

No. 17-370

IN THE
Supreme Court of the United States

JAMEKA K. EVANS,

Petitioner,

v.

GEORGIA REGIONAL HOSPITAL, *et al.*,

Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit**

**MOTION FOR LEAVE TO FILE BRIEF AS
AMICI CURIAE AND BRIEF OF 76 BUSINESSES
AND ORGANIZATIONS AS *AMICI CURIAE* IN
SUPPORT OF PETITIONER**

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October 10, 2017

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**MOTION FOR LEAVE TO FILE BRIEF AS
*AMICI CURIAE***

Under Rule 37.2 of the Rules of this Court, the undersigned businesses and organizations move for leave to file the accompanying brief as *amici curiae* in support of the petition for a writ of certiorari. The petitioner has consented to the filing of this brief, and that letter has been lodged with the Clerk of this Court. The named respondents have taken the position that they are not “parties” in this case whose consent is required to file an *amicus* brief, and that they accordingly take no position regarding the filing of *amicus* briefs in this case. That letter has also been lodged with the Clerk of this Court. Thus, out of an abundance of caution, *amici* move for leave to file the accompanying brief.

The 76 businesses and organizations that join this brief share an interest in equality because they know that ending discrimination in the workplace is good for business, their employees, and the U.S. economy as a whole. These businesses and organizations are committed to giving everyone the opportunity to earn a living, excel in their profession, and provide for their family free from fear of unequal treatment. *Amici* support the notion that no one should be passed over for a job, paid less, fired, or subject to harassment or any other form of discrimination based on nothing more than their sexual orientation, which is inherently sex-based. Creating workplaces in which employees are and feel safe from discrimination frees them to do their best work, with substantial benefits for their employers.

Amici should therefore be granted leave to file the attached brief.

Respectfully submitted,

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INTEREST OF *AMICI CURIAE*¹

The 76 businesses and organizations that join this brief share an interest in equality because they know that ending discrimination in the workplace is good for business, their employees, and the U.S. economy as a whole. The below businesses and organizations are committed to giving everyone the opportunity to earn a living, excel in their profession, and provide for their family free from fear of unequal treatment. *Amici* listed below support the notion that no one should be passed over for a job, paid less, fired, or subject to harassment or any other form of discrimination based on nothing more than their sexual orientation, which is inherently sex-based. Creating workplaces in which employees are and feel safe from discrimination frees them to do their best work, with substantial benefits for their employers.

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

AdRoll, Inc.; Affirm, Inc.; Airbnb, Inc.; AltSchool; American Airlines; Apple; BASF Corporation; Ben & Jerry's Homemade, Inc.; Betterment; Brandwatch; Caldwell Partners; Carnival Corporation; CBS Corporation; Celtra Inc.; Cigna Health and Life Insurance Company; Citrix Systems, Inc.; City National Bank; Coach, Inc.; Cornerstone Capital Inc.;

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution intended to fund preparation or submission of this brief. Counsel of record for all parties were timely notified of *amici*'s intention to file this brief more than ten days prior to its filing.

Deutsche Bank; Diageo North America, Inc.; DoorDash, Inc.; Dropbox, Inc.; Eastern Bank; eBay Inc.; Edelman; The Estée Lauder Companies; Facebook, Inc.; FiftyThree, Inc.; General Assembly; Google LLC; Gusto; HopSkipDrive; IAC/InterActiveCorp; Indiegogo; Intel Corporation; Kargo; Levi Strauss & Co.; Linden Lab; LinkedIn; Lyft, Inc.; Mapbox; MassMutual; Mastercard International Inc.; Match Group, Inc.; Miami HEAT; Microsoft Corporation; Mitchell Gold + Bob Williams; Morgan Stanley; National Gay & Lesbian Chamber of Commerce (NGLCC); NIO U.S.; OBOX Solutions; On Top of the World Communities, Inc.; Out Leadership; PayPal Holdings, Inc.; Pinterest; RBC Bank (Georgia), N.A.; RBC Capital Markets, LLC; RealNetworks, Inc.; Replacements, Ltd.; Rhapsody International Inc. d/b/a Napster; Rising Tide Brewing Company; Royal Bank of Canada; salesforce.com, inc.; Shutterstock, Inc.; Spotify USA Inc.; Starbucks Corporation; Sun Life Financial (U.S.) Services Company, Inc.; Tampa Bay Rays Baseball Ltd.; Thumbtack, Inc.; Trillium Asset Management; Uber Technologies, Inc.; Ultragenyx Pharmaceutical Inc.; Viacom Inc.; Weebly, Inc.; and Witeck Communications.

SUMMARY OF ARGUMENT

Interpreting Title VII of the Civil Rights Act of 1964 to exclude sexual orientation from protections against sex discrimination, as the court of appeals did in the decision below, has wide-ranging, negative consequences for businesses, their employees, and the U.S. economy. Businesses' first-hand experiences—supported by extensive social-science research—confirm the significant costs for employers and employees when sexual orientation discrimination is 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 grant of review and ruling that members of the nation's large and productive lesbian, gay, bisexual and transgender ("LGBT") workforce need not fear discrimination for simply doing their jobs.

There is no truth to the notion that laws forbidding sexual orientation discrimination are unreasonably costly or burdensome for business. To the contrary, recognizing that Title VII prohibits sexual orientation discrimination as a form 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.

Unless this Court grants review, the same federal law will continue to be interpreted in opposite ways

based on nothing more than the happenstance of the state in which an employee lives. Such a lack of uniformity in the treatment of the same federal law creates significant business costs that federal employment discrimination law is intended to obviate.

Accordingly, the 76 above-listed businesses and organizations joining this brief respectfully urge this Court to grant the petition for a writ of certiorari and recognize that Title VII's prohibition on discrimination "because of ... sex" includes the prohibition of sexual orientation discrimination.

ARGUMENT

I. EXCLUDING SEXUAL ORIENTATION FROM TITLE VII'S PROTECTION AGAINST SEX DISCRIMINATION UNDERMINES THE NATION'S BUSINESS INTERESTS

Amici are businesses and organizations 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. The failure to recognize that Title VII protects LGBT workers hinders the ability of *amici* to compete in all corners of the nation and harms 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, fostering creativity and innovation, making such 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 2016, the buying power of LGBT people in the United States stood at over \$900 billion.⁵ In “matching the market,” businesses succeed by including diverse employees who “are

² See Jon Miller & Lucy Parker, *Open For Business: The Economic and Business Case for Global LGB&T Inclusion* 28 (2015), <https://tinyurl.com/y9mtp3of> (“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. (Dec. 2013), <https://tinyurl.com/j8nyu8k>.

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 Jeff Green, *LGBT Purchasing Power Near \$1 Trillion Rivals Other Minorities*, BLOOMBERG (July 20, 2016), <https://tinyurl.com/jzdaptl> (“The combined buying power of U.S. lesbian, gay, bisexual and transgender adults rose about 3.7 percent to \$917 billion last year[.]”).

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 Fortune 500 companies and the top 50 federal government contractors, for example, the overwhelming majority of the top-performing, most-innovative companies connect policies prohibiting sexual orientation discrimination with a better bottom line.⁸

Recent studies confirm that companies with LGBT-inclusive workplaces 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

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)).

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).

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 uniform federal law 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 From Title VII's Prohibition On Sex Discrimination Undermines Diverse And Inclusive Workplaces

Employment discrimination based on sexual orientation (a form of sex-based discrimination) is widespread and has significant, harmful effects on employers, employees, and the bottom line. As of 2016, approximately 10 million adults in the United States (4.1% of all adults) identify as LGBT.¹¹ By any measure, the LGBT segment of the U.S. workforce represents a significant number of both

¹⁰ Lauren Box, *It's Not Personal, It's Just Business: The Economic Impact of LGBT Legislation*, 48 IND. L. REV. 995, 995-96 (2015) ("While 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.").

¹¹ Gary J. Gates, *In US, More Adults Identifying as LGBT*, GALLUP (Jan. 11, 2017), <https://tinyurl.com/yb9d8ubd>; see also Gary J. Gates, *LGBT Demographics: Comparisons Among Population-Based Surveys*, THE WILLIAMS INST. (Oct. 2014), <https://tinyurl.com/y8mn6hfw> (summarizing various surveys conducted from 2006 to 2014, the results of which implied that between 5.2 and 9.5 million adults in the U.S. identified as LGBT).

public- and private-sector employees. Businesses draw on and benefit from the contributions of LGBT workers at all levels and across industries.

Many courts have acknowledged the long history of sexual orientation 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”); *Roberts v. United Parcel Serv., Inc.*, 115 F. Supp. 3d 344, 361-66 (E.D.N.Y. 2015) (surveying empirical literature on workplace discrimination against LGBT employees). There is also significant evidence that such discrimination remains pervasive,¹² including evidence that has been offered to Congress in legislative hearings.¹³ One analysis estimates that, as of 2011, over 25% of all lesbian, gay, and bisexual respondents had

¹² See, e.g., 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, 719-22 (2012).

¹³ *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 S. Comm. on Health, Educ., Labor, and Pensions*, 112th Cong. 8-10 (2012) (statement of M.V. Lee Badgett, Research Director, The Williams Inst.), <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).

experienced sexual orientation discrimination (such as harassment and wage discrimination) at the workplace in the past five years—a figure that rose to 42% when expanded to cover their entire working lives.¹⁴ Rates of discrimination were even higher for LGBT persons who did not hide their sexual orientation at work, with harassment being the most common reported form of discrimination.¹⁵ And nearly one in ten out gay, lesbian, or bisexual respondents reported losing a job due to sexual orientation discrimination in the last five years.¹⁶ Such discrimination is not hidden—up to 30% of heterosexual respondents reported having witnessed anti-gay discrimination at the workplace.¹⁷

Amici recognize that their employees are essential to their success and are, in many ways, their most valuable assets. Accordingly, *amici* are strong proponents of anti-discrimination laws and policies, which are linked to higher morale and productivity. Sexual orientation discrimination—

¹⁴ 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 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”).

¹⁵ Sears & Mallory, *supra* note 14, at 4-5; see also Pew Research Center, *A Survey of LGBT Americans: Attitudes, Experiences and Values in Changing Times* 42 (June 2013), <https://tinyurl.com/nmfpx7a> (21% of LGBT persons report unequal treatment by their employer).

¹⁶ Sears & Mallory, *supra* note 14, at 5.

¹⁷ Pizer, *supra* note 12, at 727.

even the mere *risk* of such discrimination—impedes productivity by instilling unnecessary anxiety in employees and creating a culture that suffocates openness.¹⁸ In the absence of full protection from discrimination, LGBT employees may seek to protect themselves by hiding who they are, a practice linked by substantial research to poor workplace and health outcomes.¹⁹

Hiding one’s sexual orientation is a rational response to the fact that those persons who are out in the workplace are more likely to experience discrimination than their closeted peers.²⁰ Fear of discrimination has also been shown to exact a significant toll on employees—manifesting in, *inter alia*, negative attitudes toward one’s career; increased stress; difficulty trusting coworkers and superiors; and experiences of isolation, frustration, anxiety, depression, and low self-esteem.²¹

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

¹⁸ M.V. Lee Badgett, et al., *The Business Impact of LGBT-Supportive Workplace Policies*, THE WILLIAMS INST. 26 (May 2013), <https://tinyurl.com/y7mtb6um>.

¹⁹ See Badgett, *supra* note 18, 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, *supra* note 12, at 735-37.

²⁰ See Sears & Mallory, *supra* note 14, at 1.

²¹ Pizer, *supra* note 12, at 736-37, 740-41.

exhausted from expending energy to hide their identities, and being distracted due to a negative environment.²²

“Laws are perhaps the strongest of social structures that uphold and enforce stigma,”²³ and excluding a class of persons from legal protections sends a strong message in the workplace. Excluding sexual orientation from sex discrimination protections has a stigmatizing effect on LGBT employees, resulting in negative consequences for employee health and productivity.²⁴ For example,

²² Human Rights Campaign, *The Cost of the Closet and the Rewards of Inclusion: Why the Workplace Environment for LGBT People Matters to Employers* 2-3, 22 (May 2014), <https://tinyurl.com/ycbzwzme>. Other ways productivity is negatively affected by an unwelcoming workplace environment included when LGBT workers responded to this culture by avoiding a specific project, a social event, or certain coworkers. *Id.* at 22.

²³ *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 974 (N.D. Cal. 2010).

²⁴ See, e.g., Mark L. Hatzenbuehler, et al., *Structural Stigma and All-Cause Mortality in Sexual Minority Populations*, 103 SOC. SCI. & MED. 33, 37 (2014) (finding life expectancy reduced by an average of 12 years for sexual minorities living in communities with high levels of anti-gay prejudice); 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 attendant health consequences); Vickie M. Mays & Susan D. Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian*,
(footnote continued)

whereas nearly 10% of LGBT employees reported finding a new job to escape a workplace that was not accepting, over 25% of LGBT employees reported staying in a job *specifically* because it offered an inclusive, safe workplace.²⁵

The failure of non-discrimination protections to include LGBT employees takes a heavy toll on businesses' bottom lines and, in the aggregate, hurts 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.²⁶ 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.”²⁷ Such costs can be significantly higher depending on the job.²⁸

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”).

²⁵ See Human Rights Campaign, *supra* note 22, at 23.

²⁶ Ian Johnson & Darren Cooper, *LGBT Diversity: Show Me the Business Case*, OUT NOW 5, 47 (2015), <https://tinyurl.com/yaput4mn>.

²⁷ 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/y6wpz0j3>.

²⁸ See Burns, *supra* note 7, at 10 (assessing replacement costs as between \$75,000 and \$211,000 for an executive with \$100,000 salary).

II. THE CURRENT SPLIT IN FEDERAL CIRCUIT COURT DECISIONS OVER WHETHER TITLE VII PROHIBITS SEXUAL ORIENTATION DISCRIMINATION HARMS BUSINESSES AND THE U.S. ECONOMY

Businesses have the greatest opportunity for success when they operate under legal certainty. Under the current state of federal law, however, employees who work in Illinois, Indiana, or Wisconsin enjoy a different set of federal anti-discrimination protections than those who work in Alabama, Florida, or Georgia. Compare *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017) (holding that sexual orientation discrimination is a form of sex discrimination to which Title VII applies) with *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017) (sexual orientation discrimination not a form of sex discrimination actionable under Title VII). This Court should grant review to dispel this conflict and uncertainty, and to ensure the consistent nationwide interpretation of a vital federal statute.

The need for uniformity is underlined by the conflicting positions adopted by the EEOC and the Department of Justice. Compare *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at *10 (July 15, 2015) (“Complainant’s allegations of discrimination on the basis of his sexual orientation state a claim of discrimination on the basis of sex within the meaning of Title VII.”) with Amicus Brief in Supp. of Appellee, Department of Justice, at 9, *Zarda v. Altitude Express, Inc.*, Case No. 15-3775 (2d Cir.), ECF No. 417 (July 26, 2017) (“Title VII does

not reach discrimination based on sexual orientation.”).

This need for uniformity is further underscored by empirical evidence showing that sexual orientation discrimination tends to be higher in jurisdictions without non-discrimination laws.²⁹ In addition, workplace discrimination tends to decrease in response to legal rules against it.³⁰

While businesses and the U.S. economy benefit from the clarity, predictability, reliability and efficiency that comes from the uniform application of federal law, the lack of such uniformity imposes significant costs on businesses.³¹ The Court should

²⁹ See András Tilcsik, *Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States*, 117 AM. J. SOC. 586, 614-15 (2011).

³⁰ See Laura G. Barron & Michelle Hebl, *The Force of Law: The Effects of Sexual Orientation Antidiscrimination Legislation on Interpersonal Discrimination in Employment*, 19 PSYCH. 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 inclusive anti-discrimination laws and policies significantly decrease reports of discrimination in the workplace.”).

³¹ See Larry E. Ribstein & Bruce H. Kobayashi, *An Economic Analysis of Uniform State Laws*, 25 J. OF LEGAL STUDIES 131, 137-40 (Jan. 1996) (discussing the costs of reduced uniformity among states’ laws); *cf.* Joshua D. Wright & Eric Helland, “The Dramatic Rise of Consumer Protection Law,” in *The American Illness: Essays on the Rule of Law* at 369 (2013) (“Businesses must spend resources attempting to predict
(footnote continued)

grant the petition for a writ of certiorari to dispel these harmful effects.

Neither state and local legislation prohibiting sexual orientation discrimination, nor voluntary enactment by many companies of similar policies, can substitute for uniform application of federal law guarding against discrimination. Today, residents of 23 states and the District of Columbia indisputably are protected from sexual orientation discrimination,³² but the remaining 27 states offer no explicit protection under state law or lack favorable federal precedent.

Moreover, state and local laws often differ in important ways from the established protections under Title VII. “For example, some state laws do

how vague [states’ Consumer Protection Act] standards will be enforced; judges must expend further resources defining illegal conduct and sorting between meritorious and frivolous claims. These added costs are directly and indirectly filtered back to consumers in the form of higher prices.”).

³² Twenty-two states prohibit sexual orientation discrimination in private employment by statute. Cal. Gov’t Code § 12940; Colo. Rev. Stat. § 24-34-402; Conn. Gen. Stat. § 46a-81c; Del. Code Ann. tit. 19, § 711; Haw. Rev. Stat. § 378-2; 775 Ill. Comp. Stat. Ann. 5/1-102; Iowa Code § 216.6; Me. Rev. Stat Ann. tit. 5, § 4571; Md. Code Ann., State Gov’t § 20-606; Mass. Gen. Laws ch. 151B, § 4; Minn. Stat. § 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. § 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, 49.60.180; Wis. Stat. § 111.36. Indiana prohibits sexual orientation discrimination under Title VII pursuant to *Hively*, 853 F.3d 339. The District of Columbia prohibits such discrimination in private employment. D.C. Code § 2-1402.11.

not allow for recovery of punitive damages at all, or they impose caps that are lower than those under Title VII.”³³ Although protections against sexual orientation discrimination are evolving, they are treated inconsistently in federal courts and are often under-inclusive or nonexistent at state and local levels.³⁴

An interpretation of Title VII that excludes sexual orientation as a form of sex discrimination makes it more difficult and expensive for those doing business in jurisdictions without other laws against sexual orientation discrimination to recruit LGBT employees. Reading sexual orientation out of federal anti-discrimination laws leaves LGBT employees and

³³ 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 less beneficial punitive damages provisions).

³⁴ Even where state or local laws exist against sexual orientation 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) (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 “discriminating because of the perception or belief that a person is a member of a particular” group).

their families vulnerable to employment discrimination and economic disruption because such employees are guaranteed protection only by (at best) a patchwork of inconsistent, and often under-inclusive, state and local laws. The uncertainty and vulnerability LGBT workers face results in diminished employee health, productivity, job engagement, and satisfaction.³⁵ LGBT employees risk losing the right to be free from discrimination merely because they transfer offices from one jurisdiction to another.³⁶

Accordingly, companies conducting business in places that offer lesser or no such protections are at a disadvantage in recruiting the best employees for

³⁵ See Sears & Mallory, *supra* note 14, at 15-16.

³⁶ Family members of LGBT employees could also be jeopardized by taking a job in or transferring to a jurisdiction without adequate nondiscrimination laws. As of late 2015, there were approximately 972,000 people in a same-sex marriage in the United States, and an estimated 1 million cohabiting same-sex couples. See 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 Couples after Obergefell*, THE WILLIAMS INST. 4 (Nov. 2015), <https://tinyurl.com/y6ut343k>; see also Gary J. Gates, *Marriage and Family: LGBT Individuals and Same-Sex Couples*, 25 FUTURE OF CHILDREN, no. 2 at 67 (Fall 2015), <https://tinyurl.com/ya6n23yz> (“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.”). For LGBT parents, the economic stakes of working in a jurisdiction that lacks legal protections are especially high.

operations in those jurisdictions. Similarly, *amici*'s LGBT employees (and employees who prefer to work in a community that does not tolerate discrimination) are less willing to transfer to 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 from Title VII's sex discrimination protections undermines businesses' efforts to recruit, organize, and retain talent.

Amici are committed to equal treatment and equal opportunity regardless of sexual orientation. But *amici* cannot create widespread equality in the workplace by themselves; Title VII plays a crucial role in creating and cultivating workplaces that embody equality by affirming the civil right to be free from discrimination.³⁷ By recognizing that sexual orientation discrimination is 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 grant certiorari to dispel the conflict among the courts of appeals and hold that Title VII prohibits discrimination on the basis of sexual orientation.

³⁷ See Barron & Hebl, *supra* note 30, at 192-202; Boso, *supra* note 30, at 603.

CONCLUSION

The failure to recognize that Title VII requires uniform, urgently needed protection against sex discrimination in the form of sexual orientation discrimination is bad for employees, workplace culture, and the bottom line. *Amici* urge this Court to grant the petition for writ of certiorari and hold that Title VII's prohibition on discrimination "because of ... sex" includes within its scope the prohibition of sexual orientation discrimination.

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APPENDIX

The businesses and organizations that join this brief are (in alphabetical order):

1. AdRoll, Inc.
2. Affirm, Inc.
3. Airbnb, Inc.
4. AltSchool
5. American Airlines*
6. Apple*
7. BASF Corporation
8. Ben & Jerry's Homemade, Inc.*
9. Betterment
10. Brandwatch
11. Caldwell Partners
12. Carnival Corporation
13. CBS Corporation
14. Celtra Inc.
15. Cigna Health and Life Insurance Company*
16. Citrix Systems, Inc.
17. City National Bank*
18. Coach, Inc.

* Denotes *amici* represented solely by Shapiro Arato LLP. All other *amici* are represented solely by Quinn Emanuel Urquhart & Sullivan, LLP.

19. Cornerstone Capital Inc.
20. Deutsche Bank*
21. Diageo North America, Inc.
22. DoorDash, Inc.
23. Dropbox, Inc.
24. Eastern Bank
25. eBay Inc.
26. Edelman
27. The Estée Lauder Companies
28. Facebook, Inc.*
29. FiftyThree, Inc.
30. General Assembly
31. Google LLC
32. Gusto
33. HopSkipDrive
34. IAC/InterActiveCorp
35. Indiegogo
36. Intel Corporation*
37. Kargo
38. Levi Strauss & Co.
39. Linden Lab
40. LinkedIn*
41. Lyft, Inc.
42. Mapbox
43. MassMutual

44. Mastercard International Inc.*
45. Match Group, Inc.
46. Miami HEAT
47. Microsoft Corporation*
48. Mitchell Gold + Bob Williams
49. Morgan Stanley*
50. National Gay & Lesbian Chamber of Commerce (NGLCC)
51. NIO U.S.
52. OBOX Solutions
53. On Top of the World Communities, Inc.
54. Out Leadership
55. PayPal Holdings, Inc.
56. Pinterest
57. RBC Bank (Georgia), N.A.*
58. RBC Capital Markets, LLC*
59. RealNetworks, Inc.
60. Replacements, Ltd.
61. Rhapsody International Inc. d/b/a Napster
62. Rising Tide Brewing Company
63. Royal Bank of Canada*
64. salesforce.com, inc.
65. Shutterstock, Inc.
66. Spotify USA Inc.
67. Starbucks Corporation

68. Sun Life Financial (U.S.) Services Company, Inc.*
69. Tampa Bay Rays Baseball Ltd.*
70. Thumbtack, Inc.
71. Trillium Asset Management
72. Uber Technologies, Inc.*
73. Ultragenyx Pharmaceutical Inc.
74. Viacom Inc.
75. Weebly, Inc.
76. Witeck Communications