WASHINGTON
LEGISLATIVE OFFICE

June 11, 2012

The Honorable Tom Harkin
Chairman, Senate Committee on Health, Education, Labor and Pensions
428 Senate Dirksen Office Building
Washington, D.C. 20510

The Honorable Michael B. Enzi
Ranking Member, Senate Committee on Health, Education, Labor and Pensions
428 Senate Dirksen Office Building
Washington, D.C. 20510

Re: ACLU Urges Support for the Employment Non-Discrimination Act (S. 811)

Dear Chairman Harkin and Ranking Member Enzi:

On behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with more than a half million members, countless additional activists and supporters, and fifty-three affiliates nationwide, we write to thank you for holding a hearing on the problem of workplace discrimination against those who are or perceived to be lesbian, gay, bisexual, or transgender (LGBT). The ACLU has long supported the Employment Non-Discrimination Act (ENDA) (S. 811) to address this problem. While we still support ENDA, we also support several strengthening modifications to the bill, as noted below, in light of recent legal and political developments. ENDA would prohibit employment discrimination based on sexual orientation and gender identity in most American workplaces. This critical and long overdue legislation will allow American workers who stand side-by-side at the workplace and contribute with equal measure in their jobs to also stand on the same equal footing under the law.

Congress needs to act to ensure that LGBT individuals have the same workplace protections that apply based on race, color, religion, sex, national origin, age, and disability. The reality remains that it is legal to fire or refuse to hire someone based on his or her sexual orientation in 29 states. Those who are transgender can be fired or denied employment solely based on their gender identity in 34 states. Such numbers demonstrate the need for the

AMERICAN CIVIL LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

LAURA W. MURPHY
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

federal government to expand employment non-discrimination protections to LGBT workers.

This view is shared by the overwhelming majority of the American public, including majorities of self-identified Democrats, Republicans, and independents. In addition, many large and small businesses – including many federal contractors – have already taken these steps on their own, and report that they have very few or no costs and actually reap longer-term benefits to their bottom lines (e.g. recruiting the best and brightest, minimizing turnover costs, increasing productivity, appeal to new markets, etc.). Nearly 90 percent of Fortune 500 companies have implemented non-discrimination policies including sexual orientation and over 45 percent have policies that include gender identity.

While such facts are encouraging, there are obvious gaps in the patchwork of state civil rights laws that leave many LGBT people vulnerable to employment discrimination based purely on who they are. In 2007, the ACLU released a report entitled *Working the Shadows: Ending Employment Discrimination for LGBT Americans*, which documented the stories of workers from across the country who have experienced workplace discrimination based on sexual orientation and gender identity. The following individuals were among those courageous enough to come forward and share their stories.

- Single mother **Jacinda Meyer** worked as a licensed insurance agent in Southern California. During her first nine months on the job, the company gave her positive feedback about her performance and a raise. But soon after her boss learned that she was a lesbian, she was fired. She later applied for a job with a "sister company" and after several interviews and personality and placement testing, they made her a verbal offer. The next day, she received a call rescinding the offer.

- Before transitioning from male to female, **Diane Schroer** was a decorated U.S. Army Special Forces officer who completed 450 parachute jumps into some of the world's most dangerous places during her 25 years of service. She was handpicked to head up a classified national security operation and briefed Vice President Cheney. After retiring from the military, she wanted to capitalize on her experience fighting terrorism and applied for a job with a large federal agency library in Washington, D.C., as a senior terrorism research analyst. She received an offer after the interview and accepted the position. Prior to starting work, Schroer invited her new boss to lunch to explain that she was transgender and would like to begin the job as a woman. The next day, the director called Schroer and rescinded the offer because she wasn't a "good fit."[1]

[1] In April 2009, as a result of litigation brought by the ACLU in 2005, a federal court awarded Schroer maximum damages of $491,190 for back pay, other financial losses and emotional pain and suffering after finding the library illegally discriminated against her because of her sex. While Schroer succeeded in her challenge using prohibitions on sex discrimination, her case does not negate the need for a federal law making clear that workplace discrimination against individuals based on sexual orientation or gender identity is illegal.

- **Thomas Bryant** worked for a temporary staffing agency in Indiana where he was viewed as a good employee and was responsible for training 50 new workers. Bryant, who was honest about the fact that he was gay when asked, had a co-worker who repeatedly made comments about "fags" in front of him. After complaints to his supervisor were ignored, Bryant complained to human resources. After a meeting with HR and the other employee, Bryant thought the problem was resolved. The next day, Bryant was fired.

- **Brooke Waits** worked as an inventory control manager for a cell phone vendor in Texas. Brooke's manager opened Waits' cell phone and saw a picture of Waits and her partner sharing a New Year's Eve kiss. The next day she was fired.

Proposed Change to Section 8(c) – Expanding the Reach of the DOMA

While the ACLU has been and remains strongly committed to the critical employment non-discrimination protections that ENDA would extend to LGBT individuals, there have been important legal and political developments in recent years that necessitate a need to modify several of ENDA's provisions. Section 8(c) of the bill would allow employers in states where same-sex couples can legally marry to treat married gay and lesbian employees as unmarried for purposes of employee benefits. While the discriminatory and unconstitutional Defense of Marriage Act (Public Law 104-199) remains binding on the federal government, this provision would extend DOMA's reach by providing companies that would otherwise be required under ENDA not to discriminate in employee benefits, with an ability to discriminate against their married gay and lesbian employees. When DOMA was passed by Congress and signed into law in 1996, gay and lesbian couples could not legally marry in any state, and it was not until 2000 that Vermont made national headlines with its civil unions law. Today, gay and lesbian couples can legally marry in six states – Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont – as well as in the District of Columbia. With last year's momentous legislative victory in New York extending the freedom to marry to lesbians and gay men, the number of Americans who enjoy this freedom jumped from nearly 16 million to 35 million. In 2012, the legislatures in Maryland and Washington passed freedom to marry bills that have not yet taken effect. In addition, to date, there have been five federal court decisions, including from the First Circuit Court of Appeals, that have declared DOMA unconstitutional.[2] As more states continue to move in the direction of extending the freedom to marry to gay and lesbian couples and the ongoing legal challenges work their way through the judicial process, Congress should not pass legislation that expands the reach of a discriminatory and unconstitutional law.

[2] See *Massachusetts v. Dep't of Health and Human Servs*., Nos. 10-2204, 10-2207, 10-2214, 2012 WL 1948017 (1st Cir. May 31, 2012); *Windsor v. United States*, No. 10 CIV. 8435 (BSJ), 2012 WL 2019716 (S.D.N.Y. June 6, 2012); *Dragovich v. Dep't of Treasury*, No. C 10-1564 (CW), 2012 WL 1909603 (N.D. Cal. May 24, 2012); *Golinski v. Office of Pers. Mgmt*., 824 F. Supp. 2d 968 (N.D. Cal. 2012); *Gill v. Office of Pers. Mgmt.*, 699 F. Supp. 2d 374 (D. Mass. 2010).

Proposed Change to Section 6 – Overly Broad Religious Exemption

In addition, Section 6 of the bill grants religious organizations a blanket exemption from ENDA. All organizations that are permitted to discriminate on the basis of religion under Sections 702(a) and 703(e)(2) of Title VII would be permitted to discriminate on the basis of sexual orientation and gender identity under ENDA. We believe this exemption is far too broad. First, it allows religious organizations to engage in employment discrimination that is far broader than preferring members of their own faith, which is the exemption granted to them under Title VII. The purpose of the Title VII exemption is to ensure a religious organization can require those who carry out its work to share its faith.[3] It is not a blank check for religious organizations to discriminate for any reason.[4] Section 6 of S. 811 would go even broader, and would provide a license for a religious organization to discriminate on the basis of sexual orientation or gender identity – for *any* reason, not just based on the organization's religious teachings. We believe that the existing Title VII exemption – which allows religious organizations the ability to restrict their hiring based on religion, but not to engage in race, sex, or national origin discrimination, for example, offers sufficient protection to religious organizations. There is no reason to adopt a different exemption for LGBT discrimination by those organizations.

Furthermore, although courts are supposed to grant exemptions under Section 702(a) of Title VII when it's clear the religious organization's purpose and character are primarily religious, in some instances, hospitals, children's homes, organizations serving the homeless, and newspapers have been considered eligible for the exemption. These institutions employ hundreds of thousands of workers and open their doors to serve the public. Many receive significant government funding and support, and the work they do is often far from a core religious function. We should not authorize public institutions that rely on government funding to discriminate against LGBT people. As ENDA moves through the legislative process, we urge that the overly broad religious exemption be appropriately narrowed, and the language expanding the reach of DOMA be eliminated entirely.

It is fundamentally unacceptable that in America in the year 2012 there are individuals who, when they go to work, are forced to deny their families and loved ones and hide who they are for

[3] This does not affect how churches select their ministers. As the Supreme Court recently held, churches may assert a "ministerial exception" in response to employment discrimination claims brought by their ministers. *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 710 (2012). The constitutionally mandated "ministerial exception" "ensures that the authority to select and control who will minister to the faithful–a matter strictly ecclesiastical–is the church's alone." *Id.* at 709 (internal quotation marks and citation omitted).

[4] When religious organizations have argued, for example, that Title VII's exemption should allow them to pay women less because of religious teachings about the appropriate roles of men and women, courts have not allowed Title VII's religious exemption to authorize otherwise impermissible sex discrimination. *E.g., EEOC v. Fremont Christian Sch.*, 781 F.2d 1362, 1365-67 (9th Cir. 1986).

fear of losing their livelihood. Particularly with unemployment numbers still so persistently high, it makes absolutely no sense to add otherwise talented, dedicated workers to the unemployment rolls, simply because they have the "wrong" sexual orientation or gender identity. By passing ENDA with appropriate modifications, Congress can help to ensure that everyone can enter and succeed in the workplace without regard to sexual orientation or gender identity.

We thank the Senate HELP Committee for holding a hearing on the serious problem of LGBT workplace discrimination, and we urge the Committee to move forward with an expeditious markup of the Employment Non-Discrimination Act (S. 811). If you have questions, please contact Ian Thompson at (202) 715-0837 or ithompson@dcaclu.org.

Sincerely,

Laura W. Murphy
Director, Washington Legislative Office

Ian S. Thompson
Legislative Representative

Cc: Members of the Senate HELP Committee