreted by the courts, or (2) where legislation sweeps beyond the Fourteenth Amendment but is congruent and proportional to the injury to be prevented or remedied.

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The Court could not have concluded that RFRA simply enforces rights guaranteed by the Free Exercise Clause, as interpreted by the courts. Given that RFRA expressly overrides *Smith*, to have concluded otherwise would have permitted Congress to alter the scope of the Free Exercise Clause, as interpreted by the courts. *See Boerne*, 521 U.S. at 532 ("[RFRA] appears . . . to attempt a substantive change in constitutional protections."). Accordingly, the Court applied the congruence and proportionality test.

In applying the test, the Court declared that "[t]he appropriateness of remedial measures must be considered in light of the evil presented." *Id.* at 530. Thus, while acknowledging that "[j]udicial deference, in most cases, is [not] based . . . on the state of the legislative record," *id.* at 531, the Court examined RFRA's legislative record. Because "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry," the Court found that "it is difficult to maintain . . . that [RFRA's legislative record] indicate[s] some widespread pattern of religious discrimination in this country." *Id.* at 530.

Moreover, the Court found that, because RFRA sweeps so far beyond the Free Exercise Clause, it is not proportional to the injury to be prevented or remedied:

> Regardless of the state of the legislative record, RFRA cannot be considered remedial, preventive legislation, if those terms are to have any meaning. RFRA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior . . . . Preventive measures

> prohibiting certain types of laws may be appropriate when there is reason to believe that many of the laws affected by the congressional enactment have a significant likelihood of being unconstitutional . . . .
>
> RFRA is not so confined.

Id. at 532 (citation omitted).

In light of both the absence of an evil of a magnitude that would justify an abrogation of sovereign immunity, and the overly broad sweep, the Court concluded that "[t]he stringent test RFRA demands of state laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved." *Id.* at 533.

The principles articulated in *Boerne* are reflected in both the reasoning and the result of both *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000), and *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001), in which the Court concluded, respectively, that the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621, *et seq.*, which prohibits employment discrimination on the basis of age, and Title I of the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12111, *et seq.*, which prohibits employment discrimination on the basis of disability, were not valid exercises of Congressional power to abrogate sovereign immunity.

In *Kimel*, the Court began by observing that the Eleventh Amendment "does not provide for federal jurisdiction over suits against nonconsenting States." *Kimel*, 528 U.S. at 73 (citations omitted). Nevertheless, the Court recognized that States are not immune from suit by individuals in federal court where both (1) "Congress unequivocally expressed its intent to abrogate that immunity," and (2) "Congress acted pursuant to a valid grant of constitutional authority." *Id.* (citation omitted).

Undertaking this two-step analysis, the Court first concluded that, in enacting the ADEA, Congress clearly expressed its intent to abrogate the rights that States enjoy under the Eleventh Amendment:

> To determine whether a federal statute properly subjects States to suits by individuals, we apply a simple but stringent test: Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making

> its intention unmistakably clear in the language of the statute. We agree with petitioners that the ADEA satisfies that test . . . . Read as a whole, the plain language of these provisions clearly demonstrates Congress' intent to subject the States to suit for money damages at the hands of individual employees.

Id. at 73-74 (quotation omitted). The Court, however, went on to hold that Congress did not properly exercise its authority under Section 5 of the Fourteenth Amendment to abrogate sovereign immunity.

As in *Boerne*, the Court in *Kimel* recognized that Congress may abrogate sovereign immunity either (1) where legislation enforces rights guaranteed by the Fourteenth Amendment, as interpreted by the courts, or (2) where "prophylactic" legislation is congruent and proportional to the injury to be prevented or remedied. *Id.* at 81. Because classifications based on age, unlike classifications based on race or sex, do not enjoy a presumption of unconstitutionality that may be overcome only upon the requisite evidentiary showing, *see, e.g., Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976), the ADEA's broad prohibition of employment discrimination based on age does not purport to simply enforce rights guaranteed by the Equal Protection Clause. Accordingly, the Court applied the congruence and proportionality test.

Although the Court acknowledged that "[i]t is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference," and that "Congress must have wide latitude in determining where [the] line [between appropriate remedial legislation and a substantive redefinition of the Fourteenth Amendment right at issue] lies," the Court affirmed that "there must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Kimel*, 528 U.S. at 80-81 (quotations omitted). The Court defined the congruence and proportionality test as an inquiry into both (1) whether the law is in proportion to its remedial or preventive objective such that it can be understood as responsive to, or designed to prevent, unconstitutional behavior (hereinafter, "the proportionality inquiry"), and (2) whether the legislative record contains evidence of unconstitutional conduct that reveals a widespread pattern of discrimination by States against individuals (hereinafter, "the evidentiary inquiry"). *Id.* at 81-82.

With respect to the proportionality inquiry, the Court reached the following conclusion:

> Judged against the backdrop of our equal protection jurisprudence, it is clear that the ADEA is so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior. The Act, through its broad restriction on the use of age as a discriminating factor, prohibits substantially more state employment decisions and practices than would likely be held unconstitutional under the applicable equal protection, rational basis standard.

Id. at (86 quotation omitted). In reaching its conclusion, the Court relied on the fact that classifications based on age, unlike classifications based on race or sex, do not enjoy a presumption of unconstitutionality that may be overcome only upon the satisfaction of the requisite evidentiary showing:

> Age classifications . . . cannot be characterized as so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy. Older persons . . . have not been subjected to a history of purposeful unequal treatment. Old age also does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it . . . .
>
> . . . . Under the Fourteenth Amendment, a State may rely on age as a proxy for other qualities, abilities, or characteristics that are relevant to the State's legitimate interests.

Id. at 83-84 (quotations and citation omitted); *see also id.* at 85 (age is a rational proxy for the physical and mental fitness that certain types of employment require).

With respect to the evidentiary inquiry, the Court found that, in enacting the ADEA, "Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." *Id.* at 89. In doing so, the Court bolstered its conclusion that the ADEA did not constitute a valid exercise of Congressional power to abrogate sovereign immunity: "A review of the ADEA's legislative record as a whole . . . reveals that

Congress had virtually no reason to believe that state and local governments were unconstitutionally discriminating against their employees on the basis of age." *Id.* at 91.

Significantly, the Court expressly stated that its finding under the proportionality inquiry, standing alone, was not dispositive:

> That the ADEA prohibits very little conduct likely to be held unconstitutional, while significant, does not alone provide the answer to our § 5 inquiry. Difficult and intractable problems often require powerful remedies, and we have never held that § 5 precludes Congress from enacting reasonably prophylactic legislation . . . . The appropriateness of remedial measures must be considered in light of the evil presented.

Id. at 88-89 (quotation omitted). Similarly, the Court made clear that its finding under the evidentiary inquiry, standing alone, was not dispositive:

> Although that lack of support is not determinative of the § 5 inquiry, Congress' failure to uncover any significant pattern of unconstitutional discrimination here confirms that Congress had no reason to believe that broad prophylactic legislation was necessary in this field.

Id. at 91 (citations omitted). Thus, its holding necessarily rested on both "the indiscriminate scope of the Act's substantive requirements" and "the lack of evidence of widespread and unconstitutional age discrimination by the States." *Id.*

In *Garrett*, the Court engaged in a similar analysis. Because classifications based on disability are presumptively constitutional, *see, e.g., City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), Title I of the ADA's broad prohibition of employment discrimination does not purport to simply enforce rights guaranteed by the Equal Protection Clause. Accordingly, after confirming that, in enacting Title I of the ADA, Congress acted pursuant to Section 5 of the Fourteenth Amendment, *Garrett*, 531 U.S. at 363-64, the Court applied the congruence and proportionality test.

The Court first "examine[d] whether Congress identified a history and pattern of unconstitutional employment discrimination by the States against the disabled." *Id.* at 369. In doing so, the Court found that "[t]he legislative record of the ADA . . . simply fails to show that Congress did in

fact identify a pattern of irrational state discrimination in employment against the disabled." *Id.*

The Court then found that, even if it were otherwise, "the rights and remedies created by the ADA against the States would raise . . . concerns as to congruence and proportionality." *Id.* at 372. Its assessment that Title I of the ADA sweeps far more broadly than the Equal Protection Clause was predicated on the absence of a presumption of unconstitutionality, given that disabled individuals constitute a "large and amorphous class" that "possesses distinguishing characteristics relevant to interests the State has authority to implement." *Id.* at 366 (quotations omitted).

In light of its findings, the Court held that Title I of the ADA did not abrogate sovereign immunity:

> [I]n order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation. Those requirements are not met here.

Id. at 374.

In sum, the case law confirms that the interplay between the Eleventh Amendment and Section 5 of the Fourteenth Amendment requires an analysis of whether (1) Congress unequivocally expressed its intent to abrogate sovereign immunity, and (2) Congress acted pursuant to a valid grant of constitutional authority. With respect to the second step of the analysis, the threshold inquiry is whether (1) the legislation at issue is legislation that enforces rights guaranteed by the Fourteenth Amendment, as interpreted by the courts, or (2) the legislation at issue is prophylactic legislation that is congruent and proportional to the injury to be prevented or remedied. Legislation that generally prohibits the use of a classification that is presumptively *unconstitutional* falls under the first category, and no further inquiry is necessary. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). In contrast, legislation that generally prohibits the use of a classification that is presumptively *constitutional* falls under the second category, and the congruence and proportionality test applies. See *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62 (2000); *City of Boerne v. Flores*, 521 U.S. 507 (1997). The congruence and proportionality test is an inquiry into both (1) whether the law is in

proportion to its remedial or preventive objective such that it can be understood as responsive to, or designed to prevent, unconstitutional behavior, and (2) whether the legislative record contains evidence of unconstitutional conduct that reveals a widespread pattern of discrimination by States against individuals.

II. Section 11(a) of ENDA Would Properly Abrogate Sovereign Immunity.

Where ENDA is concerned, there is no question that Section 11(a) would clearly express Congressional intent to abrogate sovereign immunity. Thus, we focus our analysis on whether Section 11(a) would constitute a valid exercise of Congressional power under Section 5 of the Fourteenth Amendment. Given the principled conclusion that classifications based on sexual orientation or gender identity are presumptively unconstitutional, ENDA's prohibition of employment discrimination based on sexual orientation or gender identity simply enforces rights guaranteed by the Equal Protection Clause. *See* § II.A. *infra*. Even if this were not so, the proposed scope of ENDA is in proportion to the scope of the Equal Protection Clause, and there is evidence of a widespread pattern of irrational discrimination by States against their LGBT employees, and therefore ENDA satisfies the congruence and proportionality test. *See* § II.B. *infra*. Either way, section 11(a) of ENDA would properly abrogate sovereign immunity.

At the outset, we emphasize that municipal employment discrimination has unique relevance to the analysis where sexual orientation and gender identity are concerned. *See Tennessee v. Lane*, 541 U.S. 509, 527 n.16 (2004) ("THE CHIEF JUSTICE dismisses as irrelevant the portions of this evidence that concern the conduct of nonstate governments. This argument rests on the mistaken premise that a valid exercise of Congress' § 5 power must always be predicated solely on evidence of constitutional violations by the States themselves . . . . [O]ur cases have recognized that evidence of constitutional violations on the part of nonstate governmental actors is relevant to the § 5 inquiry.") (quotation omitted). This is so because such discrimination has often been the product of unconstitutional discrimination by States against LGBT individuals. In particular, until recently, state laws criminalizing same-sex sodomy have translated into high barriers to municipal employment for LGBT individuals. *See Lawrence v. Texas*, 539 U.S. 558, 575 (2003) ("[T]he Texas criminal conviction carries with it the other collateral consequences always following a conviction, such as notations on job application forms."). This has been true across all areas of municipal employment, including law enforcement

and public education. *See, e.g., Nat'l Gay Task Force v. Bd. of Educ.*, 729 F.2d 1270, 1273 (10th Cir. 1984) ("We see no constitutional problem in the statute's permitting a teacher to be fired for engaging in 'public homosexual activity.'"); *Clearfield City v. Dep't of Employment Sec.*, 663 P.2d 440, 443 (Utah 1983) ("The act of sodomy violated the laws the officer and his employer had a sworn duty to uphold and enforce . . . . This entire course of events . . . would surely have a significant adverse effect upon the officer's credibility as a police officer and as a witness in the courts of law."). The adverse effects of such laws on LGBT individuals linger to this day.

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Accordingly, we present scores of instances in which both States and municipalities across the country have engaged in unconstitutional discrimination against their employees on the basis of sexual orientation or gender identity. *See* § II.B.2. *infra*. Such discrimination encompasses all types of adverse employment actions – whether termination, refusal to hire, refusal to promote, hostile work environment, differential terms and conditions of employment, retaliation, or censorship. It encompasses actual as well as perceived sexual orientation or gender identity, as well as associational discrimination based on sexual orientation or gender identity. Significantly, it is commonly intertwined with unconstitutional discrimination on the basis of sex, whether in the form of sex stereotyping, sexual harassment, or associational discrimination based on sex.

A. ENDA Would Properly Abrogate Sovereign Immunity Because Classifications Based on Sexual Orientation or Gender Identity Are Presumptively Unconstitutional Absent the Requisite Evidentiary Showing.

As a prudential matter, the Supreme Court has thus far refrained from ruling on whether classifications on the basis of sexual orientation enjoy a presumption of constitutionality that may be overcome only upon the requisite evidentiary showing. *See Romer v. Evans*, 517 U.S. 620, 632 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end. Amendment 2 fails, even defies, this conventional inquiry.") (citation omitted); *see also Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 618 (1985) ("[I]f the statutory scheme cannot pass even the minimum rationality test, our inquiry ends."). The Court has not yet had an opportunity to consider whether classifications on the basis of gender identity merit such a presumption.

The principled conclusion is that classifications based on sexual orientation or gender identity are presumptively unconstitutional. Each of the factors that independently renders a classification especially suspect because the classification is especially likely to reflect invidious discrimination is satisfied where classifications based on sexual orientation or gender identity are concerned. LGBT people have "experienced a history of purposeful unequal treatment" and have "been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities." *Cleburne*, 473 U.S. at 441, 445 (quotation omitted). In addition, neither sexual orientation nor gender identity is an aspect of personal identity that an individual either can or should be compelled to change in order to escape governmental discrimination, *see Frontiero v. Richardson*, 411 U.S. 677, 685, 686 (1973), and LGBT people are particularly vulnerable politically so as to "command extraordinary protection from the political processes," *Murgia*, 427 U.S. at 313, although neither of these factors is essential to a finding that a classification is presumptively unconstitutional. *See generally* Br. of Amici Curiae Nat'l Lesbian & Gay Law Ass'n, et al., *Lawrence v. Texas*, No. 02-102, 2003 WL 152348 (Jan. 16, 2003) (enclosed).

It cannot be seriously disputed that LGBT people have long suffered and continue to suffer systemic and egregious discrimination. *See Varnum v. Brien*, 763 N.W.2d 862, 889 (Iowa 2009) ("The County does not, and could not in good faith, dispute the historical reality that gay and lesbian people as a group have long been the victim of purposeful and invidious discrimination because of their sexual orientation.") (ruling under state analog to Equal Protection Clause); *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407, 434 (Conn. 2008) ("There is no question . . . that gay persons historically have been, and continue to be, the target of purposeful and pernicious discrimination due solely to their sexual orientation.") (ruling under state analog to Equal Protection Clause); *In re Marriage Cases*, 183 P.3d 384, 442 (Cal. 2008) ("[S]exual orientation is a characteristic . . . that is associated with a stigma of inferiority and second-class citizenship, manifested by the group's history of legal and social disabilities.") (citations omitted) (ruling under state analog to Equal Protection Clause); *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435, 447 (Or. Ct. App. 1998) ("[C]ertainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social . . . prejudice.") (ruling under state analog to Equal Protection Clause).

It also cannot be seriously disputed that one's sexual orientation and one's gender identity are not indicative one's ability to participate in or

contribute to society. *See Varnum*, 763 N.W.2d at 892 ("[I]t is clear sexual orientation is no longer viewed in Iowa as an impediment to the ability of a person to contribute to society."); *Kerrigan*, 957 A.2d at 435 ("[H]omosexuality bears no relation at all to an individual's ability to contribute fully to society.") (quotation omitted); *Marriage Cases*, 183 P.3d at 442 ("[S]exual orientation is a characteristic . . . that bears no relation to a person's ability to perform or contribute to society.") (citation omitted); *Tanner*, 971 P.2d 435 at 447 ("[C]ertainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social stereotyping."); *see also* http://www.aclu.org/pdfs/lgbt/discrim_map_bw.pdf (21 States and the District of Columbia have sexual orientation-inclusive civil rights laws; 13 States and the District of Columbia have gender identity-inclusive civil rights laws).

Moreover, sexual orientation and gender identity are so intrinsic to personal identity that, even if one could, one should not be compelled to change them to escape governmental discrimination. *See Varnum*, 763 N.W.2d at 893 ("Sexual orientation is not the type of human trait that allows courts to relax their standard of review because the barrier is temporary or susceptible to self-help."); *Kerrigan*, 957 A.2d at 438-39 ("This prong of the suspectness inquiry surely is satisfied when, as in the present case, the identifying trait is so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change it. In other words, gay persons, because they are characterized by a central, defining trait of personhood, which may be altered if at all only at the expense of significant damage to the individual's sense of self are no less entitled to consideration as a suspect or quasi-suspect class than any other group that has been deemed to exhibit an immutable characteristic. To decide otherwise would be to penalize someone for being unable or unwilling to change a central aspect of individual and group identity, a result repugnant to the values animating the constitutional ideal of equal protection of the laws.") (quotations and citations omitted); *Marriage Cases*, 183 P.3d at 442 ("Because a person's sexual orientation is so integral an aspect of one's identity, it is not appropriate to require a person to repudiate or change his or her sexual orientation in order to avoid discriminatory treatment.") (citations omitted); *Tanner*, 971 P.2d 435 at 446-47 ("[T]he focus of suspect class definition is not necessarily the immutability of the common, class-defining characteristics, but instead the fact that such characteristics are historically regarded as defining distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice . . . . Sexual orientation . . . is widely regarded as defining a distinct, socially recognized group of citizens, and certainly it is beyond dispute that homosexuals in our

society have been and continue to be the subject of adverse social and political stereotyping and prejudice.").

Finally, LGBT people have long lacked and continue to lack political power to a sufficient degree to warrant judicial solicitude. *See Varnum*, 763 N.W.2d at 895 ("We are convinced gay and lesbian people are not so politically powerful as to overcome the unfair and severe prejudice that history suggests produces discrimination based on sexual orientation."); *Kerrigan*, 957 A.2d at 444 ("We apply this facet of the suspectness inquiry not to ascertain whether a group that has suffered invidious discrimination borne of prejudice or bigotry is devoid of political power but, rather, for the purpose of determining whether the group lacks sufficient political strength to bring a prompt end to the prejudice and discrimination through traditional political means. Consequently, a group satisfies the political powerlessness factor if it demonstrates that, because of the pervasive and sustained nature of the discrimination that its members have suffered, there is a risk that that discrimination will not be rectified, sooner rather than later, merely by resort to the democratic process. Applying this standard, we have little difficulty in concluding that gay persons are entitled to heightened constitutional protection despite some recent political progress.") (citation omitted); *Marriage Cases*, 183 P.3d at 443 ("[O]ur cases have not identified a group's *current* political powerlessness as a necessary *prerequisite* for treatment as a suspect class.") (emphasis in original); *Tanner*, 971 P.2d 435 at 447 ("[C]ertainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse . . . political stereotyping and prejudice.").

Significantly, federal case law concluding that discrimination based on sexual orientation or gender identity is presumptively constitutional heavily relies on *Bowers* for the proposition that the liberty interest in forming an intimate relationship with a partner does not extend to LGBT people. *Bowers* has been wholly repudiated. The Supreme Court has held not only that *Bowers* "is not correct today" but indeed that it "was not correct when it was decided." *Lawrence*, 539 U.S. at 578. Thus, for example, *Lofton v. Sec'y of Dep't of Children & Fam. Servs.*, 358 F.3d 804, 818 & n.6 (11th Cir. 2004), is unpersuasive because it relies on federal case law that in turn relies on *Bowers*. *See Equality Found. of Greater Cincinnati, Inc. v. City of Cincinnati*, 128 F.3d 289, 292-93 (6th Cir. 1997) ("[U]nder *Bowers* . . . and its progeny, homosexuals [do] not constitute either a 'suspect class' or a 'quasi-suspect class' because the conduct which define[s] them as homosexuals [is] constitutionally proscribable.") (citation and footnote omitted); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126,

1132 (9th Cir. 1997) (relying on progeny of *Bowers*); *Richenberg v. Perry*, 97 F.3d 256, 260 & n.5 (7th Cir. 1996) (relying on *Bowers* and its progeny); *High Tech Gays v. Def. Indus. Sec. Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990) ("[A]lthough the Court in [*Bowers*] analyzed the constitutionality of the sodomy statute on a due process rather than equal protection basis, by the [*Bowers*] majority holding that the Constitution confers no fundamental right upon homosexuals to engage in sodomy, and because homosexual conduct can thus be criminalized, homosexuals cannot constitute a suspect or quasi-suspect class entitled to greater than rational basis review for equal protection purposes.") (citations and footnote omitted); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes.") (footnote omitted); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("After [*Bowers*] it cannot be logically asserted that discrimination against homosexuals is constitutionally infirm.").[1]

Moreover, such federal case law erroneously relies on *Romer* for the proposition that classifications based on sexual orientation are presumptively constitutional. As discussed above, in *Romer*, the Court did not reach whether classifications based on sexual orientation are presumptively constitutional. Thus, such case law is unpersuasive. *See, e.g., Lofton*, 358 F.3d at 818 & n.6 (relying on *Holmes*, 124 F.3d at 1132, and *Richenberg*, 97 F.3d at 260 n.5, both of which in turn rely on a misapprehension of *Romer*).

Finally, we note that discrimination against LGBT people is also presumptively unconstitutional both because it implicates the liberty interest in forming an intimate relationship with a same-sex partner, *see, e.g., Witt v. Dep't of Air Force*, 527 F.3d 806 (9th Cir. 2008) (holding, in the public employment context, that a penalty on formation of an intimate relationship with a same-sex partner is subject to heightened scrutiny), and because it implicates sex discrimination, *see, e.g., Glenn v. Brumby*, __ F. Supp. 2d __, No. 1:08-CV-2360-RWS, WL 1849951 (N.D. Ga. June 25, 2009) (transgender state employee was subjected to sex stereotyping); *see also, e.g., Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (transgender municipal employee was subjected to sex stereotyping); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (transgender federal applicant

[1] The remaining federal case law on which *Lofton* relies does not address whether sexual orientation is presumptively constitutional.

was subjected to sex stereotyping and discrimination on the basis of change of sex).

Because classifications based on sexual orientation or gender identity enjoy a presumption of unconstitutionality that may be overcome only upon the requisite evidentiary showing, no further inquiry is necessary. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976).

B. In the Alternative, ENDA Would Properly Abrogate Sovereign Immunity Because It Would Satisfy the Congruence and Proportionality Test.

1. The Proportionality Inquiry.

Even if classifications based sexual orientation or gender identity were not presumptively constitutional, ENDA would easily satisfy the proportionality inquiry. As discussed below, the proposed scope of ENDA would largely mirror the Equal Protection Clause's prohibition on irrational discrimination. Moreover, it would be in proportion to the Equal Protection Clause's prohibition on sex discrimination. Furthermore, it would be in proportion to the Due Process Clause's prohibition on penalizing the exercise of a liberty or expression interest.

The Equal Protection Clause prohibits States from classifying on *any* basis where the classification does not even rationally further a legitimate State interest. *Hooper*, 472 U.S. at 618. In other words, the Equal Protection Clause prohibits irrational discrimination by States. Thus, it is significant that courts have routinely found that discrimination by States and municipalities against their LGBT employees lacks even a rational basis. *See, e.g., Lovell v. Comsewogue Sch. Dist.*, 214 F. Supp. 2d 319 (E.D.N.Y. 2002); *Miguel v. Guess*, 51 P.3d 89 (Wash. Ct. App. 2002); *Emblen v. Port Auth.*, No. 00 Civ. 8877 (AGS), 2002 WL 498634 (S.D.N.Y. Mar. 29, 2002); *Quinn v. Nassau County Police Dep't*, 53 F. Supp. 2d 347 (E.D.N.Y. 1999); *Glover v. Williamsburg Local Sch. Dist. Bd. of Educ.*, 20 F. Supp. 2d 1160 (S.D. Ohio 1998); *Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998); *Alaska Civil Liberties Union v. Alaska*, 122 P.3d 781 (Alaska 2005) (ruling under state analog to Equal Protection Clause); *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445 (Mont. 2004) (same); *see also United States v. Georgia*, 546 U.S. 151, 158 (2006) ("[N]o one doubts that § 5 grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions.") (emphasis in original). While significant, it is not surprising

that courts have found that employment discrimination based on sexual orientation or gender identity is generally irrational.[2] Simply put, one's sexual orientation and gender identity have no bearing on one's ability to do one's job.[3]

Moreover, the factors on which the Court specifically relied in *Kimel* and *Garrett* for the proposition that discrimination based on age or disability is generally rational are not present where discrimination based on sexual orientation or gender identity is concerned. Even courts that have held that classifications based on sexual orientation or gender identity do not enjoy a presumption of unconstitutionality have acknowledged that LGBT individuals constitute a discrete and insular minority who have suffered a history of discrimination, and that one's sexual orientation and gender identity are not indicative of one's ability to participate in or contribute to society. *See Conaway v. Deane*, 932 A.2d 571, 614 (Md. 2007) (holding that sexual orientation classifications are subject to rational basis review

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[2] It need be only that employment discrimination based on sexual orientation or gender identity is *generally* irrational. *See Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727-28 (2003) ("Congress may, in the exercise of its § 5 power, do more than simply proscribe conduct that we have held unconstitutional. Congress' power 'to enforce' the Amendment includes the authority both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text. In other words, Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.") (quotation and citation omitted).

[3] Whether discrimination based on sexual orientation or gender identity is generally irrational in contexts *other than employment* is immaterial to the analysis. *See Lane*, 541 U.S. at 530-31 ("[N]othing in our case law requires us to consider Title II, with its wide variety of applications, as an undifferentiated whole. Whatever might be said about Title II's other applications, the question presented in this case is not whether Congress can validly subject the States to private suits for money damages for failing to provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the power under § 5 to enforce the constitutional right of access to the courts. Because we find that Title II unquestionably is valid § 5 legislation as it applies to the class of cases implicating the accessibility of judicial services, we need go no further.") (citation and footnotes omitted).

under state analog to Equal Protection Clause, but acknowledging that "gay, lesbian, and bisexual persons in recent history have been the target of unequal treatment in the private and public aspects of their lives, and have been subject to stereotyping in ways not indicative of their abilities, among other things, to *work* and raise a child") (emphasis added); *Andersen v. King County*, 138 P.3d 963, 974 (Wash. 2006) (holding that sexual orientation classifications are subject to rational basis review under state analog to Equal Protection Clause, but acknowledging that "[t]here is no dispute that gay and lesbian persons have been discriminated against in the past").

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Furthermore, ENDA would sweep less broadly than the Equal Protection Clause in significant ways. In particular, section 8(b) of ENDA makes express that ENDA would not apply to the differential terms and conditions of employment that the LGBT employees of 28 States suffer with respect to the health, pension, and other dependent benefits that constitute a substantial portion of the compensation package of employees who may marry their partners in a manner that would be recognized under ENDA. *See* www.hrc.org/documents/Employment_Laws_and_Policies.pdf. Such differential treatment violates the Equal Protection Clause. *See, e.g., Alaska Civil Liberties Union v. Alaska*, 122 P.3d 781 (Alaska 2005) (ruling under state analog to Equal Protection Clause); *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445 (Mont. 2004) (same); *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435 (Or. Ct. App. 1998) (same). ENDA's express limitations serve only to bolster the conclusion that ENDA would satisfy the proportionality inquiry.

Separate and apart from the analysis above, it is significant that the discrimination at issue is commonly intertwined with sex discrimination. *See, e.g., Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (gay employee was subjected to sexual harassment); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004) (transgender municipal employee was subjected to sex stereotyping); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864 (9th Cir. 2001) (gay employee was subject to sex stereotyping); *Glenn v. Brumby*, __ F. Supp. 2d __, No. 1:08-CV-2360-RWS, WL 1849951 (N.D. Ga. June 25, 2009) (transgender state employee was subjected to sex stereotyping); *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008) (transgender federal applicant was subjected to sex stereotyping and discrimination on the basis of change of sex). In other words, it is significant that sexual orientation and gender identity discrimination are contexts in which sex discrimination persists with particular tenacity. The Court has already ruled that Congress may abrogate State sovereign immunity where employment discrimination based on sex is at issue. *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976). The Court has also already ruled that Congress may continue to

enact prophylactic legislation to deter and remedy sex discrimination to the extent that sex discrimination persists. *Hibbs*, 538 U.S. at 730 ("[After Congress enacted Title VII,] state gender discrimination did not cease . . . . States continue to rely on invalid gender stereotypes in the employment context . . . . [T]he persistence of such unconstitutional discrimination by the States justifies Congress' passage of prophylactic § 5 legislation."). Thus, in enacting ENDA, Congress would also abrogate sovereign immunity by virtue of the constitutional concern that employment discrimination based on sex presents.[4]

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It is also significant that, in addition to equality considerations under the Equal Protection Clause, ENDA would implicate liberty and expression considerations under the Due Process Clause. *See Tennessee v. Lane*, 541 U.S. 509 (2004) (Congress may enforce Due Process rights under Section 5 of the Fourteenth Amendment); *City of Boerne v. Flores*, 521 U.S. 507 (1997) (Congress may enforce First Amendment rights under Section 5 of the Fourteenth Amendment). The Due Process Clause prohibits States and municipalities from penalizing their LGBT employees for exercising their constitutionally protected liberty interests. *See, e.g., Witt v. Dep't of Air Force*, 527 F.3d 806 (9th Cir. 2008) (holding, in the public employment context, that a penalty on formation of an intimate relationship with a same-sex partner is subject to heightened scrutiny). It also prohibits States and municipalities from penalizing their LGBT employees for exercising their constitutionally protected expression interests. *See, e.g., Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998) (recognizing, in the public employment context, that the censorship of pro-LGBT expression is unconstitutional). Given that State and municipal employers routinely penalize their LGBT employees for forming an intimate relationship with a same-sex partner or for expressing pro-LGBT viewpoints, *see* § II.B.2. *infra*, ENDA would constitute an appropriate prophylactic measure to deter and remedy such unconstitutional conduct.

For all of these reasons, the scope of ENDA would largely mirror the scope of Section 1 of the Fourteenth Amendment and therefore readily satisfy the proportionality inquiry.

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[4] The fact that some of the discrimination at issue might not be intertwined with sex discrimination does not alter the analysis. Again, "Congress may enact so-called prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct." *Hibbs*, 538 U.S. at 727-28.

2. The Evidentiary Inquiry.

We cannot emphasize enough that our data egregiously underreport the magnitude of the constitutional concern. Precisely because such discrimination is so prevalent, many LGBT employees are understandably reluctant to disclose their sexual orientation or gender identity, as seeking redress for discriminatory acts often necessitates. *See Kerrigan*, 957 A.2d at 446 n.40 (Conn. 2008) ("Because of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena.") (quotation omitted). Moreover, despite some recent favorable legal developments, many LGBT employees have been understandably discouraged from exploring suit when they suffer workplace discrimination, given that many courts have exhibited hostility toward their claims. *See, e.g., Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) (adverse Title VII ruling against transgender employee); *DeSantis v. Pac. Tel. & Tel. Co.*, Inc., 608 F.2d 327 (9th Cir. 1979) (adverse Title VII ruling against lesbian and gay employees). Furthermore, our data capture only a small fraction of the inquiries that we field from the small minority of LGBT employees who have the wherewithal to contact us, and purport to represent only a snapshot of our records during recent times. Accordingly, our catalog below is merely illustrative of the constitutional concern.

Still, our data confirm that there is in fact a widespread pattern of irrational discrimination by States and municipalities against their LGBT employees, as reflected in the 87 examples of discrimination from 35 States – 24 examples of State discrimination and 63 examples of municipal discrimination – referenced below.

First, our outreach to the LGBT community over just the past month, and our review of the inquiries that we have fielded from LGBT employees over just the past 18 months, readily yielded 16 stories of irrational discrimination by States and 48 stories of irrational discrimination by municipalities. The following stories are illustrative:

Shannon P. Dietz of Baton Rouge, Louisiana

> I was hired in 2006 as a faculty member and coordinator of the 4-H Program at Louisiana State University. The program had 500 participants, 8-18 years old, and I built a strong youth program for at-risk and underserved youth. My job also involved serving as the liaison between the 4-H

office and the University. I had never received a negative comment on any past evaluations and, in December 2007, I was promoted to office supervisor of an off-campus parish office. I had also received a Distinguished Service Award from the 4-H Program.

In April 2009, I was called away from a camping event where I was supervising at-risk youth. The University's Human Resources manager said I needed to come back immediately for a meeting. At the meeting, she informed me that the school had received an anonymous letter saying that I had a personal ad on a gay dating site. After the meeting was over, I was not allowed to go back to camp and collect my personal items because I was told I could not interact with the youth in my program anymore.

I was immediately put on administrative leave and told I was going to be fired eventually. However, I refused to quit and, despite the threats, they did not fire me. Instead, I was demoted from my job as the office supervisor and taken off all programs involving interacting with youth. Now, I am researching and writing curricula and my contract has not been renewed, so I have no job security.

This demotion has been very stressful. Although I have been out to my family for a long time, I was always very careful not to give any indications or signs at work about my sexual orientation. My career with the 4-H Program is ruined because people are starting rumors about my sexual orientation.

Kathleen Culhane of St. Paul, Minnesota

I was hired in 1998 as a research assistant for an orthopedic surgeon at the University of Iowa. In August 2001, I came out as transgendered, and the surgeon I worked for immediately quit coming into the lab. The department administrator told me, to my face and in front of witnesses, that my condition (transsexuality) was such that they didn't feel I could give sufficient effort to the department and they were firing me.

I went to the University's affirmative action department, who found enough merit to my story that my termination was stopped, as long as I agreed to find work in another department. I had a few interviews, but no one gave me a second one, so, effectively, I was fired.

I chose to relocate to Minnesota in March of 2002 specifically because the state offers civil rights protections. At the time, it was overwhelming and terrible to lose my job and leave Iowa and the city I had lived in for 16 years.

John Schmidt of Fort Mill, South Carolina

I was hired as a New Jersey State Trooper in 1982. I loved working in law enforcement and received many promotions as well as many commendations for my work in alcoholic beverage control.

In January 1997, I was beaten up by other troopers while on an assignment. I was undercover waiting for other troopers to arrive in a sting operation. When they arrived, one of the troopers headed straight towards me (even though they knew that I was a trooper) and started beating me with his baton. He knocked me to the ground and kicked me, shouting anti-gay slurs.

I enjoyed my job, but the incident made me feel scared, depressed, and very uncomfortable. I filed a lawsuit, but it was dismissed on procedural grounds because my lawyer missed court deadlines.

The culture of the New Jersey State Troopers is notoriously intolerant, and it is well-documented in the press and in lawsuits that many African-American and gay and lesbian troopers have faced workplace hostility and harassment.

I retired from law enforcement in 2003 on disability because of a cardiac condition. In all honesty, my cardiac condition is not such that it would prevent me from working in some capacity in law enforcement. However, the hostility

of my work environment made me realize that I was lucky to be able to retire before I faced further harassment or violence.

Gypsey Teague of Pendleton, South Carolina

In 2002, I was hired as the Branch Librarian for the Oklahoma City Branch of Langston University, Oklahoma's only historically black college or university (HBCU). I have both an MLS and an MBA and so, not only was I the library director, but I also taught classes in the business department.

In late 2004, after I had been successfully employed at the University for almost three years, I decided to begin the process of transitioning from male to female. The administration was very accommodating, both in supportive words and in providing generous leave, which made my transition very easy. I spoke with the Campus Director, my Library Director, and the Vice President of Academic Affairs. All three were helpful, and promised to support me and help in creating a smooth transition. I was pleased, but not surprised, to find that this historically black university understood issues of diversity. With their encouragement, I took an extended vacation over the Christmas holiday to finalize my transition. When I returned, I conducted myself as a woman, professionally and properly dressed at all times, and afforded myself of the bathroom of my new gender. Things went extremely well, and I felt that success in both my professional life and my personal life.

I went to a professional conference in February 2005. When I returned, I was stunned to learn that a student had circulated a hate-filled petition calling for my removal from campus, and had posted offensive flyers around the campus. Various reasons were cited, but all were related to my transgender identity. I never saw the actual petition but there were over 100 copies circulated throughout the small campus building. I spoke with the Campus Director, and asked for his assistance in removing the offensive flyers. I was stunned to hear him say that the student had a right to freedom of speech, and that he could and would do nothing. In fact, when other students also complained about these hateful

flyers as being inappropriate, he went so far as to support the right of the students to pass out the flyers.

The very next day, the Campus Director issued a rule that all faculty and staff must use the bathrooms in the break room, at the other end of the building, and not the student bathrooms across the hall from the library. Surprised by this, I noticed that none of the other faculty were adhering to this policy. When I mentioned this to the Director, he told me that he could not control the actions of all faculty and staff, but that I would adhere to the policy or be disciplined.

The petition-circulating student, encouraged by the administration's failure to support me, circulated another petition, this one stating that God wished me dead, and expressing the hope that something to this effect should happen. I spoke to several high-level administrators, who I was sure would see reason at this point. Instead, they told me my concerns were unwarranted, and to stop causing drama. Then, suddenly and surprisingly, my teaching schedule for the summer was changed to the late-night 7:30-10:00 p.m. time slot. This meant I would be the last instructor to leave the building, and I would have to exit into an empty parking lot in a dangerous section of the city.

I decided to apply for a job at another college, even though it would require relocating. In May 2005, I left Langston University and accepted a position as Branch Head of the Architecture Library at Clemson University in South Carolina. Having to relocate was difficult because my mother was in a nursing home in Oklahoma and she passed away there before I could return to see her.

Had the administrators who were charged with my welfare stood up and supported me in the face of mean-spirited prejudice, I think I would have been able to stay and to prosper. When they failed to take decisive action, I was forced to choose between my safety, both emotional and physical, and my job.

Laura J. Doty of Boise, Idaho

I was hired in April 1997 as an Adult Probation Officer in Power County, Idaho. I was closeted except for my direct supervisor, who had no problem with my sexuality. It was a professional environment, and my peer reviews indicated I was respected and did a good job. I liked being able to help people overcome difficulties and improve themselves. I had letters of recommendation from the Prosecuting Attorney, a letter of recommendation from my direct supervisor, and positive reviews from a judge and the Public Defender.

In September of 1997, I ran into a co-worker from the county building at a store and introduced my partner to her. Two days later, the Power County Commissioners called me in and told me I was unhappy at work and I could quit or be fired. I said they would have to fire me.

After I was fired, I immediately called the Human Rights Commission in Boise, and they told me I had no basis to make a claim because sexual orientation is not a protected status. I was devastated because I considered myself a dedicated employee and hard worker. I cared about my probationers, and I worked very hard to help them succeed, whether in getting a GED or staying in a 12-step program.

My partner at the time was in graduate school, so we struggled financially after I lost the job.

Laura Elena Calvo of Portland, Oregon

From 1980 to 1996, I worked for the Josephine County Sheriff's Office in Grant's Pass, Oregon. At the end of my employment, I held the rank of Sergeant, although, during the course of my employment, I was promoted often and worked in a variety of capacities including as a S.W.A.T. team commander and a detective in both the Major Crimes Unit and the Narcotics Task Force.

During my 16 years at the Sheriff's Office, I received numerous commendations, including commendations for

removing an automobile accident victim from a burning vehicle, delivering a baby alongside a roadway, disarming an armed man intent on harming himself, and for the expertise and diligence shown in a number of complicated criminal cases. I was named Deputy of the Year in 1994, and I also taught law enforcement classes at Rogue Community College and at the Oregon Police Academy.

Apart from a distinguished employment record and career in law enforcement, from my earliest recollection at about age four, I felt I was very different than other boys. I would have preferred to be born female. In my late teens, I felt the need to express my female gender identity, and I began to cross-dress in private. In the day, this sort of thing was shameful, confusing and considered counter-social. I compartmentalized that part of my identity, keeping it a very well-kept secret. I went out of my way to be sure that, when I did express my gender identity, it was such that it was very unlikely it would be discovered. I rented a storage locker in another city and another county where I kept my cross-dressing items.

On Labor Day 1995, I was on duty in an extremely remote area of Josephine County searching for a fugitive when a police dog attacked me, penetrating the bones in my leg with its teeth. I suffered major blood and tissue loss, and my injuries required emergency surgery. After this incident, I was put on administrative leave until my leg could heal.

Roughly a month after this attack, the storage unit I rented in Medford, Oregon, was broken into and the contents stolen. I was notified of the theft and requested to file a police report. Since this storage unit contained only my female effects and belongings, I felt I could not report the crime because I would need to provide a list of the stolen property. I also assumed the items would never be recovered anyways.

However, within a week of the break-in, my immediate supervisor called me into the Sheriff's Office for a meeting. Instead of an office, I was brought into one of our interrogation rooms where I was informed that the Medford

Police Department had recovered my stolen property alongside some railroad tracks. I was told that I was personally identified from very personal intimate pictures contained within the property and that these pictures had been seen by both Medford County and Josephine County officers.

I was told by my supervisor that the Sheriff felt that I would no longer be able to perform my duties because of the fact I had been discovered to dress as a woman and that it would be a big mistake to try to come back to work.

In the spring of 1996 after my leg had healed, I was ordered to travel to Portland for a psychiatric determination for fitness of duty. I went before a panel of doctors, selected by the Sheriff's Office, who determined I was not fit to return to work. I was informed that the Sheriff, in conjunction with the County's Risk Manager and Attorney, were in the process of putting together a settlement offer in return for my resignation.

The direct impact of the discrimination I experienced has been devastating on so many levels. I don't have a college degree or any other skills except law enforcement. I tried working as a school bus driver and driving a senior citizen bus, but found the work unrewarding. I contacted attorneys, but they said I had no legal protections. Had employment non-discrimination laws been in effect, I likely would have continued serving the citizens of Josephine County to this day.

Shawn Wooten of Jonesboro, Georgia

In February of 2001, I started working as school bus coordinator for the Henry County School District in McDonough, Georgia. I was always considered one of the best drivers during my six years of employment.

In 2006, another employee found a personal ad I had posted six years previously on a gay dating site. She printed it and distributed it at one of the high schools. In June of 2006, as soon as word got out that I was gay, I was fired.

When I pressed for a reason, I was told that it was "in the best interests of the school system" and that I knew the answer.

I complained to board of education members but got no response. I also contacted Atlanta Legal Aid and tried to find an attorney to take my case, but I was told Georgia was a right-to-work state and I had no legal protection.

I applied for school bus coordinator jobs in other districts, but, every time, after expressing initial interest, the school district refused to hire me. I believe that word got around from Henry County that I was gay. I was unemployed for two years. I have Lupus, and I am constantly in need of medical attention, but couldn't get it because my insurance was canceled when I was terminated.

Nerissa Belcher of Douglasville, GA

In September 2005, I moved to Georgia and applied for a job as a Disease Investigator with the Fulton County Health Department in Atlanta, Georgia.

I had originally applied for the job with a male name, but, by the time they called me back, I had legally changed my name, and so I started work as Nerissa.

The first month or so with the Health Department went very well. I did well in the training, and I had highest testing scores of all disease investigators trained by my mentor. However, the supervisor of the Department was very uncomfortable with my transition.

The supervisor tried to make my life miserable at work and forbid me from using the female restroom. I complained to Human Resources, but my private conversation with them was related to my supervisor without my consent. In February 2006, I was fired without cause.

When I was fired, I lost my ability to be financially self-sufficient and to provide assistance to my children. It was also frustrating because I was extremely well-qualified

for my job and was replaced by a medically untrained Parks Department employee.

Johnny Woodnal of Concord, Massachusetts

I was hired in the spring of 2002 to teach English at a public high school in Medford, Massachusetts. Medford appealed to me initially because it is a fairly urban district with a lot of diversity and a need for talented teachers (the turnover rate is quite high). I loved everything about teaching, and all of my formal observations were written up in a positive light.

During the spring of my first school year, one year after my hire, the school became aware of my sexual orientation when my partner (now husband) directed the school musical with me. I was the only openly gay teacher on staff at the high school at the time.

In 2005, I was told I would not be receiving tenure during the final month of my tenure year (year three). When no actual proof could be offered as validation for why my teaching was so bad they did not want to continue my employment, I pressed for answers. I was told by the superintendent that I shouldn't be known for my "activities outside the classroom," which everyone involved took to mean that I should have been quiet about my sexual orientation rather than open in dealing with a high school community.

I pursued action with my union, including legal action, but was told that discrimination could be difficult to prove. The district only backed down and gave me tenure after students and parents expressed their outrage. Even after the community forced the administration to back down and give me tenure, they found other ways to harass me, continually beating me down professionally and robbing my self-esteem. I am still in therapy now, nearly five years later, in relation in part to the experience.

My husband and I now have two children, and they are our entire world. When our daughter came to our family,

I knew that I needed to leave the hostile environment in order to protect my family. So, in 2007, I got a new job with a district outside of the city, serving a much more heterogeneous and wealthy population. I don't feel quite as needed as I did by the lower socio-economic groups of Medford.

Camille Hopkins of Portland, Oregon

I was hired in 1987 as a planner for the City of Buffalo in upstate New York. My job offered me an opportunity to improve the quality of life for poor residents of Buffalo. I was good at and enjoyed making a difference in people's lives.

In August 2001, I informed the Mayor of Buffalo that I was a transgender woman and was hoping he would support my transition in the workplace. At this time, I had been working for the City of Buffalo for over fifteen years and had developed a method of improving a Federal program that assists poor HIV+ individuals and persons with AIDS from becoming homeless. My management method impacted more HIV+ people than ever before. As a result of my work and initiative, I received a county-wide civic award.

However, not long after my transition, I was demoted. I was heartbroken to be removed from the program I had worked so hard to develop. For the previous fifteen years (as a male), I never had difficulty in the workplace. However, after my transition in September 2002, I received unwarranted criticism of my work and hostility in the workplace.

On a "casual" Friday in July 2007, I wore a gay pride t-shirt to work. Later that day, I was informed by the Director of Labor Relations that someone in my department was offended by my shirt. I was instructed to remove it or cover it. When I did not, I was charged with harassment and insubordination. At the informal hearing, the Legal Department offered to drop the charges if I signed a waiver stating I would never sue them for past grievances. I refused to sign. I was then informed they would in all likelihood

terminate me after the formal hearing to follow. This hearing was constantly postponed but the workplace hostilities continued.

This incident, as well as other workplace transphobic events, put pressure on me that I never had experienced before. I became anxious and nervous and had difficulty sleeping at night. My family doctor put me on medication to help. These conditions eventually affected the quality of my work. In August 2008, worn down by the stress, depression and fear of retaliation, I resigned. I filed grievances with the City of Buffalo Human Resource Department and the Commission on Citizen Rights as well as the New York State Division of Human Rights and the Federal EEO Commission, but all to no avail.

Nikki Fultz of Fort Wayne, Indiana

This is my fourth year teaching 5th grade at Adams Elementary, an inner city school in Fort Wayne, Indiana. I am out to everyone in my life but my students. All of my co-workers know about my sexual orientation and are very supportive, as is my principal.

Last year, my partner and I had a commitment ceremony, and I legally had my name changed. I had discussed with my principal whether it would be okay for me to come out to students, and she thought it would be fine. I was not planning on going into depth, obviously, but students knew my name changed.

However, my principal checked with our legal department, and they told her it would be inappropriate. I was told that, if I come out directly or even indirectly to students, I would be fired. After that, I was very nervous. Last year, some of my 5th grade students Googled my name and found out that I am the director of Fort Wayne's Pride Committee. Luckily, the principal did not find out this had occurred. I can't relax, though, because the same thing could happen this year. My partner, who now also teaches school in the same district, was actually fired for being out at a small

high school in northern Indiana, so we know the threat is very real.

It's also frustrating because, as teachers, we're encouraged to talk about our families at school. My partner and I are foster parents and are in the process of adopting a child, and so it's very strange not to be able to talk about the fact I have a family. I also want to be honest with my students so that they know I am not ashamed.

Rachel White of Los Angeles, California

I was hired as the Chief Deputy Director of the Department of Children and Family Services for Los Angeles County in March of 2002. I had over 100 direct and next-level subordinates. I liked being in service to children and families and thought the challenge of transforming a large government bureaucracy was exciting. In my time with the County, I was recognized for settling a large labor dispute without a strike or making ill-advised concessions, took a 10% cut in the Department's budget and still maintained services at preexisting levels, and made major progress in reducing the number of children in out-of-home care.

I told my Director in late-May, early-June of 2002 that I would be transitioning on the job from male to female. She was supportive and immediately assumed responsibility for transition planning throughout the County. The Board of Supervisors gave their verbal approval to my transition plan, HR was engaged, press releases were developed, and I wrote an article for the Department website's news section.

Three weeks after my transition plan was quietly put in place, my Director was fired. It is noteworthy that my Director was the only one who could fire me. The interim director assured me I could transition on the job, and the CAO assured me all was well; however, in September 2002, three weeks before my transition date at work, the interim director fired me without cause. I was told I was an "at will employee" and a political appointee. I was deeply hurt, shocked and professionally devastated. I found work again, but my income suffered and so did my self-esteem.

I filed an official complaint with the County and involved the Ombudsman, to no avail. I also sought legal advice, but ultimately decided that the suit wasn't worth the years of legal wrangling that it would entail and the damage it would cause to other employees in the Department.

The callousness of the County's actions was inexcusable and clearly was related to changing my gender identity.

William "Bart" Birdsall of Tampa, Florida

I was hired in 1997 as a teacher and then a school librarian and medial specialist for the School District of Hillsborough County in Tampa, Florida.

In July 2005, I was involved in protesting the dismantling of a gay pride book display at the local public library. I was quoted in the local paper saying that I was upset that the book display was prematurely taken down, both as a gay man and a school librarian.

The school superintendent was concerned that I was quoted in the paper and proceeded to have my behavior reviewed by the school district's Professional Standards Office. Professional Standards decided not to punish me for taking part in protests but warned me not to bring the issue into the workplace. I have always taken my work very seriously, and to have my professionalism called into question was hurtful and upsetting.

I continue to work as a school librarian and have always received satisfactory or outstanding marks on evaluations. I have lots of anger about the incident and my therapist says I show signs of post-traumatic stress.

Brianne Rivera of Hollywood, Florida

I was hired as a Technical Support Specialist for Broward College in August 2007. Computer repair is my passion, and I liked the job because I could use my technical knowledge and experience to troubleshoot computer

hardware and software on a daily basis. I also learned to like the social interaction between myself and the users whose computers I was repairing. I was given a letter stating that I was dependable, able to work independently and a skilled technician.

About two months prior to my firing from the college, I came out to my boss as a transgender lesbian. I told him that I was undergoing hormone therapy and that I would be transitioning on the job.

On Friday, March 27th, 2009, I was called on my day off and asked to come in to work for two hours in order to attend a technical staff meeting. As I was provided only four uniforms and I had worked the four previous days, my uniforms were in the washing machine. I informed my boss of this and said I would come in but that it would be in women's clothes (which up until this point I had not worn to work). He agreed that that was fine, so I left to attend the meeting.

When I arrived on campus, I started getting multiple hostile looks from faculty and staff, as they only knew me as a man. This made me feel uncomfortable and a bit scared. I called one of the other technicians who I was friendly with in order to meet up with him and have some safety by being around someone accepting. But, as soon as I started to explain what was happening, he hung up. This freaked me out, so I dialed my friend back multiple times, but he wouldn't pick up.

My boss was standing next to my friend when I was repeatedly calling, and he asked my friend who kept calling him so many times. My boss claimed that these calls were harassment, and so he moved me to another shift. Unfortunately, the new shift interfered with all of my support group, psychological therapy and speech therapy appointments. It was critical to the treatment of my gender identity disorder that I make these appointments; so I had to choose between my job with Broward College and continuing my transition.

Since the incident occurred, my finances have suffered dramatically, as I still am unemployed. Over the previous six years, I had saved over $14,000 to use towards my gender reassignment surgery. I've had to spend a lot of my savings, and, now, I may be forced to give up on transitioning altogether because soon I won't be able to afford my medications and doctors' visits.

Michael DiSchiavi of Brooklyn, New York

I was hired as a sixth grade English teacher at Dyker Heights I.S. 201 in 1998. I wasn't out at work, except to a few of my colleagues, but I knew there were rumors about my sexual orientation. Also, during my job interview the school's principal asked whether I was married or had a girlfriend, so she probably had her suspicions that I was gay.

I worked for a year and a half without incident. All of my work was fine, and my observation reports were all satisfactory. In April 2000, I was called into a meeting with the assistant principal. During the meeting, he said I was a very hard worker and very conscientious, and then proceeded to tell me I was not invited to return to teach the following year. I told him I was confused because I'd always received satisfactory ratings, to which he replied that I had "classroom management" issues. He said he would do me a favor and let me resign at the end of the school year, but, if I failed to do so, I would receive an unsatisfactory rating on my next report.

I reported this threat to my union rep, but he said it would be my word against theirs if I tried to fight back. Then, two days after my meeting with the assistant principal, my classroom was vandalized with "faggot" written across the chalkboard. At this point, I didn't have tenure, and the union wasn't prepared to back me up. Feeling that I lacked any other option, I resigned at the end of the school year.

Marlin Earl Bynum of Irving, Texas

I was originally hired in the summer of 2006 as a mathematics teacher for the Keller Learning Center, an alternative public high school in Keller, Texas. All of my

evaluations for the last three years have been "exceeds expectations," which is the highest rating one can receive. I have also been named teacher of the month. In 2008, I was asked to get qualified to teach special education, which I did, so I am now the special education teacher for our school.

Two years ago, I had a student ask me directly if I was gay, and I said yes. I was called into the assistant principal's office and warned not to disclose my sexual orientation to students. She warned me that I endanger myself and my job by being out.

In response to this, I wrote a letter explaining that I wouldn't hide being gay because I would not send the message to a student that it was something to be ashamed of. As a result, I had three students removed from my classroom because their parents were upset about my sexual orientation.

Another time, I mentioned to my assistant principal that I wanted to learn to dance Country and Western. She offered to teach me, and I said I needed to learn to lead and follow, as that is what gay men do when dancing. In response, she said, "Eww, Marlin," and immediately changed the subject. Also, last year, my request to have a diversity training was denied by the assistant principal.

These homophobic incidents have made me feel increasingly isolated. The more I try to be open at work about my sexual orientation, the more I am persecuted. I interact with my fellow teachers on a professional basis, but I have learned to keep personal life and interaction to a minimum because I realize now that it is too problematic to try and educate people about LGBT discrimination.

The remaining stories are summarized below:

- A transgender scientist was not hired by a Virginia state agency on account of her gender identity in 2006.

- A transgender electrician was not hired by at an Ohio state university on account of her gender identity in 2006.

- A lesbian Michigan state corrections officer was fired on account of her sexual orientation in 2007.
- A transgender editor in the Georgia legislative counsel's office was fired on account of her gender identity in 2007.
- A transgender applicant for a position in the Montana state attorney general's office was not hired on account of her gender identity in 2008.

- A lesbian California state corrections officer was subjected to a hostile work environment on account of her sexual orientation in 2008.
- A lesbian Virginia state corrections psychologist was subjected to a hostile work environment on account of her sexual orientation in 2008.
- A gay employee at a New Mexico state university was constructively discharged on account of his sexual orientation in 2008.
- An athletic trainer at a Virginia state military academy was subjected to a hostile work environment on account of her association with lesbian individuals in 2008.
- A transgender applicant for an analyst position at a Pennsylvania state agency was not hired on account of his gender identity in 2008.
- A gay employee was fired by a Virginia state museum on account of his sexual orientation in 2009.
- A Virginia state agency retaliated against an employee for supporting a claim of discrimination based on sexual orientation by a gay employee in 2009.
- A gay North Carolina county deputy planning director was fired on account of his sexual orientation in 1991.

- A gay firefighter at a Washington county fire district was subjected to a hostile work environment on account of his sexual orientation in 1996.
- A gay nurse at a Pennsylvania county adult day health services center was subjected to a hostile work environment on account of his sexual orientation in 1996.
- A gay employee at a Florida county clerk's office was subjected to a hostile work environment on account of his sexual orientation in 1997.
- A gay public school principal and a gay public school teacher in Indiana were subjected to a hostile work environment on account of their sexual orientation from 1997 to 2000.
- A lesbian firefighter in Florida was subjected to a hostile work environment on account of her sexual orientation in 2000.
- A transgender Florida city public works supervisor was fired on account of her gender identity in 2001.
- A gay public school teacher in Alabama was fired on account of his sexual orientation in 2002.
- A transgender New Hampshire county corrections officer was subjected to a hostile work environment on account of her gender identity from 2005 to 2007.
- A gay emergency medical technician was fired by a South Carolina county on account of his sexual orientation in 2006.
- A transgender nurse was fired by an Arizona county hospital on account of his gender identity in 2006.
- A transgender Illinois city chief naturalist was fired on account of her gender identity in 2006.
- A gay deputy sheriff in Utah was subjected to a hostile work environment on account of his sexual orientation in 2007.

- A lesbian applicant was not hired by a Maryland city police department on account of her sexual orientation in 2007.
- A lesbian public school teacher in Minnesota was subjected to a hostile work environment on account of her sexual orientation in 2007.
- A gay public school teacher in Virginia was subjected to a hostile work environment on account of his sexual orientation in 2007.

- Lesbian kitchen workers at a Missouri sheriff's office were fired on account of their sexual orientation in 2007.
- A gay police officer in Michigan was constructively discharged on account of his sexual orientation in 2008.
- A lesbian police officer in New York was subjected to a hostile work environment on account of her sexual orientation in 2008.
- Another lesbian police officer in New York was subjected to a hostile work environment on account of her sexual orientation in 2008.
- A transgender public school teacher in Nevada was fired on account of her gender identity in 2008.
- A perceived gay applicant for a public school teacher position in Missouri was not hired on account of his perceived sexual orientation in 2008.
- A lesbian public school teacher in Illinois was subjected to a hostile work environment on account of her sexual orientation in 2008.
- A gay applicant for a position in a Missouri county prosecutor's office was not hired on account of his sexual orientation in 2008.

- A lesbian California state corrections psychiatric technician was denied permission to accompany her partner to the hospital during an emergency in 2008.
- A gay public school administrator and a bisexual public school administrator in Kentucky were subjected to a hostile work environment and denied job-related funding and travel on account of their sexual orientation in 2008.
- A gay public school bus driver in New Jersey was subjected to a hostile work environment and fired on account of his sexual orientation in 2008.
- Lesbian public school bus drivers in California were subjected to a hostile work environment on account of their sexual orientation in 2008.
- A gay professor at an Illinois community college was subjected to a hostile work environment in 2008.
- Lesbian nurses at a California county health clinic were subjected to a hostile work environment on account of their sexual orientation in 2008.
- A lesbian public school teacher in Virginia was subjected to a hostile work environment on account of her sexual orientation in 2009.
- A lesbian public school teacher in Texas was subjected to a hostile work environment on account of her sexual orientation in 2009.
- A public school teacher in Texas was censored for expressing pro-LGBT viewpoints in 2009.
- A transgender public school teacher in New Jersey was censored from expressing pro-LGBT viewpoints in 2009.
- A lesbian Arizona city crime scene investigator was fired on account of her sexual orientation in 2009.

- A lesbian public school guidance counselor in Texas was subjected to a hostile work environment on account of her sexual orientation and censored from expressing pro-LGBT viewpoints in 2009.

Second, a partial survey of formal and informal advocacy on behalf of LGBT State and municipal employees reveals another 8 instances of irrational discrimination against LGBT State employees and another 15 instances of irrational discrimination against LGBT municipal employees. *See* Examples of Anti-LGBT Discrimination by State and Municipal Employers (enclosed).

Separate and apart from the 86 examples referenced above, 28 States discriminate against all of the LGBT employees in their workforce in the terms and conditions of their employment by refusing to extend dependent employment benefits to their same-sex domestic partners – health and pension benefits that are often critical to the well-being of the employee's family. *See* www.hrc.org/documents/Employment_Laws_and_ Policies.pdf. Significantly, of the States that have come to offer same-sex domestic partner benefits, several have done so only in response to litigation. *See, e.g., Alaska Civil Liberties Union v. Alaska*, 122 P.3d 781 (Alaska 2005); *Snetsinger v. Mont. Univ. Sys.*, 104 P.3d 445 (Mont. 2004); *Tanner v. Or. Health Scis. Univ.*, 971 P.2d 435 (Or. Ct. App. 1998); *Bedford v. N.H. Cmty. Technical College Sys.*, Nos. 04-E-229, 04-E-230, 2006 WL 1217283 (N.H. Super. Ct. May 3, 2006); *Levitt v. Bd. of N.M. Retiree Health Care Auth.*, No. CV-2007-01048 (N.M. Dist. Ct.) (settled).

In sum, even our cursory and limited investigation yielded numerous examples of discrimination by States and municipalities against their LGBT employees. All such evidence confirms a significant pattern of employment discrimination based on sexual orientation or gender identity by States and municipalities.

For the foregoing reasons, the ACLU submits that, in enacting ENDA, Congress would properly exercise its authority under Section 5 of the Fourteenth Amendment to abrogate the rights of States under the Eleventh Amendment.

Sincerely,

Matthew A. Coles
Director
ACLU LGBT & AIDS Project

Enclosures

AMERICAN CIVIL LIBERTIES
UNION FOUNDATION