

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., AND RAY MAYNARD, *Petitioners*,

—v.—

MELISSA ZARDA AND WILLIAM MOORE, JR.,
CO-INDEPENDENT EXECUTORS OF THE ESTATE OF
DONALD ZARDA, *Respondents*.

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

—v.—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND
AIMEE STEPHENS, *Respondents*.

**On Writs Of Certiorari To The
United States Courts Of Appeals For The
Eleventh, Second, And Sixth Circuits**

**BRIEF FOR BUSINESS ORGANIZATIONS AS
AMICI CURIAE IN SUPPORT OF THE EMPLOYEES**

LISA S. BLATT

Counsel of Record

COLETTE CONNOR

AMANDA J. COX

BRIAN P. HAGERTY

MICHAEL J. MESTITZ

WILLIAMS & CONNOLLY LLP

725 Twelfth Street, N.W.

Washington, DC 20005

(202) 434-5000

lblatt@wc.com

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	ii
INTEREST OF <i>AMICI CURIAE</i>	1
SUMMARY OF ARGUMENT	4
ARGUMENT.....	6
I. Federal Protections for LGBT Employees Benefit Employers' Ability to Attract and Retain Employees	7
II. Federal Protections for LGBT Employees Benefit Employers By Boosting Productivity	14
III. Federal Protections for LGBT Employees Reduce Administrative Burdens on Employers.....	20
CONCLUSION	24

TABLE OF AUTHORITIES

	Page(s)
Cases:	
<i>Hively v. Ivy Tech Cmty. Coll.</i> , 853 F.3d 339 (7th Cir. 2017) (en banc)	19
<i>Zarda v. Altitude Express</i> , 883 F.3d 100 (2d Cir. 2018)	21
Other Authorities:	
<i>Anchoring Equality: How U.S. Corporations Can Build Equal and Inclusive Global Workforces</i> , COUNCIL FOR GLOBAL EQUALITY (Oct. 2009)	16
<i>Big Demands and High Expectations: The Deloitte Millennial Survey</i> , DELOITTE (Jan. 2014).....	12
Crosby Burns, <i>The Costly Business of Discrimination</i> , CENTER FOR AMERICAN PROGRESS (Mar. 2012).....	12, 13, 16
<i>Business Success and Growth Through LGBT-Inclusive Culture</i> , U.S. CHAMBER OF COMMERCE FOUNDATION (Apr. 2019)	6, 7, 15
Carol Christian, <i>Transgender Houston Woman Swing Saks Calls Retailer’s Discrimination Stance ‘Astounding’</i> , HOUSTON CHRONICLE (Jan. 2015)	9
<i>The Cost of the Closet and the Rewards of Inclusion</i> , HUMAN RIGHTS CAMPAIGN FOUNDATION (2014)	12

Other Authorities—continued:

- Degrees of Equality: A National Study Examining Workplace Climate for LGBT Employees*, HUMAN RIGHTS CAMPAIGN FOUNDATION (2008)..... 15
- Benjamin A. Everly et al., *Don't Ask, Don't Tell? Does Disclosure of Gay Identity Affect Partner Performance?*, 48 JOURNAL OF EXPERIMENTAL SOCIAL PSYCHOLOGY 407 (2018)..... 19
- Hayley Fox, *How Salt Lake City Became an Unlikely Gay Mecca*, TAKEPART.COM (Mar. 2015)..... 11
- April Guasp and Jean Balfour, *Peak Performance: Gay People and Productivity*, STONEWALL (2008) 17, 18
- Sylvia Ann Hewlett & Kenji Yoshino, *Out in the World: Securing LGBT Rights in the Global Market Place*, CENTER FOR TALENT INNOVATION (2016) 14, 17
- Sylvia Hewlett et al., *What Don't Ask, Don't Tell Really Costs*, HARVARD BUSINESS REVIEW BLOG NETWORK (Oct. 2010)..... 16
- Mohammed Hossain et al., *Do LGBT Workplace Diversity Policies Create Value for Firms?*, JOURNAL OF BUSINESS ETHICS (Apr. 2019)..... 7

Other Authorities—continued:

Ian Johnson and Darren Cooper, <i>LGBT Diversity: Show Me the Business Case</i> , OUT NOW (Feb. 2015),.....	12
M.V. Lee Badgett et al., <i>The Business Impact of LGBT-Supportive Workplace Policies</i> , WILLIAMS INSTITUTE (May 2013).....	7
<i>Majority of Americans Believe Gay and Lesbian Couples in Committed Relationships Should Receive Equal Workplace Benefits to Heterosexual Married Couples</i> , HARRIS INTERACTIVE (Oct. 2010).....	8
Christy Mallory and Brad Sears, <i>An Evaluation of Local Laws Requiring Government Contractors To Adopt LGBT-Related Workplace Policies</i> , 5 ALBANY GOVERNMENT LAW REVIEW 478 (2012).....	23
Christy Mallory and Brad Sears, <i>Employment Discrimination Based on Sexual Orientation and Gender Identity in Georgia</i> , THE WILLIAMS INSTITUTE (Oct. 2014).....	24
Christy Mallory and Brad Sears, <i>Employment Discrimination Based on Sexual Orientation and Gender Identity in South Dakota</i> , THE WILLIAMS INSTITUTE (Aug. 2015)	24

Other Authorities—continued:

Frank Newport and Gary J. Gates, <i>San Francisco Metro Area Ranks Highest in LGBT Percentage</i> , GALLUP (Mar. 2015)	11
Shaun Pichler et al., <i>Do LGBT-Supportive Corporate Policies Enhance Firm Performance?</i> , 57 HUMAN RESOURCES MANAGEMENT 263 (2018)	19, 23, 24
<i>Research Reveals the Driving Force Behind American Employees and Their Career Choices</i> , CORNERSTONE ONDEMAND (Mar. 2016)	10
John N. Roberts and Cristian A. Landa, <i>Return on Equality, the Real ROE: The Shareholder Case for LGBT Workplace Equality</i> (2014)	6
Dennis Romboy, <i>Salt Lake City Has 7th-highest Rate of LGBT Population in U.S.</i> , DESERET NEWS (Mar. 2015)	11
Brad Sears and Christy Mallory, <i>Documented Evidence of Employment Discrimination & Its Effects on LGBT People</i> , WILLIAMS INSTITUTE (July 2011)	16, 17
Brad Sears et al., <i>Economic Motives for Adopting LGBT-related Workplace Policies</i> , WILLIAMS INSTITUTE (2011)	8

Other Authorities—continued:

<i>Seventy-Two Percent of Working Americans Surveyed Would or May Consider Leaving an Organization for One They Think is More Inclusive, Deloitte Poll Finds, DELOITTE (June 2017)</i>	9, 11, 12
<i>Small Business Owners Oppose Denying Services to LGBT Customers, SMALL BUSINESS MAJORITY (Nov. 2017)</i>	8
<i>Small Businesses Support Workplace Nondiscrimination Policies, SMALL BUSINESS MAJORITY (June 2013)</i>	6, 22, 24
<i>A Workplace Divided: Understanding the Climate for LGBTQ Workers Nationwide, HUMAN RIGHTS CAMPAIGN FOUNDATION (2018)</i>	4, 15

INTEREST OF *AMICI CURIAE**

Amici are business organizations with members that collectively represent tens of thousands of businesses nationwide.

The **American Independent Business Alliance** is a non-profit organization serving a nationwide network of local and state organizations with a cumulative membership of approximately 26,000 independent businesses. These local and state alliances serve as a voice for their constituency of independently-owned businesses and help them compete successfully against large corporations.

The **American Sustainable Business Council** (“ASBC”) is a network of business organizations and companies committed to advancing market solutions and policies that support a vibrant, just, and sustainable economy. Founded in 2009, the ASBC and its network collectively represent over 250,000 businesses committed to the triple bottom line: People, Planet, and Profit. The ASBC knows sustainable business is good business – and a sustainable economy is good for America.

The **Glendale Chamber of Commerce** is a private, non-profit, membership-driven organization comprised of nearly 1,300 business enterprises, civic organizations,

* Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.3, *amici* affirm that the Employees have been contacted and have consented to the filing of this brief; the remaining parties have provided blanket consent by letter to the filing of amicus briefs, copies of which are on file with the Clerk’s Office.

educational institutions, and individuals. Its mission is to provide leadership that facilitates the creation of a prosperous regional economy and effective advocacy for its members and the business community of Glendale, Arizona.

The **Good Business Colorado Association** (“GBCA”) is a state-wide, non-partisan business association whose members are committed to building a strong economy, thriving communities, and a sustainable environment. GBCA membership spans industries and is inclusive of businesses of all sizes and stages. With over 160 members across the state of Colorado, GBCA advocates for responsible business owners who understand that success is measured not only in profit, but by the strength of our economy, communities, and environment.

The **Greater Boston Chamber of Commerce** (“GBCC”) is an independent, non-profit organization that is the convener, voice and advocate of the Greater Boston business community. Its values include creating an environment where individuals from all backgrounds are included and have equal access, opportunity, and support for advancement. Its strategic work includes advocating for and leading work aimed at preparing, attracting, and retaining a talented workforce. GBCC represents more than 1,300 businesses of all sizes from virtually every industry and profession in the Greater Boston region.

The **Main Street Alliance** is a national network of state-based small-business coalitions that provide their members with a platform to express views on issues affecting their businesses and local economies. Main Street has affiliates in 15 states, including New York and Michi-

gan. Its work encompasses a broad range of issues affecting the business community, including matters relating to civil rights and the equal treatment of customers and patrons. Main Street's members include approximately 30,000 small businesses across the country.

The **North Texas Commission** is a public-private partnership dedicated to advancing the vibrancy of a 13-county region of 7.5 million Texans, anchored by the cities of Dallas and Fort Worth. It has scores of major investors, including American Airlines, AT&T, Bank of America, Blue Cross/Blue Shield, Boeing, Capital One, the City of Dallas, Liberty Mutual Insurance, Texas Instruments, and Toyota.

The **Seattle Metropolitan Chamber of Commerce** is the largest and most diverse business advocacy organization in the Seattle metro region. Founded in 1882 by local business leaders, the Chamber represents 2,400 members who employ over 750,000 members of our regional workforce. The Chamber's vision is an economically vibrant and globally competitive metro region where businesses of all sizes and types flourish and prosperity is shared.

SUMMARY OF ARGUMENT

Amici's members devote significant time and resources to recruit lesbian, gay, bisexual, and transgender ("LGBT") workers and create environments in which those workers feel supported and comfortable in their jobs. There is still, however, much progress to be made: nearly half of LGBT employees nationwide still conceal their sexual orientation or transgender status at work.¹ Substantial research shows that LGBT employees perform better when their sexual orientation or transgender status is known to their coworkers (i.e., when they are "out" at work), and that businesses that employ diverse workforces outperform businesses that do not. Anti-discrimination laws thus stand to advance not only employees' security and satisfaction, but also businesses' bottom lines.

A holding that Title VII countenances discrimination against LGBT employees would substantially hinder the interests of *amici*'s members. Businesses located in states that lack legal protections for LGBT employees would face difficulty recruiting and retaining talented employees. And absent a legal remedy in the regrettable event that they face discrimination in hiring, firing, and promotion decisions, LGBT employees may reasonably question whether it is in their best interest to disclose their sexual orientation or transgender status at work—

¹ *A Workplace Divided: Understanding the Climate for LGBTQ Workers Nationwide*, HUMAN RIGHTS CAMPAIGN FOUNDATION 6 (2018) (hereinafter "A Workplace Divided"), https://assets2.hrc.org/files/assets/resources/AWorkplaceDivided-2018.pdf?_ga=2.138415347.1726670172.1561215138-1243720071.1560984368.

no matter how inclusive an environment employers create. Even if they feel sufficiently protected in their current job, LGBT employees may remain closeted for fear that they may face discrimination in a future job.

This Court should confirm that Title VII's protections extend to LGBT employees. That holding would ensure that businesses are able to recruit and retain LGBT employees, and to realize their full potential once hired. With the guarantee of federal protection, LGBT employees are more likely to remain in or move to states without express state-level protections, resulting in a wider talent pool for businesses. And businesses that operate in multiple states will benefit from a mobile workforce, where LGBT employees can take new positions and accept transfers without fear of adverse employment decisions made because of their sexual orientation or transgender status. In addition, LGBT employees are more likely to come out to their co-workers with the knowledge that they have legal recourse should they face discrimination—either in their current job or in a future one. Businesses will benefit from their employees' increased job satisfaction and productivity.

Interpreting Title VII to prohibit discrimination on the basis of sexual orientation and transgender status will not place any significant burden on businesses. A study of localities that enacted prohibitions barring LGBT discrimination confirmed that businesses encountered no meaningful compliance costs. Far from imposing burden, recognizing Title VII's prohibition reduces administrative burdens on employers. Human resources and legal departments tasked with explaining the law to lay employees have a far easier time explaining an interpretation of sex-based discrimination that includes transgender status

and sexual orientation discrimination, in addition to sex stereotype discrimination.

ARGUMENT

The majority of American businesses support LGBT-nondiscrimination laws.² But more than half of states lack express employment protections for their LGBT workforce: without Title VII’s protection, employees can be fired on the basis of their sexual orientation or transgender status.³ And because federal courts do not uniformly extend Title VII’s protections to LGBT employees, businesses are subject to a patchwork of regulations across the country.

The benefits of diverse, inclusive workforces to their employers and communities are well-documented. Studies have found that LGBT-inclusive businesses thrive compared to their less inclusive peers, demonstrating the value of a diverse, inclusive workforce to the economy in general.⁴ At an organizational level, LGBT-inclusive policies lead to increased revenue, lower costs, and growth in

² *Small Businesses Support Workplace Nondiscrimination Policies*, SMALL BUSINESS MAJORITY 4 (June 2013) (hereinafter “Small Business Majority”), <https://smallbusinessmajority.org/sites/default/files/research-reports/060413-workplace-nondiscrimination-poll-report.pdf>.

³ *Business Success and Growth Through LGBT-Inclusive Culture*, U.S. CHAMBER OF COMMERCE FOUNDATION 4 (Apr. 2019) (hereinafter “Growth Through LGBT-Inclusive Culture”).

⁴ John N. Roberts and Cristian A. Landa, *Return on Equality, the Real ROE: The Shareholder Case for LGBT Workplace Equality* 3 (2014), <http://www.lmalloyds.com/CMDownload.aspx?Con>

customer bases.⁵ LGBT-inclusive businesses are also more innovative.⁶ Simply put, businesses with inclusive workforces thrive.

Of particular importance to *amici*'s members is their ability to attract and retain talented employees and create productive working environments. *Amici*'s members' efforts would be substantially hindered should the Court interpret Title VII to permit employment discrimination on the basis of sexual orientation or transgender status. *Amici* thus stand with the consensus of businesses that support prohibiting discrimination against LGBT workers, and urge the Court to recognize that Title VII's prohibition on employment discrimination "because of sex" protects LGBT workers.

I. Federal Protections for LGBT Employees Benefit Employers' Ability to Attract and Retain Employees

As organizations that collectively represent tens of

tentKey=f604124c-3411-4717-b03e-965bb4e9ee39&ContentItemKey=76fbec6d-cf0b-4de7-88d1-245bd001138b (finding companies with LGBT-inclusive workplaces have higher shareholder returns); *see also* Growth Through LGBT-Inclusive Culture, *supra* note 3, at 4.

⁵ M.V. Lee Badgett et al., *The Business Impact of LGBT-Supportive Workplace Policies*, WILLIAMS INSTITUTE 1 (May 2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Business-Impact-of-LGBT-Policies-May-2013.pdf>.

⁶ *See* Mohammed Hossain et al., *Do LGBT Workplace Diversity Policies Create Value for Firms?*, JOURNAL OF BUSINESS ETHICS (Apr. 25, 2019), <https://link.springer.com/article/10.1007/s10551-019-04158-z>.

thousands of businesses, *amici* understand the importance of recruiting and retaining top talent no matter the size of the business. For instance, a majority of small businesses “believe that laws protecting against discrimination improve the business bottom line by attracting the best and brightest employees, regardless of the employee’s sexual orientation or gender identity[.]”⁷ Similarly, Fortune 500 companies that have adopted LGBT-inclusive policies consider the ability to recruit and retain top talent to be one of the largest benefits of promoting an LGBT-inclusive workforce.⁸

And indeed, LGBT-inclusive policies are crucial to recruiting talented employees, no matter those employees’ sexual orientation or gender identity. In one study, over three-quarters of LGBT respondents considered it important to work for a company with a written policy prohibiting discrimination against LGBT employees, as did nearly three-fifths of non-LGBT respondents.⁹ And in another study, four out of every five employees reported

⁷ *Small Business Owners Oppose Denying Services to LGBT Customers*, SMALL BUSINESS MAJORITY 4 (Nov. 2017), <https://smallbusinessmajority.org/sites/default/files/research-reports/111617-Small-Business-Non-Discrimination-Poll.pdf>.

⁸ See Brad Sears et al., *Economic Motives for Adopting LGBT-related Workplace Policies*, WILLIAMS INSTITUTE 2 (2011), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Mallory-Sears-Corp-Statements-Oct2011.pdf>.

⁹ *Majority of Americans Believe Gay and Lesbian Couples in Committed Relationships Should Receive Equal Workplace Benefits as Heterosexual Married Couples*, HARRIS INTERACTIVE (Oct. 2010), <http://www.prnewswire.com/news-releases/majority-of-americans-believe-gay-and-lesbian-couples-in-committed-relationships-should->

that inclusion was an “important factor” in choosing an employer.¹⁰ These results dovetail with the experience of *amici*’s members: that LGBT-inclusive policies are a key component of attracting top talent in the workforce, and that companies without them will be left behind.

As important as LGBT-inclusive policies are, they are not enough by themselves to ensure that *amici*’s members can recruit and retain the talent their businesses demand. Anti-discrimination laws play an important and distinct role. *Amici*’s members recognize that even the most protective policies may not be viewed by employees as comparable to federal or state laws providing legal remedies in the event of a discriminatory employment decision.¹¹ The employment decisions at issue—hiring, promotion, and termination—go to the heart of an individual’s ability to earn a livelihood. Given the stakes, LGBT

receive-equal-workplace-benefits-as-heterosexual-married-couples-104293928.html.

¹⁰ *Seventy-Two Percent of Working Americans Surveyed Would or May Consider Leaving an Organization for One They Think is More Inclusive, Deloitte Poll Finds*, DELOITTE (June 2017) (hereinafter “Deloitte”), <https://www2.deloitte.com/us/en/pages/about-deloitte/articles/press-releases/inclusion-survey.html>.

¹¹ For example, Saks Fifth Avenue has a corporate non-discrimination policy, but when an employee filed suit claiming she had been fired due to her transgender status, Saks argued in court filings that her suit should be dismissed because “transsexuals are not protected by Title VII.” See Carol Christian, *Transgender Houston Woman Suing Saks Calls Retailer’s Discrimination Stance ‘Astounding’*, HOUSTON CHRONICLE (Jan. 2015), <https://www.chron.com/houston/article/Transgender-Houston-woman-suing-Saks-calls-6027267.php>.

employees take greater comfort in express legal protections—which many states and localities do not have.

Amici fear that one consequence that would result from a lack of federal protection for LGBT workers is an unwillingness of those workers to move to the places and businesses that need them. Today’s workforce is increasingly mobile, with as many as 77% of employees indicating a willingness to relocate to another city, state, or country to pursue a desirable career opportunity.¹² Should the Court interpret Title VII to exclude protections for LGBT employees, LGBT individuals and families are less likely, all else being equal, to relocate to areas without state-level protections. Interpreting Title VII to include such protections nationwide, on the other hand, would remove barriers to mobility, ensuring that LGBT workers do not lose protections as they or their family members seek career advancements in new locations. And increased mobility would create a larger, more diverse talent pool of job applicants—benefiting employees and employers alike.

Indeed, the cities experiencing the greatest increase in their LGBT populations are also cities that promote inclusivity and prohibit LGBT discrimination. Salt Lake City, for example, approved an ordinance prohibiting LGBT employment discrimination in 2009; by 2015, it had the 7th highest rate of LGBT population in the country—

¹² Cornerstone, *Research Reveals the Driving Force Behind American Employees and Their Career Choices*, CORNERSTONE ONDEMAND (Mar. 2016), <https://www.cornerstoneondemand.com/company/news/press-releases/research-reveals-driving-force-behind-american-employees-and-their-career>.

up from 39th in 1990.¹³ Other metro areas in the top ten are traditionally known for their progressive, inclusive communities, such as San Francisco, Portland, and Seattle.¹⁴ Although these cities may have earned their ranking from their desirable location or survey respondents' increased willingness to self-identify as LGBT, it would be a mistake to discount the value of nondiscrimination laws in building and fostering welcoming communities.

Protection against employment discrimination advances not only employee recruitment, but also employee retention. The protection afforded by employer policies alone significantly contributes to a business's ability to retain its employees. A 2017 study found that 72% of respondents would consider leaving their job to join a more inclusive employer, and nearly 25% had already done so.¹⁵ It also found that Millennials—who will account for 75%

¹³ See Dennis Romboy, *Salt Lake City Has 7th-highest Rate of LGBT Population in U.S.*, DESERET NEWS (Mar. 2015), <https://www.deseretnews.com/article/865624686/Salt-Lake-City-has-7th-highest-rate-of-LGBT-population-in-US.html>; see also Hayley Fox, *How Salt Lake City Became an Unlikely Gay Mecca*, TAKEPART.COM (Mar. 2015), <http://www.takepart.com/article/2015/03/24/gay-mecca>.

¹⁴ Frank Newport and Gary J. Gates, *San Francisco Metro Area Ranks Highest in LGBT Percentage*, GALLUP (Mar. 2015), https://news.gallup.com/poll/182051/san-francisco-metro-area-ranks-highest-lgbt-percentage.aspx?utm_source=Social%20Issues&utm_medium=newsfeed&utm_campaign=tiles.

¹⁵ See Deloitte, *supra* note 10.

of the global workforce by 2025¹⁶—were particularly likely to seek out workplaces with inclusive policies: 30% reported having already left an employer for a more inclusive employer.¹⁷ In a different study, 26% of LGBT employees reported staying in a job because the environment was accepting, and 9% reported having left a job that was not accepting.¹⁸ As with recruitment, while company policies play an important role, federal protections are uniquely situated to shield businesses from the specter of unnecessary turnover and the resultant costly, counter-productive losses.

Any impact on retention is of paramount concern for *amici*'s members, as employee turnover creates some of the most significant costs that businesses face. Although turnover costs vary from employee to employee, costs usually increase as the skill level of the worker being replaced increases,¹⁹ and can total between 93% and 200% of the departing employee's salary.²⁰ One study estimated

¹⁶ *Big Demands and High Expectations: The Deloitte Millennial Survey*, DELOITTE (Jan. 2014), <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/About-Deloitte/gx-dttl-2014-millennial-survey-report.pdf>.

¹⁷ See Deloitte, *supra* note 10.

¹⁸ *The Cost of the Closet and the Rewards of Inclusion*, HUMAN RIGHTS CAMPAIGN FOUNDATION 23 (2014), <https://www.hrc.org/resources/the-cost-of-the-closet-and-the-rewards-of-inclusion>.

¹⁹ Ian Johnson and Darren Cooper, *LGBT Diversity: Show Me the Business Case*, OUT NOW 22 (Feb. 2015), <https://www.outnowconsulting.com/media/13505/Report-SMTBC-Feb15-V17sm.pdf>.

²⁰ Crosby Burns, *The Costly Business of Discrimination*, CENTER FOR AMERICAN PROGRESS 10 (Mar. 2012) (hereinafter "The Costly

turnover costs to fall “somewhere between \$5,000 and \$10,000 for an hourly worker, and between \$75,000 and \$211,000 for an executive who makes an annual salary of \$100,000.”²¹ Turnover-related costs are particularly prevalent among gay and lesbian employees, who report “leav[ing] their employers due to workplace unfairness at twice the rate of straight white males.”²² The money and resources spent to replace workers who voluntarily leave their current jobs to join more inclusive environments would be better spent investing in the employees, themselves.

In today’s competitive business world, every advantage (and disadvantage) counts. Were a productive, valuable employee in Nebraska (which does not have an express prohibition on employment discrimination on the basis of sexual orientation or transgender status) to decide to move to neighboring Iowa (which explicitly prohibits such discrimination), the Nebraska-based business would suffer preventable turnover costs. Similarly, Nebraska-based businesses are comparatively disadvantaged in their ability to recruit LGBT employees.

In sum, interpreting Title VII to prohibit LGBT discrimination will ensure that employers can recruit and retain the talent they need for their businesses to thrive.

Business of Discrimination”), https://www.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/lgbt_biz_discrimination.pdf.

²¹ *Id.*

²² *Id.*

II. Federal Protections for LGBT Employees Benefit Employers By Boosting Productivity

In addition to recruiting and retaining top talent, employers like *amici*'s members devote substantial resources to creating workplace environments that maximize their employees' job satisfaction and productivity. A key component of this effort is to foster an inclusive atmosphere in which LGBT employees feel supported at work and comfortable being out to their colleagues. And while *amici*'s members have already undertaken myriad steps to foster such environments, their efforts would be substantially aided by the recognition of nationwide legal protections for LGBT workers. These protections increase employees' comfort with being out at work, and employees who are out at work have higher job satisfaction and greater productivity. And businesses reap the benefits of their workers' increased productivity.

Employers who want LGBT employees to feel comfortable being out at work cannot simply adopt policies prohibiting discrimination against those employees. To be sure, those policies advance the interest of businesses. As mentioned above, many of *amici*'s members have such policies, and those policies play an important role: LGBT employees whose employers have adopted LGBT-supportive policies are more motivated, reporting that they will "go the extra mile" for their employer at a higher rate than LGBT employees whose employers do not have such policies.²³ But nondiscrimination policies are inherently limited in their ability to impact the difficult decision that

²³ Sylvia Ann Hewlett & Kenji Yoshino, *Out in the World: Securing LGBT Rights in the Global Market Place*, CENTER FOR TALENT INNOVATION 22 (2016) (hereinafter "Out in the World").

LGBT employees face regarding whether to be open with their colleagues and supervisors about their sexual orientation or transgender status.

Although 91% of Fortune 500 companies explicitly include sexual orientation in their nondiscrimination policies,²⁴ nearly half (46%) of LGBTQ employees remain closeted at work.²⁵ This is an improvement of only five percentage points from a decade ago,²⁶ despite the significant progress that has been made since that time, such as the recognition of marriage equality. Further research suggests a reason why: 45% of LGBT workers (nearly identical to the number of closeted LGBT workers) feel that enforcement of a non-discrimination policy is no guarantee, but rather depends on their supervisor's own feelings towards LGBT individuals.²⁷ These workers recognize that despite best efforts, corporate policies are not always enforced, and without legal protections, LGBT workers who face discrimination are left without recourse.

This reality prevents businesses from realizing the substantial benefits that result when LGBT employees are out at work. *Amici's* members' experience, backed by

²⁴ See Growth Through LGBT-Inclusive Culture, *supra* note 3, at 4.

²⁵ See A Workplace Divided, *supra* note 1, at 6.

²⁶ See *Degrees of Equality: A National Study Examining Workplace Climate for LGBT Employees*, HUMAN RIGHTS CAMPAIGN FOUNDATION 11 (2008) (discussing LGBT workers who are closeted or out to only a few coworkers), https://assets2.hrc.org/files/assets/resources/DegreesOfEquality_2009.pdf?_ga=2.171975779.1726670172.1561215138-1243720071.1560984368.

²⁷ See A Workplace Divided, *supra* note 1, at 7.

a substantial body of research, confirms that LGBT employees who feel supported at work and comfortable being out to their coworkers are happier, and perform better, in their jobs. Research shows that out employees are up to 30% more productive than closeted employees,²⁸ and are more likely to be entrepreneurial than closeted employees.²⁹ In addition, out employees are more than twice as likely to trust their employer as closeted employees, and are more likely to report feeling “very loyal” to their employers than closeted employees.³⁰

The greater trust and loyalty that out employees feel towards their employers translates to significant increases in job satisfaction. In a 2011 survey of 2,800 LGBT white-collar employees, out employees were twice as likely to report being happy in their careers than closeted employees.³¹ In that survey, only one-third of clos-

²⁸ *Anchoring Equality: How U.S. Corporations Can Build Equal and Inclusive Global Workforces*, COUNCIL FOR GLOBAL EQUALITY 10 (Oct. 2009), http://www.globalequality.org/storage/documents/pdf/anchoringequality_cfgereport.pdf.

²⁹ Sylvia Hewlett et al., *What Don't Ask, Don't Tell Really Costs*, HARVARD BUSINESS REVIEW BLOG NETWORK (Oct. 2010), <https://hbr.org/2010/10/what-dont-ask-dont-tell-really>.

³⁰ See The Costly Business of Discrimination, *supra* note 20, at 33.

³¹ See Brad Sears and Christy Mallory, *Documented Evidence of Employment Discrimination & Its Effects on LGBT People*, WILLIAMS INSTITUTE 13 (July 2011), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf>.

eted employees reported feeling happy with their careers,³² a strikingly low number that highlights the danger to employers if their employees feel that they must remain closeted at work. Additional research shows that more than one in four LGBT employees who were closeted said they felt nervous or sad at work, and nearly one in five said that concealing their sexual orientation or transgender status caused them to consider quitting.³³

These results should come as little surprise. Anecdotal evidence confirms the hardships imposed on closeted employees, who must spend time and energy hiding their private lives from their coworkers. Participants in a 2008 focus group who were closeted at work reported “spending a lot of time worrying about people’s perceptions,” and “spend[ing] more time trying to conceal my home life and therefore not concentrating on my job.”³⁴ Those worries dissipated for employees who had come out to their colleagues: “There was a real noticeable improvement. . . . I felt far more relaxed, far more willing to help out and far more willing to get involved.”³⁵

Participants in the same focus group also reported that remaining closeted at work harmed their confidence and creativity. One employee explained that “I really lacked confidence . . . and I know it was because being gay

³² *Id.*

³³ See *Out in the World*, *supra* note 23, at 17, 20–21.

³⁴ April Guasp and Jean Balfour, *Peak Performance: Gay People and Productivity*, STONEWALL 5 (2008), https://www.stonewall.org.uk/sites/default/files/Peak_Performance__2008_.pdf.

³⁵ *Id.* at 6.

was on my mind a lot. My confidence really suffered.”³⁶ Another described how “[i]t’s a depressing thing to do, to have to shield and hide parts of yourself and not be fully who you are at work. I think that kills your creativity.”³⁷ Again, these problems were lessened for employees who felt comfortable coming out: they reported that their “confidence has definitely increased since I’ve been out,” and that their “confidence levels have soared.”³⁸

The benefits to employers from out employees extend beyond the increased satisfaction and productivity of those employees. Research shows that *all* employees’ productivity increases when their colleagues are open about their sexual orientation. One study compared two groups: one which paired straight men with gay men who were out, and another which paired straight men with men whose sexual orientation was left ambiguous. When asked to complete tasks that required the pairs to work together, researchers found that the pairs that were open about their sexual orientation performed significantly better than those that were not.³⁹

This result—that teams perform better when they are open to each other about their identity—is borne out both by the experience of *amici*’s members and by additional research. For instance, a 2016 study showed that firms with LGBT-supportive policies enjoyed higher sales per

³⁶ *Id.*

³⁷ *Id.* at 7.

³⁸ *Id.* at 6.

³⁹ Benjamin A. Everly et al., *Don’t Ask, Don’t Tell? Does Disclosure of Gay Identity Affect Partner Performance?*, 48 *Journal of Experimental Social Psychology* 407 (2012).

employee than firms that did not have such policies, suggesting that employees at LGBT-supportive firms were more productive as a result.⁴⁰ Importantly, this increase in sales was not limited to LGBT employees; it extended to *all* employees.

Interpreting Title VII to exclude protections for LGBT employees would harm not just those employees, but other protected subsets of workers as well. Sexual orientation discrimination is, at its core, inextricable from discrimination based on gender non-conforming behavior. *See Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 346 (7th Cir. 2017) (en banc) (“[A] policy that discriminates on the basis of sexual orientation . . . is based on assumptions about the proper behavior for someone of a given sex.”). Should sexual orientation discrimination be permitted, there is a significant risk that other types of sex-based discrimination will go unchecked as well. Individuals who do not conform to gender stereotypes—particularly those whose behavior may lend itself to assumptions about their sexual orientation—will reasonably fear that their behavior may subject them to discrimination against which they no longer have protection. Such employees will suffer performance impacts similar to those of LGBT employees who remain closeted at work. And of course, employers will be harmed as a result.

By contrast, interpreting Title VII to protect LGBT employees will benefit all employees (and their employers). Such an interpretation will allow all employees—not

⁴⁰ Shaun Pichler et al., *Do LGBT-Supportive Corporate Policies Enhance Firm Performance?*, 57 HUMAN RESOURCES MANAGEMENT 263, 269–72 (2018).

just LGBT employees—to work without fear of discriminatory employment decisions. It will create more inclusive and diverse workplaces, improving the performance of all employees. And it will allow employers to realize the benefits of the increased productivity that will result.

III. Federal Protections for LGBT Employees Reduce Administrative Burdens on Employers

Interpreting Title VII’s prohibition on sex-based discrimination to include LGBT employees would also benefit employers by reducing their administrative burdens. Employers, including all businesses that have at least fifteen employees, are obligated to inform their employees about federal laws barring discrimination such as Title VII. But the current state of federal protection for LGBT workers outside the Second, Sixth, and Seventh Circuits creates an unworkable distinction between sex stereotype discrimination and sexual orientation or transgender status discrimination. Lay employees undoubtedly struggle to understand such a distinction (just as the courts have). This difficulty is only exacerbated by the confusing and often contradictory patchwork of state and local laws that subject business owners to different rules and regulations in different localities, making it more difficult to explain the applicable law to employees. By contrast, interpreting Title VII’s ban on discrimination “because of sex” to prohibit discrimination on the basis of sexual orientation and transgender status brings clarity and simplicity, easing the burden on employers and freeing HR and legal departments to devote their valuable resources elsewhere. And, as discussed below, research confirms it will do so without creating any additional burdens on employers.

Excluding LGBT employees from Title VII's protections will have negative consequences for HR and legal departments that must explain the law to employees. Consider, for instance, an HR representative who is tasked with devising an orientation training session for new employees—none of whom are attorneys—that explains the distinction between sex stereotype discrimination (which is prohibited by Title VII) and sexual orientation discrimination (which would not be, should this Court reverse the Second and Sixth Circuits). The representative would find no help from judicial opinions interpreting Title VII, which have struggled for years to articulate the distinction. *See Zarda v. Altitude Express*, 883 F.3d 100, 121 (2d Cir. 2018) (“Lower courts operating under this standard have long labored to distinguish between gender stereotypes that support an inference of impermissible sex discrimination and those that are indicative of sexual orientation discrimination.”). Indeed, it is difficult to imagine that the HR representative would be able to find help anywhere, as articulating the distinction between sex stereotype and sexual orientation discrimination has proven an impossible task.

The difficulties for HR or legal departments extend beyond devising training materials. Consider a different scenario—an HR representative is asked by a lay employee whether the law permits an adverse employment action to be taken against a lesbian employee who is perceived by her colleagues as masculine. The HR representative will again be forced to articulate a distinction between the employee's sexual orientation (which would be a permissible basis for such an action), and the employee's gender non-conforming behavior (which would not be).

Any such explanation would almost certainly lead to confusion among employees about what the law does and does not allow.

Making matters worse, businesses that operate in more than one location are often subject to inconsistent state and local laws that either do or do not prohibit sexual orientation discrimination to varying degrees. Employers must keep themselves informed about these laws, and must explain to their employees that certain actions that are prohibited in one locale may not be in another. The varying laws and regulations to which these businesses are subject makes it even more difficult to keep employees adequately informed about the applicable law.

By contrast, holding that federal law bars discrimination against LGBT employees promotes simplicity and consistency, and will not create any additional burden to employers. The experience of *amici*'s members, consistent with research, has shown that providing and maintaining an LGBT-inclusive workforce does not pose additional costs to businesses. For instance, in a nationwide survey of small business owners who had implemented LGBT-inclusive policies, the overwhelming majority of respondents reported negligible or no costs associated with implementing their LGBT-inclusive policies. Eighty-six percent of small business owners reported that their policies cost "nothing or next to nothing."⁴¹ Only 2% of respondents reported a "small but significant cost"; none reported "substantial cost."⁴²

⁴¹ See Small Business Majority, *supra* note 2, at 4.

⁴² *Id.*

Research assessing the costs associated with complying with state and local anti-discrimination laws confirms the absence of any significant burden on businesses. One study examined whether city and county ordinances prohibiting local contractors from discriminating against LGBT employees were administratively burdensome.⁴³ Of the twenty-nine cities and counties that participated in the study, every single one reported that “there was little or no administrative burden associated with implementing or enforcing” the non-discrimination ordinances.⁴⁴ Further, the localities did not incur burdensome compliance costs, and in fact, twenty-eight of them reported that no individuals filed a complaint under the local ordinances for LGBT discrimination committed by contractors.⁴⁵

Any fear that the number of complaints being filed each year would soar and that businesses would be negatively impacted is unfounded. To the contrary, studies have estimated that the inclusion of sexual orientation and transgender status in nondiscrimination legislation would only lead to a few additional complaints being filed in states each year. In Georgia, for example, one study estimated that LGBT nondiscrimination laws would lead to two additional complaints being filed each year with the

⁴³ Christy Mallory and Brad Sears, *An Evaluation of Local Laws Requiring Government Contractors To Adopt LGBT-Related Workplace Policies*, 5 ALBANY GOVERNMENT LAW REVIEW 478, 481, 485, 515 (2012).

⁴⁴ *Id.* at 542.

⁴⁵ *Id.* at 531–32. One locality reported that it was unsure whether any LGBT discrimination complaints had been filed as it did not track such data.

Georgia Commission on Equal Opportunity.⁴⁶ In South Dakota, a different study estimated that such laws would lead to an additional nine complaints each year, with a “minimal” impact on the South Dakota Employment Commission.⁴⁷ There is thus little risk that businesses would face cumbersome investigations, or that exorbitant enforcement costs could be passed onto businesses directly (or indirectly through increased taxes).

The studies demonstrating the lack of any burden imposed by recognizing protections for LGBT employees reflect the fact that such protections are unlikely to alter the majority of businesses’ employment decisions. Over 80% percent of small business owners already consider it illegal to fire or refuse to hire LGBT workers.⁴⁸ For these businesses, a ruling that recognizes federal nondiscrimination protections for LGBT workers will simply confirm their understanding of the law, rather than impose any meaningful administrative burden.

CONCLUSION

Protections for LGBT workers benefit the economy, businesses themselves, and a business’s most important asset: its employees. The judgment of the United States Courts of Appeals for the Second and Sixth Circuits should be affirmed, and the judgment of the United States

⁴⁶ Christy Mallory and Brad Sears, *Employment Discrimination Based on Sexual Orientation and Gender Identity in Georgia*, THE WILLIAMS INSTITUTE 8–9 (Oct. 2014).

⁴⁷ Christy Mallory and Brad Sears, *Employment Discrimination Based on Sexual Orientation and Gender Identity in South Dakota*, THE WILLIAMS INSTITUTE 6–7 (Aug. 2015).

⁴⁸ See Small Business Majority, *supra* note 2, at 4.

Court of Appeals for the Eleventh Circuit should be reversed.

Respectfully submitted.

LISA S. BLATT
Counsel of Record
COLETTE CONNOR
AMANDA J. COX
BRIAN P. HAGERTY
MICHAEL J. MESTITZ
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, N.W.
Washington, DC 20005
(202) 434-5000
lblatt@wc.com

JULY 3, 2019