Nos. 17-1618, 17-1623, 18-107

In the Supreme Court of the United States

GERALD LYNN BOSTOCK, *Petitioner,*

v.

CLAYTON COUNTY, GEORGIA, *Respondent*.

ALTITUDE EXPRESS, INC., *et al.*, *Petitioners,*

v.

MELISSA ZARDA, *et al.*, *Respondents*.

R.G. & G.R. HARRIS FUNERAL HOMES, INC., *Petitioner,*

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al.*, *Respondents*.

On Writs of Certiorari to the United States Courts of Appeals for the Eleventh, Second, and Sixth Circuits

BRIEF OF 206 BUSINESSES AS *AMICI CURIAE* IN SUPPORT OF THE EMPLOYEES

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INTEREST OF *AMICI CURIAE*[1]

The 206 businesses that join this brief as *amici* collectively employ over 7 million employees, and comprise over $5 trillion in revenue. These businesses—which range across a wide variety of industries (and some of which are even competitors)—share a common interest in equality because they know that ending discrimination in the workplace is good for business, employees, and the U.S. economy as a whole. These businesses are committed to creating workplaces that afford lesbian, gay, bisexual and transgender ("LGBT") employees the opportunity to earn a living, excel in their professions, and provide for their families free from fear of unequal treatment. *Amici* support the principle that no one should be passed over for a job, paid less, fired, or subjected to harassment or any other form of discrimination based on their sexual orientation or gender identity. *Amici*'s commitment to equality is violated when any employee is treated unequally because of their sexual orientation or gender identity. When workplaces are free from discrimination against LGBT employees, everyone can do their best work, with substantial benefits for both employers and employees.

The 206 businesses joining this brief, also listed in the attached Appendix, are:

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no one other than *amici* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

- 1010data
- 3 Percent Movement, Inc.
- 98point6 Inc.
- Accenture
- Adobe Inc.
- AdRoll Group
- Advance
- Advance Local
- Airbnb, Inc.
- Akamai Technologies, Inc.
- AllianceBernstein
- Amalgamated Bank
- Amazon.com, Inc.
- American Airlines
- American City Business Journals
- American Express
- American International Group, Inc.
- Amyris, Inc.
- ANGI Homeservices Inc.
- Apple
- Aramark
- Asana, Inc.
- ASCAP – American Society of Composers, Authors and Publishers
- Ascena Retail Group, Inc.
- AT&T Services, Inc.
- Atlassian
- AXA Equitable Life Insurance Company
- Bank of America
- BASF Corporation
- Bayer US LLC
- Ben & Jerry's Homemade, Inc.
- Best Buy Co., Inc.
- Betterment
- BlackRock, Inc.
- Bloomberg L.P.
- BNP Paribas USA, Inc.
- BNY Mellon
- Boehringer Ingelheim USA
- Boston Scientific Corporation
- Broadcast Music, Inc.

- Brown-Forman Corporation
- Brownstein Group
- Caldwell Partners Executive Search
- Caven Enterprises
- CBS Corporation
- Celo Labs Inc.
- Chobani Global Holdings, LLC
- Chubb
- Cigna
- Cisco Systems, Inc.
- Citigroup Inc.
- Citrix
- Clockwork
- CNO Financial Group
- The Coca-Cola Company
- Comcast NBCUniversal
- Condé Nast
- Corning Incorporated
- COTA, Inc.
- Couchbase, Inc.
- Cox Enterprises, Inc.
- CSAA Insurance Group
- Cummins Inc.
- CVS Health
- Danaher Corporation
- Danone North America, PBC
- Deloitte
- Deutsche Bank
- Diageo North America, Inc.
- Domino's
- DoorDash, Inc.
- Dow, Inc.
- Dropbox, Inc.
- DTCC
- Eastern Bank
- eBay Inc.
- Edelman
- Electric Imp, Inc.
- Ernst & Young LLP
- The Estée Lauder Companies Inc.
- Etsy, Inc.
- Evolent Health LLC
- Exelon Corporation

- Expedia Group
- Facebook, Inc.
- Fastly, Inc.
- Genentech, Inc.
- General Assembly
- General Motors
- Gilead Sciences
- Glassdoor, Inc.
- GlaxoSmithKline LLC
- The Goldman Sachs Group, Inc.
- Google LLC
- Grant Thornton LLP
- Greenhouse Software, Inc.
- GSBA
- Gucci
- Gusto
- The Hartford
- HERE Technologies
- Hilton
- HP Inc.
- HSBC Bank USA, N.A.
- IAC/InterActiveCorp
- IBM Corporation
- ICM Partners
- IHS Markit
- IKEA North America Services, LLC
- Indiegogo, Inc.
- Ingersoll Rand
- Ingram Micro Inc.
- Insala, LLC
- International LGBTQ+ Travel Association
- Intuit Inc.
- Invesco, Ltd.
- John Hancock
- JPMorgan Chase & Co.
- Kering Americas, Inc.
- Kickstarter, PBC
- KIND Healthy Snacks
- Levi Strauss & Co.
- Linden Research, Inc. d/b/a Linden Lab
- LinkedIn Corporation
- Lord Abbett
- Lush Fresh Handmade Cosmetics
- Lyft, Inc.

- Macy's, Inc.
- Mallinckrodt plc
- Mapbox
- Marriott International, Inc.
- Marsh & McLennan Companies, Inc.
- MassMutual
- Mastercard International Incorporated
- Match Group, Inc.
- MGM Resorts International
- Michelin North America, Inc.
- Microsoft Corporation
- Mitchell Gold + Bob Williams
- Moody's Corporation
- Morgan Stanley
- Mozilla Corporation
- New York Life
- NIKE, Inc.
- Nokia of America Corporation
- Northrop Grumman Corporation
- Nuance Communications, Inc.
- Ogilvy
- PayPal, Inc.
- Peloton
- Pfizer Inc.
- Pinterest, Inc.
- Pivotal
- PricewaterhouseCoopers LLP
- Principal
- The Procter & Gamble Company
- Prudential Financial, Inc.
- Publicis Groupe
- Pure Storage, Inc.
- Quantcast Corp.
- Replacements, Ltd.
- Rockwell Automation, Inc.
- Rowdies Soccer LLC d/b/a Tampa Bay Rowdies
- Royal Bank of Canada
- Runtime Collective Limited (d/b/a Brandwatch)

- S&P Global Inc.
- salesforce.com, inc.
- San Francisco Giants
- Southwest Airlines Co.
- Starbucks Corporation
- State Farm Mutual Automobile Insurance Company
- Sun Life U.S.
- Sunrun Inc.
- T-Mobile USA, Inc.
- T. Rowe Price
- Takeda Pharmaceuticals USA, Inc.
- Tampa Bay Rays
- Tapestry, Inc.
- Tech Data Corporation
- Thermo Fisher Scientific Inc.
- Thumbtack, Inc.
- TNTP, Inc.
- TPG Global
- Trillium Asset Management LLC
- Turnitin
- Turo Inc.
- Uber Technologies, Inc.
- Ultimate Software
- Ultragenyx Pharmaceutical Inc.
- Under Armour, Inc.
- Univision Communications Inc.
- User Testing, Inc.
- Viacom Inc.
- ViiV Healthcare Company
- Vimeo, Inc.
- The Walt Disney Company
- WarnerMedia LLC
- Wells Fargo & Company
- Williams-Sonoma, Inc.
- Workday, Inc.
- Wyndham Hotels & Resorts, Inc.
- Xerox Corporation
- Xylem Inc.
- YSC Consulting
- Zillow Group, Inc.
- Zume, Inc.

SUMMARY OF ARGUMENT

Interpreting Title VII of the Civil Rights Act of 1964 to exclude sexual orientation or gender identity from protections against sex discrimination would have wide-ranging, negative consequences for businesses, their employees and the U.S. economy. Businesses' first-hand experiences—supported by extensive social-science and economic research—confirm the significant costs for employers and employees when sexual orientation and gender identity discrimination are not forbidden by a uniform law, even where other policies exist against such discrimination. Our nation's employers and employees would benefit from this Court's recognition that members of the nation's large and productive LGBT workforce are protected from such sex-based discrimination in the workplace.

Laws forbidding sexual orientation or gender identity discrimination are not unreasonably costly or burdensome for business. To the contrary, recognizing that Title VII prohibits these forms of sex discrimination would strengthen and expand benefits to businesses, such as the ability to recruit and retain top talent; to generate innovative ideas by drawing on a greater breadth of perspectives, characteristics, and experiences; to attract and better serve a diverse customer base; and to increase productivity among employees who experience their workplace as a place where they are valued and respected.

Businesses and their employees all benefit from the consistency and predictability that uniform federal law provides nationwide. Removing sexual orientation and gender identity discrimination from Title VII's scope means that employees and their

families may be unprotected from such discrimination based on nothing more than where they happen to live, work, or travel to for their jobs. Even where companies voluntarily implement policies to prohibit sexual orientation or gender identity discrimination, such policies are not a substitute for the force of law. Nor is the patchwork of incomplete state or local laws sufficient protection—for example, they cannot account for the cross-state mobility requirements of the modern workforce. Only a uniform federal rule can enable businesses to recruit and retain, and employees to perform, at their highest levels.

Accordingly, the 206 businesses joining this brief respectfully urge this Court to recognize that Title VII's prohibition on discrimination "because of … sex" includes the prohibition of sexual orientation and gender identity discrimination.

ARGUMENT

I. EXCLUDING SEXUAL ORIENTATION AND GENDER IDENTITY FROM TITLE VII'S PROTECTION AGAINST SEX DISCRIMINATION WOULD UNDERMINE THE NATION'S BUSINESS INTERESTS

Amici are businesses in wide-ranging sectors of the national and local economy and are committed to building workplaces that value diversity, inclusion, and equality. The U.S. economy is strengthened when *all* employees are protected from discrimination in the workplace based on sexual orientation or gender identity. The failure to recognize that Title VII protects LGBT workers would hinder the ability of businesses to compete in all corners of the nation, and would harm the U.S. economy as a whole.

A. The U.S. Economy Benefits From A Diverse Workforce

Diversity is a key factor in U.S. businesses' ability to compete and succeed in the modern global economy. Including diverse viewpoints in the workforce brings unique backgrounds and experiences to the table, which fosters creativity and innovation and makes businesses more competitive in the local, national and global economy.[2] Diversity has been found to "unlock[] innovation by creating an environment where 'outside the box' ideas are heard."[3] LGBT individuals come from all backgrounds, offer insights drawn from every walk of life, and bring unique and valuable perspectives on these experiences.

A diverse and inclusive workforce likewise furthers businesses' ability to connect with consumers, particularly given that the buying power of diverse groups has increased substantially over the past 30 years.[4] In 2015, the buying power of LGBT people in the United States stood at over $900 billion.[5] In

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[2] See Jon Miller & Lucy Parker, *Open For Business: The Economic and Business Case for Global LGB&T Inclusion* 28 (2015), https://tinyurl.com/y4cq7awe ("Researchers have found a close correlation between economic development and LGB&T inclusion.").

[3] Sylvia Ann Hewlett, et al., *How Diversity Can Drive Innovation*, HARV. BUS. REV. 30, 30 (Dec. 2013).

[4] Alison Kenney Paul, et al., *Diversity as an Engine of Innovation: Retail and Consumer Goods Companies Find Competitive Advantage in Diversity*, 8 DELOITTE REV. 108, 111 (2011), https://tinyurl.com/ya8nb3rd.

[5] See Witeck Communications, *America's LGBT 2015 Buying Power Estimated at $917 Billion* (July 20, 2016), (footnote continued)

"matching the market," businesses succeed by including diverse employees who "are better attuned to the unmet needs of consumers or clients like themselves," and "their insight is critical to identifying and addressing new market opportunities."[6]

LGBT-inclusive workplaces result in stronger work performance by *all* employees. When LGBT employees feel safe to be themselves in the workplace, "everybody's productivity is enhanced, including straight and nontransgender colleagues."[7] In a survey of the top 50 companies in the Fortune 500 and the top 50 federal government contractors, for example, the overwhelming majority of the top-performing, most innovative companies connect policies prohibiting sexual orientation and gender identity discrimination with a better bottom line.[8]

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https://tinyurl.com/y6qy6zfh ("The combined buying power of the U.S. lesbian, gay, bisexual and transgender (LGBT) adult population for 2015 is estimated at $917 billion[.]").

[6] Sylvia Ann Hewlett, et al., *Innovation, Diversity, and Market Growth*, CTR. FOR TALENT INNOVATION 4 (2013), https://tinyurl.com/htpyqra.

[7] Crosby Burns, *The Costly Business of Discrimination*, CTR. FOR AM. PROGRESS 34 (2012), https://tinyurl.com/j2r8wtu.

[8] Brad Sears & Christy Mallory, *Economic Motives for Adopting LGBT-Related Workplace Policies*, THE WILLIAMS INST. 2 (Oct. 2011), https://tinyurl.com/yd5g6sha (surveying top 50 Fortune 500 companies (2010) and top 50 federal government contractors (2009)). In addition, as of 2019, 85% of Fortune 500 companies include gender identity in their non-discrimination policies. Human Rights Campaign Foundation, *Corporate Equality Index 2019* 5-6 (Mar. 2019), https://tinyurl.com/y48l45cj.

Recent studies confirm that companies with LGBT-inclusive workplaces also have better financial outcomes.[9] This superior performance extends beyond the walls of the company itself to the larger community in which the company operates; as multiple studies have found, the level of inclusiveness of LGBT employees is strongly correlated with a jurisdiction's "wealth, prospects for economic investment, and ability to recruit talent."[10] Recognizing that Title VII protects LGBT employees would benefit individual businesses, and the economy as a whole, by removing an artificial barrier to the recruitment, retention and free flow of talent.

B. Excluding Sexual Orientation And Gender Identity From Title VII's Prohibition On Sex Discrimination Would Undermine Diverse And Inclusive Workplaces

Employment discrimination based on sexual orientation or gender identity is widespread and has significant, harmful effects on employers, employees, and the bottom line. As of 2017, more than 11 million adults in the United States (4.5% of all adults)

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[9] See, *e.g.*, Credit Suisse ESG Research, *LGBT: The Value of Diversity* 1 (2016), https://tinyurl.com/ybwhjqe8 (finding that 270 companies that supported and embraced LGBT employees outperformed the market by 3% per annum).

[10] Lauren Box, Note, *It's Not Personal, It's Just Business: The Economic Impact of LGBT Legislation*, 48 IND. L. REV. 995, 995-96 (2015) (citing multiple studies, noting that "[w]hile LGBT inclusiveness is not the only factor contributing to a state's economic vitality, it plays a key role in helping states progress in the economic development race").

identified as LGBT.[11] By any measure, the LGBT segment of the U.S. workforce represents a significant number of both public- and private-sector employees. Businesses draw on and benefit from the contributions of LGBT workers at all levels and across industries.

Courts have acknowledged the long history of sexual orientation and gender identity discrimination in the workplace. See, *e.g.*, *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 484-85 (9th Cir. 2014) ("for most of the history of this country, being openly gay resulted in significant discrimination," including "in employment"); *Bd. of Educ. of the Highland Local Sch. Dist. v. U.S. Dep't of Educ.*, 208 F. Supp. 3d 850, 874 (S.D. Ohio 2016) ("there is not much doubt that transgender people have historically been subject to discrimination including in … employment"); *Roberts v. United Parcel Serv., Inc.*, 115 F. Supp. 3d 344, 361-62 (E.D.N.Y. 2015) (surveying empirical literature on workplace discrimination against LGBT employees). There is also significant

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[11] Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%*, GALLUP (May 22, 2018), https://tinyurl.com/y8cp2c3l (noting increase from 4.1% in 2016 and 3.5% in 2012); see also Daniel Trotta, *Some 4.5 percent of U.S. adults identify as LGBT: study*, REUTERS (Mar. 5, 2019), https://tinyurl.com/y42hhmxb (roughly 11.3 million adults identify as LGBT); Gary J. Gates, *Adult LGBT Population in the United States*, THE WILLIAMS INST. (Mar. 2019), https://tinyurl.com/y5hemhl9 (estimating more than 11.3 million LGBT adults in the U.S., approximately 4.5%, based on 2017 data).

evidence that such discrimination continues.[12] For example:

- *Sexual orientation*. One analysis estimates that over 25% of all lesbian, gay and bisexual respondents had experienced sexual orientation discrimination (such as harassment and wage discrimination) at the workplace in the previous five years—a figure that rose to 42% when expanded to cover their entire working lives.[13] In addition, nearly one in ten out gay,

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[12] See, *e.g.*, Human Rights Campaign Foundation, *A Workplace Divided: Understanding the Climate for LGBTQ Workers Nationwide* 6 (June 2018), https://tinyurl.com/ycy6coo4 (national survey finding that one in five LGBT respondents had been told or had coworkers imply they should dress in more feminine or masculine ways, compared to one in twenty-four non-LGBT workers); Jennifer C. Pizer, et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 720-22 (2012). Such evidence has also been offered to Congress in legislative hearings. See *Equality at Work: The Employment Non-Discrimination Act: Examining Equality at Work, Including S. 811, To Prohibit Employment Discrimination on the Basis of Sexual Orientation or Gender Identity Before the S. Comm. on Health, Educ., Labor, and Pensions*, 112th Cong., 2d Sess. 8-10 (2012) (statement of M.V. Lee Badgett, Research Director, The Williams Institute), https://tinyurl.com/ycqk6ntb (describing evidence of continuing discrimination in sources such as: (1) official complaints filed in states that prohibit such conduct; (2) controlled experiments to measure the treatment of LGBT job applicants; (3) comparisons of wages earned by LGBT employees and their heterosexual peers; and (4) self-reported experiences).

[13] Brad Sears & Christy Mallory, *Documented Evidence of Employment Discrimination & Its Effects on LGBT People*, THE WILLIAMS INST. 4 (July 2011), https://tinyurl.com/ld8w42w; *id.* at 1-2 (prior work documenting discrimination against LGBT

(footnote continued)

lesbian, or bisexual respondents reported losing a job due to sexual orientation discrimination in the previous five years.[14]

- *Gender identity*. As of 2011, 78% of transgender respondents reported experiencing at least one form of harassment or mistreatment at work because of their gender identity, and 47% had been discriminated against in hiring, promotion, or job retention.[15] And a 2015 national study found that: (1) 27% of transgender persons reported not being hired, being denied a promotion, or being fired in the past year because of their gender identity or expression; and (2) 15% reported being verbally harassed, physically attacked, and/or sexually assaulted at work in the past year because of their transgender status.[16]

Rates of discrimination were higher for LGBT persons who did not hide their sexual orientation or gender identity at work, with harassment being the most common reported form of discrimination.[17] And

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persons has drawn data from "field studies, controlled experiments, academic journals, court cases, state and local administrative complaints, complaints to community-based organizations, and in newspapers, books, and other media").

[14] Sears & Mallory, *supra* note 13, at 5.

[15] Sears & Mallory, *supra* note 13, at 2.

[16] Sandy E. James, et al., Nat'l Ctr. for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* 151, 153 (Dec. 2016), https://tinyurl.com/yaop2spp.

[17] Sears & Mallory, *supra* note 13, at 4-5; see also Pew Research Center, *A Survey of LGBT Americans: Attitudes, Experiences and Values in Changing Times* 42 (June 2013), (footnote continued)

such discrimination is not hidden—up to 30% of heterosexual respondents reported having witnessed anti-gay discrimination at the workplace.[18]

Amici recognize that employees are essential to businesses' success and are, in many ways, their most valuable assets. Accordingly, *amici* are strong proponents of anti-discrimination laws and policies for LGBT employees, which are linked to higher morale and productivity. Sexual orientation and gender identity discrimination—even the mere *risk* of such discrimination—impedes productivity by instilling unnecessary anxiety in employees and creating a culture that suffocates openness.[19] In the absence of full protection from such discrimination, LGBT employees may seek to protect themselves by hiding who they are—a practice linked by substantial research to poorer workplace performance and increased health risks.[20]

Hiding one's sexual orientation or gender identity is an understandable response to the fact that persons who are out in the workplace are more likely to experience discrimination than their closeted

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https://tinyurl.com/y4s3efds (21% of LGBT persons report unequal treatment by their employer).

[18] Pizer, et al., *supra* note 12, at 727.

[19] M.V. Lee Badgett, et al., *The Business Impact of LGBT-Supportive Workplace Policies*, THE WILLIAMS INST. 26 (May 2013), https://tinyurl.com/y7mtb6um.

[20] See Badgett, *supra* note 19, at 6, 26; see also Burns, *supra* note 7, at 33 ("Gay and transgender employees who are out at work are 20 to 30% more productive than their closeted counterparts."); Pizer, et al., *supra* note 12, at 735-37.

peers.[21] A 2018 survey found that 46% of LGBT employees reported not being open at work about their sexual orientation or gender identity.[22] Fear of discrimination has also been shown to exact a significant toll on employees—manifesting in, among other things, negative attitudes toward one's career; increased stress; difficulty trusting coworkers and superiors; and experiences of isolation, frustration, anxiety, depression and low self-esteem.[23]

LGBT employees cannot perform effectively when they are subject to the ever-present possibility of discrimination. Productivity decreases when workplaces are unwelcoming or hostile to LGBT workers—these workers, for example, report spending time looking for other jobs, feeling exhausted from expending energy to hide their identities, staying home from work, and being distracted due to a negative environment.[24]

"Laws are perhaps the strongest of social structures that uphold and enforce stigma,"[25] and excluding a class of persons from legal protections against sex discrimination that otherwise protect everyone

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[21] See Sears & Mallory, *supra* note 13, at 1.

[22] Human Rights Campaign Foundation, *supra* note 12, at 6.

[23] Pizer, et al., *supra* note 12, at 736-37, 740-41.

[24] See Human Rights Campaign Foundation, *supra* note 12, at 7, 15 (significant percentage of LGBT respondents indicated that working in unwelcoming environments led to distraction at work, lying about personal lives, exhaustion, avoiding special work events and specific co-workers, staying home from work, depression, and searching for a new job).

[25] *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 974 (N.D. Cal. 2010).

sends a strong message in the workplace. Excluding sexual orientation and gender identity from sex discrimination protections has a stigmatizing effect on LGBT employees, resulting in negative consequences for employee health and productivity.[26] For example, while 10% of LGBT employees reported finding a new job to escape a workplace that was not accepting, 25% of LGBT employees reported staying in a job *specifically because* it offered an inclusive, safe workplace.[27]

The failure to uniformly recognize discrimination against LGBT persons as inherently sex-based and properly covered by Title VII takes a heavy toll on businesses' bottom lines and, in the aggregate, hurts

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[26] See, *e.g.*, Craig R. Waldo, *Working in a Majority Context: A Structural Model of Heterosexism as Minority Stress in the Workplace*, 46 J. COUNSELING PSYCHOL. 218, 229 (1999) (finding LGB people who experienced sexual orientation discrimination exhibited higher levels of health-related problems); Mark L. Hatzenbuehler, et al., *Stigma as a Fundamental Cause of Population Health Inequalities,* 103 AM. J. PUB. HEALTH 813, 816 (2013) (noting the corrosive impact of stigma on physical and mental health, social relationships, and self-esteem); Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCHOL. BULL. 674, 679-85 (2003) (summarizing empirical evidence of "minority stress" in LGB populations and health consequences); Vickie M. Mays & Susan D. Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 91 AM. J. PUB. HEALTH 1869, 1874 (2001) (finding "robust association between experiences of discrimination and indicators of psychiatric morbidity" and noting that "social factors, such as discrimination against gay individuals, function as important risk factors for psychiatric morbidity").

[27] Human Rights Campaign Foundation, *supra* note 12, at 7.

economic growth. The U.S. economy could save as much as $8.9 billion by protecting and welcoming LGBT employees in the workplace—more than any other country.[28] One study, for example, concluded that businesses in one state "risk[ed] losing $8,800 on average for *each* LGBT employee that leaves the state or changes jobs because of the negative environment."[29] Such costs can be significantly higher depending on the job.[30]

II. UNIFORM FEDERAL PROTECTIONS AGAINST SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION ARE NECESSARY TO PROVIDE BUSINESSES AND EMPLOYEES WITH CONSISTENCY AND CERTAINTY

Title VII's nationwide, established sex discrimination prohibition provides uniquely powerful guidance, certainty and safety to those within its ambit. For years, many businesses have operated under the expectation that Title VII prohibits sexual orientation and gender identity discrimination without incurring oppressive costs or burdens.[31] This Court's

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[28] Ian Johnson & Darren Cooper, Out Now Global LGBT 2020 Study, *LGBT Diversity: Show Me the Business Case* 5, 47 (Feb. 2, 2015), https://tinyurl.com/yaput4mn.

[29] Christy Mallory & Brad Sears, *Discrimination, Diversity, and Development: The Legal and Economic Implications of North Carolina's HB2*, THE WILLIAMS INST. 2 (May 2016) (emphasis added), https://tinyurl.com/y6wpzoj3.

[30] See Burns, *supra* note 7, at 10 (assessing replacement costs as between $75,000 and $211,000 for an executive with $100,000 salary).

[31] The Equal Employment Opportunity Commission, for example, has enforced Title VII as prohibiting sexual orienta-

(footnote continued)

confirmation that Title VII prohibits sexual orientation and gender identity discrimination would *benefit* businesses and their employees across the nation, above and beyond any local, state or private efforts.

Businesses and their employees benefit from the clarity, predictability, reliability and efficiency that comes from the uniform application of federal law. Without Title VII's guarantees, however, employees may receive little or no protection from sexual orientation or gender identity discrimination, based entirely upon the city and state where they happen to live, fostering uncertainty and inconsistency for employers and employees alike.

For example, while 22 states and the District of Columbia have enacted provisions prohibiting sexual orientation and/or gender identity discrimination in private employment,[32] 28 states offer neither; thus, it is estimated that 44% of the nation's LGBT pop-

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tion and gender identity discrimination. See *Baldwin v. Foxx*, 2015 WL 4397641 at *5 (E.E.O.C. July 15, 2015) (sexual orientation); *Macy v. Holder*, 2012 WL 1435995, at *1 (E.E.O.C Apr. 20, 2012) (gender identity).

[32] Cal. Gov't Code § 12940; Colo. Rev. Stat. §§ 2-4-401, 24-34-402; Conn. Gen. Stat. §§ 46a-60, 46a-81c; Del. Code Ann. tit. 19, § 711; Haw. Rev. Stat. § 378-2; 775 Ill. Comp. Stat. Ann. 5/1-103; Iowa Code § 216.6; Me. Rev. Stat Ann. tit. 5, §§ 4553, 4571; Md. Code Ann., State Gov't § 20-606; Mass. Gen. Laws ch. 151B, § 4; Minn. Stat. §§ 363A.03, 363A.08; Nev. Rev. Stat. § 613.330; N.H. Rev. Stat. Ann. § 354-A:7; N.J. Stat. Ann. §§ 10:5-4, 10:5-12; N.M. Stat. Ann. § 28-1-7; N.Y. Exec. Law § 296; Or. Rev. Stat. §§ 174.100, 659A.030; R.I. Gen. Laws § 28-5-7; Utah Code Ann. § 34A-5-106; Vt. Stat. Ann. tit. 21, § 495; Wash. Rev. Code §§ 49.60.030, 49.60.040, 49.60.180; Wis. Stat. § 111.36 (sexual orientation only); D.C. Code § 2-1402.11.

ulation lives in states that do not prohibit sexual orientation or gender identity discrimination in the workplace.[33] Moreover, state and local laws can differ in important ways from the established protections under Title VII.[34] Although legal protections against sexual orientation and gender identity discrimination continue to evolve, they often remain under-inclusive or nonexistent at state and local levels.[35]

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[33] See *Equality Maps: State Non-Discrimination Laws*, MOVEMENT ADVANCEMENT PROJECT (current as of June 30 2019), https://tinyurl.com/ph36ql7.

[34] "For example, some state laws do not allow for recovery of punitive damages at all, or they impose caps that are lower than those under Title VII." Sandra F. Sperino, *The New Calculus of Punitive Damages for Employment Discrimination Cases*, 62 OKLA. L. REV. 701, 716 & n.96 (2010) (collecting examples of states with more restrictive punitive damages provisions).

[35] Even where state or local laws exist against sexual orientation or gender identity discrimination, they do not always provide the same level of protection as Title VII. For example, unlike Title VII, the state anti-discrimination statutes of Delaware, Vermont, and Washington do not prohibit discrimination based on *perceived* sexual orientation. See, *e.g.*, *Capek v. BNY Mellon, N.A.*, 2016 WL 2993211, at *3 (S.D.N.Y. May 23, 2016) (recognizing and agreeing with "the weight of authority in other circuit and district courts, which hold that claims of discrimination based on a mistaken 'perception' are cognizable" under Title VII and collecting authority, including 2006 EEOC Compliance Manual); EEOC, COMPLIANCE MANUAL § 15-II (2006) ("Discrimination against an individual based on a perception of his or her race violates Title VII even if that perception is wrong."); EEOC, *Employment Discrimination Based on Religion, Ethnicity, or Country of Origin*, https://tinyurl.com/y7fwz8sj (noting that Title VII prohibits

(footnote continued)

To be sure, many companies have voluntarily implemented their own policies to prohibit discrimination based on sexual orientation or gender identity. While *amici* laud those efforts, voluntary company initiatives are not a substitute for the force of law. Employees who are protected under a company's policy, but unprotected by federal law, are left without full legal recourse or the same assurances that their colleagues protected by Title VII enjoy.

This uncertainty and vulnerability subjects LGBT employees to unnecessary anxiety and impedes productivity, harming workers and businesses. Empirical research confirms that anti-discrimination laws make a difference: Sexual orientation discrimination tends to be higher in jurisdictions without non-discrimination laws.[36] In addition, workplace discrimination tends to decrease in response to legal rules against it.[37]

"discriminating because of the perception or belief that a person is a member of a particular" group).

[36] *See* András Tilcsik, *Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States*, 117 AM. J. SOC. 586, 614-15 (2011).

[37] See Laura G. Barron & Michelle Hebl, *The Force of Law: The Effects of Sexual Orientation Antidiscrimination Legislation on Interpersonal Discrimination in Employment*, 19 PSYCHOL. PUB. POL'Y L. 191, 198, 200-02 (2013) (summarizing studies finding that antidiscrimination laws reduce discrimination against LGBT individuals by employers, "even after controlling for those community variables shown to affect both the adoption of antidiscrimination laws and prejudice in the absence of legislation"); Luke A. Boso, *Acting Gay, Acting Straight: Sexual Orientation Stereotyping*, 83 TENN. L. REV. 575, 603 (2016) ("[S]tudies have shown that sexual orientation

(footnote continued)

As a practical matter, excluding sexual orientation and gender identity from Title VII's scope would leave LGBT employees and their families vulnerable to employment discrimination and economic disruption because such employees are guaranteed legal protection only by (at best) a patchwork of inconsistent, under-inclusive or nonexistent state and local laws. The uncertainty and vulnerability LGBT workers face results in diminished employee health, productivity, job engagement and satisfaction.[38] LGBT employees risk losing the right to be free from discrimination merely because they transfer from one jurisdiction to another.

Even where a business voluntarily implements its own anti-discrimination policies based on sexual orientation and gender identity, those policies do not guarantee the same protections to employees' family members who may work for businesses that do not offer such protections.[39] Thus, family members of

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inclusive anti-discrimination laws and policies significantly decrease reports of discrimination in the workplace.").

[38] See Sears & Mallory, *supra* note 13, at 15-16.

[39] As of June 2017, there were nearly 1.1 million people in a same-sex marriage in the United States, and an estimated 1 million cohabiting same-sex couples. Adam P. Romero, *1.1 Million LGBT Adults Are Married to Someone of the Same Sex at the Two-Year Anniversary of* Obergefell v. Hodges, THE WILLIAMS INST. 1 (June 23, 2017), https://tinyurl.com/y5y6f97u; Jeffrey M. Jones & Gary J. Gates, *Same-Sex Marriages Up After Supreme Court Ruling*, GALLUP (Nov. 5, 2015), https://tinyurl.com/ydgazdcd; Gary J. Gates & Frank Newport, *An Estimated 780,000 Americans in Same-Sex Marriages*, GALLUP (Apr. 24, 2015), https://tinyurl.com/y9pryqbs. More than 1 in 4 married same-sex couples are raising children. Gary J. Gates & Taylor N. T. Brown, *Marriage and Same-Sex*

(footnote continued)

LGBT employees could face discrimination by taking a job in or transferring to a state or city without adequate nondiscrimination laws.

As a result, companies conducting business in places that offer lesser or no protections for sexual orientation or gender identity discrimination are at a disadvantage in recruiting from the most diverse pool of employees for operations in those jurisdictions, harming their ability to perform and compete. *Amici*'s LGBT employees (and employees who prefer to work in a community that does not tolerate discrimination) are less willing to move to or work in locations where such discrimination is permitted, undermining businesses' ability to organize a workforce without regard for such arbitrary legal barriers. In this way, excluding sexual orientation and gender identity from Title VII's sex discrimination protections undermines businesses' efforts to recruit, organize and retain talent.

Even when an employee accepts a job in a state that has enacted some form of protection, uncer-

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Couples after Obergefell, THE WILLIAMS INST. 4 (Nov. 2015), https://tinyurl.com/y6ut343k. In addition, estimates based on aggregated data from 2014 to 2016 indicate that 16.2% of all same-sex couples are raising children, with higher rates of childrearing among same-sex married couples. Shoshana K. Goldberg & Keith J. Conron, *How Many Same-Sex Couples in the U.S. are Raising Children?*, THE WILLIAMS INST. 1 (July 2018), https://tinyurl.com/y3z9dhnm; see also Gary J. Gates, *Marriage and Family: LGBT Individuals and Same-Sex Couples*, 25 FUTURE OF CHILDREN 67, 67 (Fall 2015), https://tinyurl.com/y5at5zeo ("Though estimates vary, as many as 2 million to 3.7 million U.S. children under age 18 may have a lesbian, gay, bisexual, or transgender parent, and about 200,000 are being raised by same-sex couples.").

tainty may still persist. For example, in *amici*'s experience, it is increasingly common for employees to work across state borders. One source reports that U.S. workers took over 460 million business trips in 2018.[40] Employees may travel to other states to meet with clients or to work with colleagues in other locations. Employees also often live in one state, but work in another.[41] Ensuring that uniform nondiscrimination protections travel with employees who cross state lines for work is essential to allowing businesses to recruit and retain employees.

Amici are committed to equal treatment and equal opportunity of employees regardless of sexual orientation and gender identity. But *amici* cannot create equality in the workplace by themselves; Title VII plays a crucial role in cultivating workplaces that uniformly and predictably embody equality.[42] By confirming that sexual orientation and gender identity discrimination are prohibited under Title VII, this Court would remove an artificial barrier that restricts the free flow of resources, ideas and capital. Because businesses benefit from clear, administrable rules and a diverse workforce free from discrimination, this Court should hold that Title VII's ban on employment discrimination "because of … sex" pro-

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[40] U.S. Travel Ass'n, *U.S. Travel Answer Sheet* (2019), https://tinyurl.com/y68brrxq.

[41] For example, in 2016, 43% of U.S. workers reported spending at least some time working remotely. Niraj Chokshi, *Out of the Office: More People Are Working Remotely, Survey Finds*, N.Y. TIMES (Feb. 15, 2017).

[42] See Barron & Hebl, *supra* note 37, at 192-202; Boso, *supra* note 37, at 603.

hibits discrimination on the basis of sexual orientation and gender identity.

CONCLUSION

Amici respectfully urge this Court to rule in favor of the employees by affirming the judgments in Nos. 17-1623 and 18-107, and reversing the judgment in No. 17-1618.

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July 3, 2019

APPENDIX

The businesses* that join this brief are:

1. 1010data
2. 3 Percent Movement, Inc.
3. 98point6 Inc.
4. Accenture
5. Adobe Inc.*
6. AdRoll Group
7. Advance
8. Advance Local
9. Airbnb, Inc.
10. Akamai Technologies, Inc.
11. AllianceBernstein
12. Amalgamated Bank*
13. Amazon.com, Inc.*
14. American Airlines
15. American City Business Journals
16. American Express
17. American International Group, Inc.
18. Amyris, Inc.
19. ANGI Homeservices Inc.
20. Apple*

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* Denotes *amici curiae* represented by Robinson Curley P.C. † Denotes *amici curiae* represented by Taylor & Cohen LLP. All other *amici curiae* are represented by Quinn Emanuel Urquhart & Sullivan, LLP.

21. Aramark
22. Asana, Inc.
23. ASCAP – American Society of Composers, Authors and Publishers
24. Ascena Retail Group, Inc.
25. AT&T Services, Inc.†
26. Atlassian
27. AXA Equitable Life Insurance Company
28. Bank of America*
29. BASF Corporation
30. Bayer US LLC*
31. Ben & Jerry's Homemade, Inc.*
32. Best Buy Co., Inc.*
33. Betterment
34. BlackRock, Inc.
35. Bloomberg L.P.†
36. BNP Paribas USA, Inc.*
37. BNY Mellon*
38. Boehringer Ingelheim USA†
39. Boston Scientific Corporation
40. Broadcast Music, Inc.
41. Brown-Forman Corporation
42. Brownstein Group†
43. Caldwell Partners Executive Search
44. Caven Enterprises
45. CBS Corporation*
46. Celo Labs Inc.

47. Chobani Global Holdings, LLC
48. Chubb*
49. Cigna*
50. Cisco Systems, Inc.
51. Citigroup Inc.*
52. Citrix
53. Clockwork
54. CNO Financial Group
55. The Coca-Cola Company
56. Comcast NBCUniversal
57. Condé Nast
58. Corning Incorporated*
59. COTA, Inc.
60. Couchbase, Inc.
61. Cox Enterprises, Inc.
62. CSAA Insurance Group
63. Cummins Inc.*
64. CVS Health*
65. Danaher Corporation*
66. Danone North America, PBC†
67. Deloitte†
68. Deutsche Bank*
69. Diageo North America, Inc.
70. Domino's
71. DoorDash, Inc.
72. Dow, Inc.*
73. Dropbox, Inc.

74. DTCC
75. Eastern Bank
76. eBay Inc.
77. Edelman
78. Electric Imp, Inc.
79. Ernst & Young LLP*
80. The Estée Lauder Companies Inc.
81. Etsy, Inc.†
82. Evolent Health LLC
83. Exelon Corporation
84. Expedia Group
85. Facebook, Inc.*
86. Fastly, Inc.
87. Genentech, Inc.*
88. General Assembly
89. General Motors†
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92. GlaxoSmithKline LLC
93. The Goldman Sachs Group, Inc.*
94. Google LLC
95. Grant Thornton LLP*
96. Greenhouse Software, Inc.
97. GSBA
98. Gucci
99. Gusto
100. The Hartford*

101. HERE Technologies
102. Hilton*
103. HP Inc.*
104. HSBC Bank USA, N.A.*
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106. IBM Corporation
107. ICM Partners
108. IHS Markit
109. IKEA North America Services, LLC*
110. Indiegogo, Inc.
111. Ingersoll Rand†
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113. Insala, LLC
114. International LGBTQ+ Travel Association
115. Intuit Inc.
116. Invesco, Ltd.*
117. John Hancock
118. JPMorgan Chase & Co.†
119. Kering Americas, Inc.†
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121. KIND Healthy Snacks†
122. Levi Strauss & Co.
123. Linden Research, Inc. d/b/a Linden Lab
124. LinkedIn Corporation*
125. Lord Abbett
126. Lush Fresh Handmade Cosmetics
127. Lyft, Inc.

128. Macy's, Inc.
129. Mallinckrodt plc
130. Mapbox
131. Marriott International, Inc.
132. Marsh & McLennan Companies, Inc.†
133. MassMutual
134. Mastercard International Incorporated†
135. Match Group, Inc.
136. MGM Resorts International*
137. Michelin North America, Inc.*
138. Microsoft Corporation*
139. Mitchell Gold + Bob Williams
140. Moody's Corporation
141. Morgan Stanley
142. Mozilla Corporation
143. New York Life
144. NIKE, Inc.
145. Nokia of America Corporation*
146. Northrop Grumman Corporation
147. Nuance Communications, Inc.*
148. Ogilvy
149. PayPal, Inc.
150. Peloton
151. Pfizer Inc.
152. Pinterest, Inc.
153. Pivotal
154. PricewaterhouseCoopers LLP*

155. Principal
156. The Procter & Gamble Company*
157. Prudential Financial, Inc.*
158. Publicis Groupe†
159. Pure Storage, Inc.
160. Quantcast Corp.
161. Replacements, Ltd.
162. Rockwell Automation, Inc.†
163. Rowdies Soccer LLC d/b/a Tampa Bay Rowdies†
164. Royal Bank of Canada*
165. Runtime Collective Limited (d/b/a Brandwatch)
166. S&P Global Inc.*
167. salesforce.com, inc.
168. San Francisco Giants*
169. Southwest Airlines Co.†
170. Starbucks Corporation
171. State Farm Mutual Automobile Insurance Company
172. Sun Life U.S.*
173. Sunrun Inc.
174. T-Mobile USA, Inc.†
175. T. Rowe Price†
176. Takeda Pharmaceuticals USA, Inc.*
177. Tampa Bay Rays*
178. Tapestry, Inc.
179. Tech Data Corporation*
180. Thermo Fisher Scientific Inc.

181. Thumbtack, Inc.
182. TNTP, Inc.
183. TPG Global
184. Trillium Asset Management LLC
185. Turnitin
186. Turo Inc.
187. Uber Technologies, Inc.*
188. Ultimate Software
189. Ultragenyx Pharmaceutical Inc.
190. Under Armour, Inc.*
191. Univision Communications Inc.†
192. User Testing, Inc.
193. Viacom Inc.
194. ViiV Healthcare Company
195. Vimeo, Inc.
196. The Walt Disney Company*
197. WarnerMedia LLC†
198. Wells Fargo & Company*
199. Williams-Sonoma, Inc.†
200. Workday, Inc.
201. Wyndham Hotels & Resorts, Inc.†
202. Xerox Corporation
203. Xylem Inc.
204. YSC Consulting
205. Zillow Group, Inc.
206. Zume, Inc.