Chapter 2: Congressional Abrogation of State Sovereign Immunity under Section 5 of the 14th Amendment

This report provides documentation of a widespread and persistent pattern of unconstitutional discrimination by state employers on the basis of sexual orientation and gender identity. This documentation is required for Congress to properly abrogate state sovereign immunity and to allow state employees who have suffered discrimination a private right of action under the Employment Non-Discrimination Act (ENDA). The following chapters are organized around specific types of evidence that the United States Supreme Court has cited when considering other non-discrimination statutes and determining if a widespread pattern of unconstitutional discrimination by state governments exists.

This chapter summarizes the criteria that the Supreme Court will use in determining whether Congress has appropriately exercised its authority under Section 5 of the Fourteenth Amendment, the application of those criteria to ENDA, and the specific types of evidence it has deemed relevant for Congress to consider in determining whether a widespread pattern of unconstitutional discrimination by state governments exists.

I. Predicate Requirements

Congress has the power to abrogate state sovereign immunity in order to provide a private right of action for damages against States when it enacts anti-discrimination legislation pursuant to Section 5 of the Fourteenth Amendment.[1] However, the exercise

[1] *United States v. Georgia*, 546 U.S. 151 (2006); *Tennessee v. Lane*, 541 U.S. 509 (2004); *Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721 (2003).

of that power is not automatically valid. The Supreme Court has outlined a series of criteria under which it will assess whether Congress has overstepped its authority by creating liability for a large category of State conduct that is not unconstitutional.[2]

To draw the line between permissible and impermissible enactments, the Court has fashioned a multi-stage inquiry involving two threshold predicate requirements, the second of which triggers a series of subsidiary tests.[3] The essence of these tests is an assessment of whether the remedial legislation is congruent and proportional to the constitutional violation, or threat of violation, by the States. Relevant factors include the clarity of the violation, the existence of a widespread pattern of unconstitutional actions, and the degree to which the legislation under consideration is targeted to remedy or prevent the aspects of State conduct that are unconstitutional.

The Supreme Court has "recognized … that Congress may abrogate the States' Eleventh Amendment immunity when it both unequivocally intends to do so and 'act[s] pursuant to a valid grant of constitutional authority.'"[4] The unequivocal intention prong of this test is clearly met by Section 11(a) of HR 3017 (ENDA).[5] Thus for ENDA, as for other statutes in which Congress was similarly explicit,[6] the first predicate test is easily satisfied.

The determinative question for the Supreme Court in evaluating the validity of the abrogation clause in ENDA will be whether Congress was "acting pursuant to a valid

[2] *Bd. Of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356 (2001); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000).
[3] *Garrett*, 531 U.S. at 369-74; *Kimel*, 528 U.S. at 86-91.
[4] *Garret*, 531 U.S. at 363 (quoting *Kimel*, 528 U.S. at 73).
[5] Section 11(a) states: "Abrogation of State Immunity—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." Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 11(a) (2009).
[6] *See e.g.*, *Lane*, 541 U.S. at 518.

grant of constitutional authority." To answer this question, the Court has relied on the following considerations:

1. The scope of Congress' legislative authority in invoking Section 5;
2. The scope of the constitutional right at issue in the particular enactment;
3. Whether Congress has identified a history and pattern of unconstitutional action relevant to that enactment; and
4. Whether the remedy enacted by Congress is congruent and proportional to the targeted violation.

The first of these inquiries – the scope of Congressional authority to invoke Section 5 in order to create a remedy enforceable against the States – is the same regardless of the particular enactment in question. The assessments made as to the other three factors will vary depending on the legislative record compiled for each piece of legislation.

II. Scope of Congressional Authority under Section 5

In *City of Boerne v. Flores*,[7] the Supreme Court recognized that Section 5 authorizes Congress to adopt "[l]egislation which deters or remedies constitutional violations." In *Garrett*, the Court elaborated on this principle: "Congress is not limited to mere legislative repetition of this Court's constitutional jurisprudence."[8] Congress's explicit power under Section 5 "to enforce" Section 1 "includes the authority *both to remedy and to deter violations of rights* guaranteed [by the Constitution] by prohibiting a

[7] 521 U.S. 507, 518 (1997).
[8] *Garrett*, 531 U.S. at 365.

somewhat broader swath of conduct, including that which is not forbidden by the Amendment's own text."[9]

The Court has cautioned that Congress "may not enforce a constitutional right by changing what the right is."[10] However, Congress does "have a wide berth in devising appropriate remedial and preventive measures for unconstitutional actions."[11] Under the *deterrence* component of its authority, Congress has the power "to enact prophylactic legislation proscribing practices that are discriminatory in effect, if not in intent, to carry out the basic objectives of the Equal Protection Clause."[12]

When exercising its *remedial* authority to prohibit conduct by the States that clearly would constitute violation of a right protected under the Constitution, Congress's own constitutional capacity to act is unquestioned. Writing for a unanimous Court in the most recent Section 5 case, Justice Scalia noted that "[w]hile members of this Court have disagreed regarding the scope of Congress's 'prophylactic' enforcement powers…, no 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."[13]

The objective of prohibiting employment discrimination by the States based on sexual orientation or gender identity is well within the broad *scope* of Congress's Section 5 authority to remedy constitutional violations. Whether such legislation would in fact be a valid *exercise* of that authority depends on the answers to the remaining three questions, which address whether the record before Congress demonstrates that a pattern of such

[9] *Id*. (emphasis added).
[10] *City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).
[11] *Lane*, 541 U.S. at 520.
[12] *Id*.
[13] *United States v. Georgia*, 546 U.S. 151, 158 (2006) (emphasis in the original).

violations has occurred and is continuing to occur, and whether ENDA is properly structured, given the nature of those violations, to achieve its objective without unduly infringing on State sovereignty.

III. Constitutional Rights Needing Protection

The "first step" in ascertaining whether there is a valid exercise of authority is "to identify with some precision the scope of the constitutional right" that Congress is seeking to enforce.[14] With regard to ENDA, Congress must identify which constitutional rights protected by the Fourteenth Amendment justify legislation to end workplace discrimination based on sexual orientation and gender identity.

To a greater extent than for most civil rights bills, the constitutional rights in need of protection by ENDA are multi-faceted and multi-dimensional. ENDA is centrally designed to prohibit violations of the Equal Protection Clause. However, the facets of equal protection law implicated by ENDA include not only the characteristics that the bill enumerates – sexual orientation and gender identity – but also discrimination based on sex, especially the form of sex discrimination apparent in the gender stereotyping line of cases. The overlap between sex discrimination and ENDA is most strongly evident from the emerging judicial consensus that discrimination based on gender identity is itself a form of sex discrimination.[15]

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[14] *Garrett*, 531 U.S. at 365; *Lane*, 541 U.S. at 522.

[15] *See e.g., Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000) (finding that gender was a motivating factor in attack on a transsexual); *Higgins v. New Balance Shoe Co.*, 194 F.3d 252, 261 n.4 (1st Cir. 1999) (supporting the view that a male employee mocked for his stereotypically feminine characteristics could state a cause of action for sex discrimination under Title VII); *Schmedding v. Tnemec Co., Inc.*, 187 F.3d 862 (8th Cir. 1999) (reversing dismissal of Title VII sex discrimination claim where male employee had

In addition to the multiple sides of this one constitutional guarantee (the right to equal protection under law), the full dimensions of the constitutional protection provided by ENDA include two additional, independent guarantees – the right to due process of law and the expression rights ensured by the First Amendment.

The Supreme Court has ruled that LGBT Americans have a right to engage in intimate consensual sexual activity between adults.[16] Such conduct falls within the liberty protected by the Due Process Clause of the Fourteenth Amendment.[17] At the time *Lawrence* was decided, such activity had already been legalized in three-quarters of the states.[18] Long before *Lawrence*, courts had ruled that the federal government could not justify negative employment actions as based on the individual's "immorality" or participation in "immoral conduct."[19] Similarly, State governments may not penalize employees for engaging in homosexual conduct unrelated to job performance without violating rights protected under the Due Process Clause.

In addition, discriminatory employment practices against LGBT job applicants and employees have included questions about their sexual orientation and behaviors in violation of their privacy rights protected under the Due Process Clause. The constitutional right to privacy protects an individual's interest—" in avoiding disclosure of personal matters"— absent a compelling government interest.[20] The more intimate or

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been harassed in an effort to debase his masculinity); *Rosa v. Park West Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (reversing dismissal of claim of sex discrimination under Equal Credit Opportunity Act by male refused service because he was not dressed in masculine attire); *Glenn v. Brumby*, 2009 U.S. Dist. LEXIS 54768 (N.D. Ga. 2009); *Schroer v. Billington*, 577 F.Supp.2d 293 (D.C. Cir. 2008).

[16] *Lawrence v. Texas*, 539 U.S. 558 (2003).

[17] *Id*. at 578.

[18] *Id*. at 559.

[19] *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969).

[20] *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977).

personal the information, the more justified is the expectation that it will not be subject to public scrutiny.[21]

LGBT Americans also have the same entitlement as other Americans to the protections of the procedural component of the Due Process Clause. Most public sector employees are not subject to the employment-at-will doctrine, and cannot be fired at the whim of the employer. Rather, a government employee is entitled to notice of the proposed action and a meaningful opportunity to respond before a decision is rendered by an impartial decision-maker.[22] When the desire to accelerate or hush up the firing of gay and transgender employees corrupts the proper process for severance of an employee, the individual's procedural due process rights are violated.[23]

Lastly, the infringement of rights to expression and association has been central to discrimination based on sexual orientation and gender identity. Most clearly, state employees who speak out on issues of LGBT rights or associate with gay or transgender persons may not constitutionally be penalized by firing or other measures.[24] As long as 30 years ago, a state supreme court held that employees' "coming out" speech was protected by the First Amendment as political expression.[25] When a gay employee self-identifies, any punitive employment action by a state actor based on that speech inevitably implicates both First and Fourteenth Amendment issues.

The protection of each of these individual rights constitutes an independent constitutional ground for Congress to include within ENDA a private right of action for

[21] *Frat. Ord. of Police, Lodge 5 v. Philadelphia*, 812 F.2d 105, 112-113 (3d Cir.1987).
[22] *Cleveland Bd of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Perry v. Sindermann*, 408 U.S. 593 (1972); *Slochower v. Bd. of Educ., City of New York*, 350 U.S. 551, 555-56 (1956).
[23] *Cf. Goldberg v. Kelly*, 397 U.S. 254 (1970).
[24] *Pickering v. Board of Education*, 391 U.S. 563 (1968).
[25] *Gay Law Students Ass'n v. Pacific Tel. & Tel. Co.*, 595 P.2d 592 (Cal. 1979).

State government employees. The chapter on Constitutional Rights Violated by Employment Discrimination Based on Sexual Orientation or Gender Identity, *infra*, explicates in greater detail the analysis underlying the "variety of basic constitutional guarantees"[26] that require enactment of ENDA for their enforcement.

IV. History and Pattern of Unconstitutional Action by State Employers

The content of the legislative record will be central to judicial assessment of ENDA's abrogation of state sovereign immunity. Whether Congress validly exercises its Section 5 power in the effort to end employment discrimination by the States "is a question that 'must be judged with reference to the historical experience which it reflects.'"[27] Where Congress responds to a "history and pattern" of constitutional violations by States,[28] its power to enact prophylactic legislation is at its strongest. Of special concern is that the historical record documents a genuine pattern rather than isolated examples.[29]

The Supreme Court has recognized that Congress can take into account a variety of different types of evidence, including "judicial findings" and "statistical, legislative and anecdotal evidence" to determine whether a history and pattern of unconstitutional action exists when passing legislation to protect groups from discrimination.[30] These include:

[26] *Lane* 541 U.S. at 522.
[27] *Lane*, 541 U.S. at 523 (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966)).
[28] *Garrett*, 531 U.S. at 368.
[29] *Id*. at 370-71.
[30] *Lane*, 541 U.S. at 529 n.17, 529 (summarizing evidence considered by Court in *Hibbs*).

- The size of the population that Congress seeks to protect, to provide a context for considering the number of examples of discrimination;[31]
- The history of discrimination against the protected group by state governments, including state laws and policies that explicitly limited the employment opportunities of the protected group;[32]
- Findings by courts that widespread discrimination exists against the protected class;[33]
- Reports and findings by state governments documenting the prohibited discrimination;[34]
- Congressional findings of discrimination by state governments in the text of the statute being enacted;[35]
- Expressions of concern about discrimination by state governments in the legislative history of the statute, including findings in Committee Reports and statements and examples provided by individual members of Congress;[36]
- Testimony before Congress from the those who have suffered discriminatory treatment;[37]
- Statistical data[38] and surveys documenting discrimination, from government as well as non-government sources, including quantitative

[31] *Garrett*, 531 U.S. 356, 370.
[32] *Hibbs*, 538 U.S. at 729; *Lane*, 541 U.S. at 524 n. 7-9 and accompanying text.
[33] *Hibbs*, 538 U.S. 730 ("It can hardly be doubted that…women still face pervasive, although at times more subtle, discrimination in the job market."(citing *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973))).
[34] *Kimel*, 528 U.S. at 89.
[35] *Lane*, 541 U.S. at 529.
[36] *Lane*, 541 U.S. at 521-22; *Garrett*, 531 U.S. at 371; *Kimel*, 528 U.S. at 89.
[37] *Hibbs*, 538 U.S. at 731 n.4; *Lane*, 541 U.S. at 527, 529.

data showing disparities in employment benefits between the protected group and other employees;[39]

- 50-state surveys of discriminatory polices and practices;[40]
- Judicial findings of unconstitutional discrimination against the protected group,[41] both in the specific area protected by the legislation as well as in other contexts;[42]
- Specific examples of discrimination collected from a variety of sources,[43] including anecdotal accounts of discrimination not submitted directly to Congress;[44]
- Conclusions by experts based on data they have collected or reviewed and their experience; and[45]
- Analysis of the shortcoming of existing state laws and polices addressing the discrimination that Congress intends to remedy or prevent.[46]

In compiling this record, Congress may consider constitutional violations by non-state govermental actors as well. The Supreme Court has recognized "that evidence of constitutional violations on the part of non-state governmental actors is relevant to the § 5 inquiry,"[47] and has included within that zone of recognition evidence of discrimination by

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[38] *Lane*, 541 U.S. at 529.
[39] *Hibbs*, 538 U.S. at 730 (citing Bureau of Labor Statistics Data that more private-sector employees have maternity leave polices than paternity leave policies); *Lane*, 541 U.S. at 527 (citing report by the U.S. Civil Rights Commission for the percentage of public services and programs in state-owned buildings that are inaccessible to people with disabilities).
[40] *Hibbs*, 538 U.S. at 730 n.3.
[41] *Lane*, 541 U.S. at 529.
[42] *Lane*, 541 U.S. at 524-525 n. 10-14 and accompanying text.
[43] *Lane*, 541 U.S. at 526, 527.
[44] *Lane*, 541 U.S. at 529.
[45] *Hibbs*, 538 U.S. at 730 n.3, 731, 731 n. 4, 732.
[46] *Lane*, 541 U.S. at 526.
[47] *Lane*, 541 U.S. at 527 n.16.

the private sector, [48] federal employers,[49] and local government agencies.[50] Consideration of local government examples is warranted for many reasons. There is often great similarity in occupational categories between state and local government employers, and the patterns of discrimination – both historically and currently -- are accordingly similar. At least one state – Hawai'i - classifies schoolteachers as state employees.[51] And directly on point for Section 5 cases, many jobs with local government agencies have been found to be part of state government when courts have adjudicated disputes over immunity. The Ninth Circuit has ruled that under California law, local school districts are state agencies for purposes of Eleventh Amendment immunity.[52] Similarly, sheriffs employed at the county level are often treated as state employees for Eleventh Amendment purposes.[53]

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[48] *See, e.g., Hibbs*, 538 U.S. at 730 n.3 and accompanying text ("While this and other material described leave polices in the private sector, a 50 state survey also before Congress demonstrated that 'The proportion and construction of leave policies available to public sector employers differs little from those offered private sector employers.'"); *see also Lane*,541 U.S. 509. ; *Hibbs,* 538 U.S. at 745-746 (Kennedy, J., dissenting)(Congress's consideration of evidence of discrimination by private entities may be relevant for Section 5 analysis where discrimination in private sector is 'parallel' to discrimination by state governments.).

[49] *Hibbs,* 538 U.S. at 732 (relying on a study of federal employers to draw the conclusion that "where state law and policies were not facially discriminatory, they were applied in discriminatory ways."); *see also id*. at 748 (Kennedy, J., dissenting)("A history of discrimination on the part of the Federal government may, in some situations, support an inference of similar conduct by the States . . . ."); *Lane,* 541 U.S. at 527 n. 16 ("Moreover, what THE CHIEF JUSTICE calls an 'extensive legislative record documenting States' gender discrimination in employment leave policies'' in *Nevada Dep't of Human Resources v. Hibbs,* in fact contained little specific evidence of a pattern of unconstitutional discrimination on the part of the States. Indeed, the evidence before the Congress that enacted the FMLA related primarily to the practices of private sector employers and the Federal Government")(citation omitted).

[50] *See e.g*., *Lane*, 541 U.S. at 527("Congress itself heard testimony from person with disabilities who described the physical inaccessibility of *local* courthouses… And its appointed task force heard numerous examples of the exclusion of persons with disabilities from state judicial services and programs, including exclusion of persons with visual impairments and hearing impairments from jury service, failure of state and *local* governments to provide interpretive services for the hearing impaired, failure to permit the testimony of adults with developmental disabilities in abuse cases, and failure to make courtrooms accessible to witnesses with physical disabilities.") (emphasis added). *See also*, *id*. at 527 n. 16 ("[The] argument [in the dissent] relies 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…. [M]uch of the evidence in *South Carolina v. Katzenbach*, 383 U.S. 301, 312– 315 (1966), to which THE CHIEF JUSTICE favorably refers … involved the conduct of county and city officials, rather than the States.").

[51] Hawaii Department of Education, Introduction, Organization, http://doe.k12.hi.us/about/intro_org.htm.

[52] *Belanger v. Madera Unif. Sch. Dist.*, 936 F.2d 248, 253 (9thCir. 1992).

[53] *Manders v. Lee*, 338 F.3d 1304, 1328 (11th Cir. 2003) (en banc) (county sheriff in Georgia "is an arm of the State, not Clinch County, in establishing use-of-force policy at the jail and in training and disciplining

In the face of persistent discrimination, the existence of other laws already protecting against the same evils does not detract from Congressional authority.[54] As the data contained in this report demonstrate, State laws and the general Section 1983 cause of action have been insufficient to solve the problem of widespread violations of the constitutional rights of gay and transgender State employees. When Congress is "confront[ing] a 'difficult and intractable proble[m],' where previous legislative attempts had failed,"[55] Congress is within its constitutional authority to adopt "added prophylactic measures" to address the problem.[56]

V. Whether ENDA is Congruent and Proportional to the Targeted Violations

The Court has required that Congress calibrate its response to the nature and extent of the constitutional violations by State actors that it has documented. The more serious, widespread and persistent the constitutional violations are, the more flexibility Congress has under Section 5 in fashioning legislation to prohibit them. But especially when Congress enacts prophylactic legislation – "prohibit[ing] conduct which is not itself unconstitutional" – "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end."[57]

In *Garrett*, for example, the Court found that the Americans with Disabilities Act (ADA) swept too broadly both in scope and in remedy. Using the rational basis test

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his deputies in that regard"); *Lancaster v. Monroe County*, 116 F.3d 1419, 1429 (11th Cir. 1997) (county jailers in Alabama "are state officials entitled to Eleventh Amendment immunity when sued in their official capacities"); *see also Cromer v. Brown*, 88 F.3d 1315, 1332 (4th Cir. 1996) (sheriffs in South Carolina are arms of the State); *Wilkerson v. Hester*, 114 F. Supp. 2d 446, 464-465 (W.D.N.C. 2000) (sheriffs in North Carolina are arms of the State).

[54] *City of Boerne*, 521 U.S. at 526.

[55] *Hibbs*, 538 U.S. at 737 (2003) (citation omitted),

[56] Id. at 731.

[57] *Lane*, 541 U.S. at 518, 520.

applied to discrimination based on disability, the Court found that the States, acting as employers, could constitutionally choose to prefer hiring persons who would not require workplace alterations, in order to achieve a legitimate interest in conserving financial resources.[58] The Court found that the ADA's remedies included extensive accommodation requirements, of the sort not required under Equal Protection law.[59] In *Hibbs*, by contrast, the Court ruled that the Family Medical Leave Act narrowly targeted the fault line – work-family balance issues – where extensive gender stereotyping had occurred.[60]

ENDA's remedies are less extensive than those in other anti-discrimination laws, in large part because the bill explicitly disallows disparate impact claims,[61] and prohibits "preferential treatment" and quotas.[62] Further, it explicitly does not require the construction of new or additional facilities by employers,[63] the treatment of unmarried couples as married couples for purposes of employment benefits,[64] or the collection of statistics on actual or perceived sexual orientation or gender identity.[65] As a result, ENDA's intervention in workforce management – including State government employment practices – is narrowly limited to prohibiting the kinds of facially discriminatory actions that are the most flagrantly unconstitutional.

With regard to money damages, ENDA provides for the same caps that exist in Title VII and to which the States as employers are already subject.[66] It does not provide

[58] *Garrett*, 531 U.S. at 372-73.
[59] *Id*.
[60] *Hibbs*, 538 U.S. at 736-737.
[61] Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 4(g) (2009).
[62] *Id*. at § 4(f).
[63] *Id*. at § 8(a)(4).
[64] *Id*. at § 8(b).
[65] *Id*. at § 9.
[66] *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

for punitive damages in suits against state employers.[67] Finally, it requires state employees to exhaust all administrative remedies before bringing an action for money damages in court and that such complaints be filed in a timely manner.[68]

Conclusion

In a series of cases, the Supreme Court has developed a roadmap to guide Congressional acts, taken in the exercise of Congress's authority under Section 5 of the Fourteenth Amendment, that abrogate the sovereign immunity of the States. Under this set of criteria, Congress must develop a substantial record documenting the nature and extent of the constitutional violations that it is seeking to remedy and deter. In the next chapter, we elaborate in greater detail on how the constitutional standards described *supra* should be applied to ENDA. The remaining chapters of this report provide more than sufficient documentation of constitutional violations to satisfy the criteria established by the Court in its Section 5 jurisprudence.

[67] Employment Non-Discrimination Act, H.R. 3017, 111th Cong. § 11(d)(1) (2009).
[68] *Id*. at §§ 10, 10(b); Title VII of the Civil Rights Act of 1964 § 706, 42 U.S.C. §§ 2000e *et seq.* (1964), *amended by* The Civil Rights Act of 1991, 42 U.S.C. § 1981a.