



November 6, 2013

**Re: ACLU Urges “NO” Vote on the Toomey Amendment to the
Employment Non-Discrimination Act (ENDA), S. 815**

Dear Senator:

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 urge you to vote NO on the Toomey Amendment to S. 815, the Employment Non-Discrimination Act. This amendment seeks to broaden an already overly broad religious exemption and could create dangerous precedent.

Section 6 of S. 815 — ENDA’s Current Religious Exemption

The ACLU has raised serious concerns about the scope of Section 6 of ENDA, the current religious exemption. This exemption, unprecedented in federal laws prohibiting employment discrimination, could provide religiously affiliated organizations — far beyond houses of worship — with a blank check to engage in employment discrimination against LGBT people. By comparison, under Title VII, which protects against employment discrimination on the basis of race, sex, religion, and national origin, houses of worship and religiously affiliated non-profits are granted an exemption from the prohibition on discrimination only on the basis of religion, allowing them to prefer members of their own faith in hiring. The existing Title VII exemption’s purpose is to permit a religious organization to require those who carry out its work to share its faith (and applies even when an employee’s work is not religious).¹ But, it is not a blank check for these non-profit organizations to discriminate for any reason such as, for example, on the basis of race or sex.² In 1964 and 1972, there were attempts to create

¹ This does not affect how religious institutions select their ministers. As the Supreme Court recently held, the “ministerial exemption,” which is grounded in the First Amendment, exempts religious institutions from all employment nondiscrimination laws when hiring people in ministerial positions — “ensur[ing] that the authority to select and control who will minister to the faithful — a matter strictly ecclesiastical — is the church’s alone.” *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 132 S. Ct. 694, 709–710 (2012) (internal quotation marks and citation omitted).

² 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).

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

OFFICERS AND DIRECTORS
SUSAN N. HERMAN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

ROBERT REMAR
TREASURER

such a blanket exemption from Title VII's protections for religious organizations and in each instance the exemption provided to these institutions was limited to hiring preferences based on religion.

ENDA's current exemption, thus, would depart from Title VII's limited exemption. Instead, it would allow these organizations to discriminate on the basis of sexual orientation and gender identity under ENDA — for *any* reason. It essentially says that LGBT discrimination is different — more legitimate — than discrimination against individuals based on their race or sex.

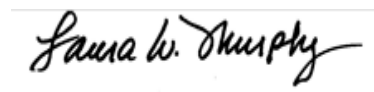
The Toomey Amendment — A Dangerous Expansion of the Religious Exemption

The Toomey Amendment would unnecessarily expand the types of organizations eligible for ENDA's religious exemption. For example, under this amendment, even for-profit companies could be allowed to discriminate against LGBT workers and applicants. Expanding this religious exemption to include for-profit corporations would dramatically diminish ENDA's protections and create an unacceptable, dangerous license to discriminate against LGBT people in federal civil rights law. Further, ENDA's current religious exemption uses the existing Title VII definition of religious organizations, which has been applied by courts in hundreds of cases. The Toomey Amendment, however, seeks to circumvent more than 40 years of settled law by creating new and untested definitions and uncertainty in the law. This language is unprecedented in *any* federal or state law that prohibits employment discrimination.

Finally, the Toomey Amendment would undermine core American values. Religious liberty guarantees us the freedom to hold any belief we choose and the right to act on our religious beliefs, unless those actions harm others or result in discrimination. This amendment would go too far and allow too many organizations, perhaps even including those whose primary purpose is profit, to discriminate against LGBT people. We urge a NO vote on the Toomey Amendment.

If you have questions, please contact Ian Thompson at (202) 715-0837 or ithompson@dcacclu.org.

Sincerely,



Laura W. Murphy
Director,
Washington Legislative Office



Ian S. Thompson
Legislative Representative



Dena Sher
Legislative Counsel