

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

IN THE
Supreme Court of the United States

GERALD LYNN BOSTOCK,
Petitioner,

v.

CLAYTON COUNTY, GEORGIA, ET AL.,
Respondents,

[Caption Continued On Following Page]

**BRIEF FOR LAWYERS' COMMITTEE FOR
CIVIL RIGHTS UNDER LAW, THE LEADERSHIP
CONFERENCE ON CIVIL AND HUMAN RIGHTS,
AND 54 CIVIL RIGHTS ORGANIZATIONS AS
AMICI CURIAE SUPPORTING THE EMPLOYEES**

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Petitioners,
v.
MELISSA ZARDA, AS EXECUTOR OF THE ESTATE
OF DONALD ZARDA, ET AL.,
Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURTS OF APPEALS
FOR THE ELEVENTH, SIXTH, AND SECOND CIRCUITS

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<i>EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.</i> , 884 F.3d 560 (6th Cir. 2018).....	17

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<i>EEOC v. Sunbelt Rentals, Inc.</i> , 521 F. 3d 306 (4th Cir. 2008).....	12
<i>Ferrill v. Parker Grp., Inc.</i> , 168 F.3d 468 (11th Cir. 1999).....	35
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<i>Gutierrez v. Mun. Ct. of Se. Judicial Dist.</i> , 838 F.2d 1031 (9th Cir. 1988).....	12
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<i>Hively v. Ivy Tech Cmty. Coll. of Ind.</i> , 853 F.3d 339 (7th Cir. 2017).....	27, 29, 30
<i>Holcomb v. Iona Coll.</i> , 521 F.3d 130 (2d Cir. 2008)	30, 32
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<i>Int’l Union, UAW v. Johnson Controls, Inc.,</i> 499 U.S. 187 (1991).....	15
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<i>Swierkiewicz v. Sorema N.A.</i> , 534 U.S. 506 (2002).....	16
<i>Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.</i> , 173 F.3d 988 (6th Cir. 1999).....	30
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<i>United States v. Ga. Power Co.</i> , 474 F.2d 906, 910 (5th Cir. 1973).....	8
<i>United Steelworkers of Am. v. Weber</i> , 443 U.S. 193 (1979).....	3
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<i>Zarda v. Altitude Express, Inc.</i> , 883 F.3d 100 (2d Cir. 2018)	16, 27, 29, 30 31, 36, 37

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--------------------------------	----

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-----------------------------------	----

110 Cong. Rec. 2579 (1964).....	26
---------------------------------	----

110 Cong. Rec. 2580 (1964).....	19, 20
---------------------------------	--------

110 Cong. Rec. 2584 (1964).....	18
---------------------------------	----

ACS Demographic and Housing

<i>Estimates</i> , U.S. Census Bureau, https://tinyurl.com/y4r5bvfc	20
---	----

American Women: Report of the

<i>President's Commission on the Status of Women</i> (1963), https://tinyurl.com/yxbdns5p	7
---	---

M.V. Lee Badgett et al., *Bias in the*

<i>Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination</i> , Williams Institute (June 2007), https://tinyurl.com/aff3h6p	22, 23
--	--------

M.V. Lee Badgett et al., *Evidence from*

<i>the Frontlines on Sexual Orientation and Gender Identity Discrimination</i> , Center for Employment Equity (July 2018), https://tinyurl.com/y6t4savt	22, 23
--	--------

- Paula Rene Bruner, *Race Discrimination in the 21st Century Workplace*, in EEOC, Digest of Equal Employment Opportunity Law (2017), <https://tinyurl.com/yxmhsses>32
- William A. Darity Jr. & Patrick L. Mason, *Evidence on Discrimination in Employment: Codes of Color, Codes of Gender*, 12 J. Econ. Perspectives 63 (1998)8
- Discrimination in America: Experiences and Views of LGBTQ Americans*, NPR/Robert Wood Johnson Foundation/Harvard T.H. Chan School of Public Health (Nov. 2017), <https://tinyurl.com/y5n778nw>22
- Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 Harv. L. Rev. 1307 (2012).....9, 18
- John Hope Franklin, *History of Racial Segregation in the United States*, 304 Annals of the Am. Acad. of Polit. & Soc. Sci. 1 (1956)7
- Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* (2011), <https://tinyurl.com/y4m37rag>23

Chang-Tai Hsieh et al., <i>The Allocation of Talent and U.S. Economic Growth</i> (Nat'l Bureau of Econ. Research, Working Paper Ver. 7.0, April 26, 2019), https://tinyurl.com/kxaz5zr	10
<i>Issues: Non-Discrimination Laws</i> , National Center for Transgender Equality, https://tinyurl.com/yye3y6vh (last visited June 28, 2009).....	23
Scott James, <i>Queer People of Color Led the L.G.B.T.Q. Charge, but Were Denied the Rewards</i> , N.Y. Times (June 22, 2019), https://tinyurl.com/y2v9lhav	21
Peter W. Kerman, <i>Sex Discrimination in Help Wanted Advertising</i> , 15 Santa Clara L. Rev. 183 (1974)	8
<i>LGBT Data & Demographics</i> , Williams Institute (Jan. 2019), https://tinyurl.com/y5b8l38h	21
<i>LGBT Families of Color: Facts at a Glance</i> , Movement Advancement Project, Family Equality Council & Center for American Progress (Jan. 2012), https://tinyurl.com/yy2kmmjj	23
Serena Mayeri, <i>Intersectionality and Title VII</i> , 95 Boston Univ. L. Rev. 713 (2015).....	18, 19

- Louis Menand, *How Women Got in on the Civil Rights Act*, New Yorker (July 14, 2014), <https://tinyurl.com/y2cqzcfk>18, 19
- Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 Geo. Wash. L. Rev. 232 (1965)26
- Pauli Murray, *Memorandum in Support of Retaining the Amendment to H.R. 7152 Title VII (Equal Employment Opportunity) to Prohibit Discrimination in Employment Because of Sex* (April 14, 1964), <https://tinyurl.com/y6kk82po>19, 26
- New Analysis Shows Startling Levels of Discrimination Against Black Transgender People*, National LGBTQ Task Force (2011), <https://tinyurl.com/y6njbt3e>24
- Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%*, Gallup News (May 22, 2018), <https://tinyurl.com/y8cp2c3l>20, 21
- Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 Ann. Rev. of Soc. 181 (2008), <https://tinyurl.com/y6brzh2o>24

<i>Paying an Unfair Price: The Financial Penalty for LGBT People of Color, Movement Advancement Project (June 2015), https://tinyurl.com/yxk9jc94.....</i>	23
Wizdon Powell Hammond et al., <i>Workplace Discrimination and Depressive Symptoms</i> , 2 J. of Race and Social Problems 19 (2010), https://tinyurl.com/y682yxox	9
<i>Report of the U.S. Commission on Civil Rights: Employment</i> (1961), https://tinyurl.com/y23r88ur	7, 9
Antonin Scalia & Bryan A. Garner, <i>Reading Law: The Interpretation of Legal Texts</i> (2012).....	14
Vicki Schultz, <i>Taking Sex Discrimination Seriously</i> , 91 Denv. Univ. L. Rev. 995 (2015).....	18, 19
<i>Significant EEOC Race/Color Cases</i> , EEOC, https://tinyurl.com/y5zk5eqh (last visited June 28, 2019)	34
Catherine Smith, <i>Queer As Black Folk?</i> , 2007 Wis. L. Rev. 379 (2007).....	25
<i>U.S. LGBTQ Paid Leave Survey</i> , Human Rights Campaign Foundation (2018), https://tinyurl.com/yxevwczu	21, 22

Judith A. Winston, <i>Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990</i> , 79 Cal. L. Rev. 775 (1991).....	24
C. Vann Woodward, <i>The Strange Career of Jim Crow</i> (1955)	7

INTEREST OF AMICI CURIAE¹

The Lawyers' Committee for Civil Rights Under Law (Lawyers' Committee) is a nonpartisan, non-profit organization that was formed in 1963 at the request of President John F. Kennedy to enlist the private bar's leadership and resources in combating racial discrimination. The principal mission of the Lawyers' Committee is to secure equal justice for all through the rule of law. To that end, the Lawyers' Committee has participated in hundreds of impact lawsuits challenging race discrimination prohibited by the Constitution and federal statutes relating to voting rights, housing, employment, education, and public accommodation. As a leading national racial justice organization, the Lawyers' Committee has a vested interest in ensuring that racial and ethnic minorities, including minorities who identify as lesbian, gay, bisexual, transgender, and queer/questioning (LGBTQ), have strong, enforceable protections from employment discrimination.

The Leadership Conference on Civil and Human Rights (The Leadership Conference) is a diverse coalition of more than 200 national organizations charged with promoting and protecting the civil and human rights of all persons in the United States, including LGBTQ individuals. It is the nation's largest and most diverse civil and human rights coalition. For

¹ The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

more than half a century, The Leadership Conference, based in Washington, D.C., has led the fight for civil and human rights by advocating for federal legislation and policy, securing passage of every major civil rights statute since the Civil Rights Act of 1957. The Leadership Conference works to build an America that is inclusive and as good as its ideals.

Statements of interest for all other amici are included in Appendix A.

INTRODUCTION AND SUMMARY OF ARGUMENT

Workplace discrimination against LGBTQ people is discrimination “because of ... sex.” 42 U.S.C. § 2000e-2(a). Recognition of that reality is essential to safeguarding the job security and economic stability of millions of LGBTQ persons in America, especially those most often subjected to discrimination in the workplace: LGBTQ people of color. It also follows directly from Title VII’s protections against other forms of prohibited discrimination—protections that depend on the same legal rules that the LGBTQ employees rely on in these cases. The diversity and vitality of American workplaces, and in turn the American economy, are dependent upon Title VII’s continued application to provide robust protections against discrimination.

Outlawing job discrimination based on LGBTQ status is fully consistent with Title VII’s long history of anti-discrimination achievements, as well as the statutory text that has made those successes possible. Title VII was enacted in 1964 with the ambitious goal

of “root[ing] out discrimination in employment.” *EEOC v. Shell Oil Co.*, 466 U.S. 54, 77 (1984). At that time, America’s workplaces were rife with bias. While the plight of African-American workers was clearly Congress’ primary impetus for action, *see United Steelworkers of Am. v. Weber*, 443 U.S. 193, 202 (1979), courts have repeatedly interpreted the plain language of Title VII to ensure protection against disparate treatment on the basis of *all* characteristics protected by Title VII—race, color, religion, sex, and national origin—and against *all* forms in which discrimination is manifested—whether overt or obscured by pretext, whether in the form of a termination notice or pervasive harassment that creates a hostile work environment, and whether part of categorical mistreatment of an entire group or targeted discrimination against an individual based on harmful stereotypes.

This record of far-reaching application is a product of the statute’s plain terms. As this Court has recognized time and again, the reach of a statute is not limited to “the principal evil” Congress sought to address, but instead turns upon “the statutory text.” *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998). And here, that text is straightforward. It prohibits disparate treatment of an employee “because of” his or her race, sex, or other protected characteristic. That means courts need only apply a “simple test”: “whether the evidence shows treatment of a person in a manner which but for [the protected characteristic] would be different.” *City of Los Angeles, Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978).

In these cases, that “simple test” is clearly satisfied. A transgender woman fired for being transgender would not have been terminated for exhibiting traits associated with women if she were a non-transgender woman. Similarly, two gay men fired for their sexual orientation would not have been terminated for their romantic or sexual associations with men if they were instead women.

This application of Title VII’s text is important to ensure that LGBTQ individuals are not “treated as social outcasts or as inferior in dignity and worth.” *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018). That is especially imperative for people living at the intersection of LGBTQ and racial-minority identities. For these people, racial bias is often compounded by other forms of discrimination.

Indeed, though LGBTQ people of color have made and continue to make great contributions to our society, they suffer far higher rates of job discrimination than their white counterparts. *See infra* at 22-23. If Title VII is interpreted to deny protection on the basis of LGBTQ status, employers could attempt to cloak their racial bias in anti-LGBTQ garb. And it may be challenging for employees suffering discrimination to prove that race, rather than LGBTQ status, caused the adverse employment action. Civil-rights leader Pauli Murray made the same point about protections for women of color at the time of Title VII’s enactment: “Without the addition of ‘sex’” to the statute, she explained, “Title VII would have protected only half the potential Negro work force.” After all, it would be “exceedingly difficult for a Negro woman to

determine whether or not she is being discriminated against because of race or sex.” *Infra* at 26. So too here: If Title VII does not bar LGBTQ discrimination, that will leave many LGBTQ people of color vulnerable to workplace discrimination—an outcome contrary to Congress’ paramount goal of ensuring equal access to employment opportunities for minorities.

Adopting a restrictive interpretation of Title VII in these cases would also mark a deviation from settled Title VII doctrine as applied to other forms of discrimination, including racial prejudice. Racial bias, to be sure, implicates unique historical and institutional concerns. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 438-44 (1968). For Title VII’s purposes, however, race- and sex-based discrimination are treated equivalently, subject to narrow exceptions irrelevant here.

Accordingly, legal rules developed in race-discrimination cases must be applied with full strength to claims of sex discrimination, including the LGBTQ employees’ claims here. For example, courts have long held that employers violate Title VII by treating employees adversely based on their marriage to, or association with, someone of a different race or national origin. There is no basis to carve out a special exception for discrimination on the basis of sex, including discrimination based on an employee’s association with a spouse or romantic partner of the same sex.

Since the enactment of Title VII, there have been significant strides in making our workforce more diverse and inclusive. Title VII’s enduring protections help ensure that employees of all backgrounds can contribute to the economy free from harassment and

discrimination—ever so important as our country continues to become more diverse. The sweeping text of Title VII, alongside the statute’s storied history of rooting out pervasive workplace discrimination, compels treating LGBTQ discrimination as unlawful.

ARGUMENT

I. Title VII’s Prohibitions Against Employment Discrimination Have Played A Critical Role In Advancing Civil Rights.

A. Title VII ensures workplace advancement based on job qualifications free from discrimination, and has expanded access to economic opportunities for all.

Discrimination was once the norm in many American workplaces. Congress understood that only a bold solution could rise to the challenge. Title VII’s robust prohibition against discrimination has repeatedly operated over the past five decades to root out discriminatory employment practices even as new challenges have emerged that Congress did not necessarily anticipate in 1964. The cases at bar exemplify that history.

1. Before Title VII, federal law was powerless to combat repugnant workplace discrimination.

Workplace discrimination was flagrant and commonplace prior to Title VII’s enactment. In the aftermath of the Civil War, African Americans were

relegated to second-class citizenship through a system of laws, ordinances, and customs that separated white and African American people in every area of life. C. Vann Woodward, *The Strange Career of Jim Crow* 7 (1955). This code of segregation “lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking.” *Id.*; see also, e.g., John Hope Franklin, *History of Racial Segregation in the United States*, 304 *Annals of the Am. Acad. of Polit. & Soc. Sci.* 1, 7-8 (1956) (describing 1915 South Carolina statute that “forbade textile factories to permit employees of different races to work together in the same room”).

A 1961 report by the U.S. Commission on Civil Rights documented the “vicious circle of discrimination in employment opportunities” that continued to harm African Americans. *Report of the U.S. Commission on Civil Rights: Employment* 153-54 (1961), <https://tinyurl.com/y23r88ur>. That discrimination included practices as blatant as government contractors’ “outright refusal to employ” African-American workers. *Id.* at 155.

Women, too, suffered extraordinary discrimination in the workplace. A 1963 report by the President’s Commission on the Status of Women (though itself expressing certain outmoded stereotypes about women’s family roles) documented examples of the obstacles faced by women in the workplace. For example, one in three surveyed private employers had separate pay scales for women employees, paying them less “for the same kind of work.” *American Women: Report of the President’s Commission on the*

Status of Women 28 (1963), <https://tinyurl.com/yxbdns5p>.

The upshot is that before Title VII was enacted, a variety of odious practices, unimaginable today, were entirely legal. Employers overtly discriminated against employees in hiring, assignments, and pay. Some of them included express discriminatory exclusions for African Americans and women in job postings and ads.² It was thus not uncommon to find employers engaging in practices like the one this Court described in a 1971 case. There, the employer “openly discriminated on the basis of race in the hiring and assigning of employees,” placing African-American employees exclusively in a department “where the highest paying jobs paid less than the lowest paying jobs in the other four ... departments in which only whites were employed.” *Griggs v. Duke Power Co.*, 401 U.S. 424, 427 (1971).³

² See, e.g., William A. Darity Jr. & Patrick L. Mason, *Evidence on Discrimination in Employment: Codes of Color, Codes of Gender*, 12 J. Econ. Perspectives 63, 66-67 tbl.1 (1998) (collecting examples of newspaper help-wanted ads from 1960 that expressed racial preferences); Peter W. Kerman, *Sex Discrimination in Help Wanted Advertising*, 15 Santa Clara L. Rev. 183 (1974).

³ See also, e.g., *United States v. Ga. Power Co.*, 474 F.2d 906, 910 (5th Cir. 1973) (Until 1963, “an open and unvarying policy of the company prevented blacks persons from competing for any but the most menial and low-paying jobs within the corporate structure.”); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 543 (1971) (per curiam) (employer refused to hire mothers of young children for assembly trainee position, but hired fathers of young children for that position).

Employers also operated unreservedly on the basis of noxious, demeaning stereotypes about both their employees and their customers. Many airlines, for instance, stopped hiring men as flight attendants and then infamously terminated women attendants when they reached a certain age or married. They strenuously defended such policies as necessary for marketing, arguing it was essential to sell male passengers a “fantasy centered on the sexual availability of female flight attendants.” Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 Harv. L. Rev. 1307, 1348-54 (2012).

The consequence of such pervasive discrimination was serious damage to the self-worth and dignity of workers. “Denial of employment because of the color of a person’s skin,” gender, religion, or other protected characteristics, “is an affront to human dignity.” U.S. Commission on Civil Rights, *supra*, at 1. Unsurprisingly, studies find that workplace discrimination can cause serious emotional and psychological harm. *See, e.g.*, Wizdon Powell Hammond et al., *Workplace Discrimination and Depressive Symptoms*, 2 J. of Race and Social Problems 19 (2010), <https://tinyurl.com/y682yxox>.

Workplace discrimination also inflicted (and continues to inflict) significant economic costs, both on the individual victims of that discrimination and, as study after study concludes, for the American economy overall. One recent publication by the National Bureau for Economic Research found that reducing workplace discrimination and discriminatory barriers to education has accounted for as much as 20-40% of increased economic output in the United States over

the last half-century. Chang-Tai Hsieh et al., *The Allocation of Talent and U.S. Economic Growth* 1-5 (Nat’l Bureau of Econ. Research, Working Paper Ver. 7.0, Apr. 26, 2019), <https://tinyurl.com/kxaz5zr>.⁴

2. Over the past half-century, Title VII has resulted in remarkable progress toward fulfilling the promise of rooting out job discrimination.

Title VII has the ambitious purpose of “eliminat[ing] those discriminatory practices and devices which have fostered ... job environments to the disadvantage of minority citizens.” *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 348 (1977) (internal quotation marks omitted). It is a “broad remedial measure, designed to assure equality of employment opportunities.” *Pullman-Standard v. Swint*, 456 U.S. 273, 276 (1982) (internal quotation marks omitted).

Recently, this Court emphasized that Title VII furthers the government’s “compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal.” *Burwell v. Hobby Lobby Stores*,

⁴ As the report explains, “[t]he last 50 years have seen a remarkable convergence in the occupational distribution between white men, women, and black men. For example, 94 percent of doctors and lawyers in 1960 were white men. By 2010, the fraction was just over 60 percent. Similar changes occurred throughout the economy, particularly in highly-skilled occupations.” Hsieh et al, *supra*, at 2.

Inc., 573 U.S. 682, 733 (2014). The government’s interest in rooting out sex discrimination, as well as disparate treatment on the basis of the statute’s other protected characteristics, is of course compelling as well. *See Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 728-29 (2003); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625-29 (1984).

In light of these compelling interests, time and again, this Court and lower courts have applied Title VII to eliminate discriminatory barriers to equality in the workplace—even where, as in these cases, arguments were made that Title VII’s drafters could not have anticipated such applications. As this Court observed in *Oncale*, the statute covers not just “the principal evil[s] Congress was concerned with when it enacted Title VII,” but also “reasonably comparable evils” as long as they fall within the statutory text. 523 U.S. at 79; *see also* Zarda Br. 42-44.

Thus, rejecting claims by some employers that Congress intended Title VII to be limited to “economic or tangible discrimination,” this Court held that the statute prohibits harassment that causes a “hostile work environment.” *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65-66 (1986); *see also Oncale*, 523 U.S. at 79 (Title VII covers same-sex harassment). This essential protection shields employees against not only sexual harassment, but also workplace harassment based on race, religion, and national origin. *Meritor*, 477 U.S. at 66. To take just one example, Title VII’s harassment prohibition helped remedy the egregious workplace harassment experienced by a

Muslim worker in the wake of the September 11th attacks. *E.g.*, *EEOC v. Sunbelt Rentals, Inc.*, 521 F. 3d 306, 321 (4th Cir. 2008).

As much discussed in these cases, this Court has also applied Title VII to forbid discrimination against subsets of men or women, rather than limiting application to discrimination against all men or all women. Notably, in *Price Waterhouse v. Hopkins*, the Court held Title VII bars discrimination on the basis of harmful stereotyping, *i.e.*, an employer's expectation that a person will behave a certain way based on perceived characteristics of that person's race, sex, religion, or national origin. 490 U.S. 228, 250 (1989) (plurality opinion); *id.* at 259-60 (White, J., concurring in the judgment) (agreeing with plurality that discrimination based on stereotyping "was supported by the record"); *id.* at 272-73 (O'Connor, J., concurring in the judgment) (same); *id.* at 294-95 (Kennedy, J., dissenting) (employee "plainly presented a strong case ... of discrimination" based on stereotypes).

In addition, courts have taken care not to place artificial limitations on Title VII's protections. They have done so, in part, by guarding against employers' use of pretext to engage in unlawful discrimination on the basis of protected characteristics. For example, as the population of the United States has become more linguistically and ethnically diverse, courts have recognized that discrimination based on language or accents can be pretext for racial or national-origin discrimination. *See, e.g.*, *Gutierrez v. Mun. Ct. of Se. Judicial Dist.*, 838 F.2d 1031, 1038 (9th Cir. 1988) (striking down rule barring court employees from

speaking a language other than English while attending to work duties), *vacated on other grounds*, 490 U.S. 1016 (1989); *Akouri v. State of Fla. Dep’t of Transp.*, 408 F.3d 1338, 1348 (11th Cir. 2005) (emphasizing employer’s remark that “all white” employees would never “take orders” from supervisor with “an accent”).

Finally, beyond recognizing robust understandings of each Title VII protected characteristic, courts have held that employees may raise a successful claim based on an employer’s combined grounds for discrimination “where two bases for discrimination exist,” such as race and gender. *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994). If the law were otherwise, it would force a plaintiff “to bisect [her] identity,” “distort[ing] or ignor[ing] the particular nature of [her] experience[.]” *Id.* It would also force courts to engage in the difficult, if not impossible task, of teasing out which of multiple forms of discrimination played a causal role in the discrimination. *Id.* Accordingly, “when a plaintiff is claiming race *and* sex bias, it is necessary to determine whether the employer discriminates on the basis of that *combination* of factors, not just whether it discriminates against people of the same race or of the same sex.” *Id.*

The relief plaintiffs seek here—construing Title VII to forbid discrimination on the basis of LGBTQ status—is hardly a departure from Title VII’s remarkable history. Since Title VII’s enactment, there has been significant progress toward the statute’s goal of eliminating bias from employment decisions. A cramped interpretation in these cases would be

wholly inconsistent with the statute’s text, history, and purpose.

B. Title VII’s plain text imposes a straightforward bar on disparate treatment.

A critical reason why Title VII’s history is so remarkable is the breadth of its *text*. Regardless of the particular “evil[s]” that motivated the statute’s proponents, “it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” *Oncale*, 523 U.S. at 79; *see also Pa. Dep’t of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998) (similar). In fact, Title VII is the poster child for this principle: Justice Scalia’s treatise on statutory interpretation points to Title VII as a prime example to illustrate that “general terms” are to be given their “full and fair scope,” rather than interpreted narrowly to “infer exceptions for situations that the drafters never contemplated.” Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 101-04 (2012).

Two features of Title VII’s text stand out for purposes of the cases presently before the Court:

First, it treats all forms of discrimination the same, regardless of the protected characteristic (race, color, religion, sex, or national origin). *See Price Waterhouse*, 490 U.S. at 243 n.9 (plurality opinion); *Meritor Sav. Bank*, 477 U.S. at 66. “The language of Title VII makes plain the purpose of Congress to assure equality of employment opportunities and to eliminate those discriminatory practices and devices’ that have been used to disadvantage racial, gender, and

religious minorities in the workplace.” *Lewis v. City of Union City*, 918 F.3d 1213, 1220 (11th Cir. 2019) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)).

Narrow exceptions, irrelevant in these cases, prove this general rule. For example, the bona fide occupational qualification (BFOQ) defense permits differential treatment in very limited circumstances for all characteristics other than race. *See* 42 U.S.C. § 2000e-2(e)(1); *Int’l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991) (construing the BFOQ exception “narrowly”). That the statute expressly provides a limited exception shows Congress knew how to depart from the general rule of equivalent treatment when it so wished. *See TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) (“*Expressio unius est exclusio alterius*.”). This principle is particularly important when it comes to Title VII associational-discrimination doctrine, discussed *infra* at 29-33.

Second, Title VII’s plain text provides for a straightforward test: Disparate treatment on the basis of a protected characteristic is unlawful. The statute bars adverse employment actions “because of” race, sex, or another protected characteristic. 42 U.S.C. § 2000e-2(a). As the Court has recognized, this language dictates a “simple test”: “whether the evidence shows treatment of a person in a manner which but for [the protected characteristic] would be different.” *Manhart*, 435 U.S. at 711; *see also Trans World*

Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (same); *Stephens Br.* 20-23.⁵

To see how *Manhart*’s “simple test” works in practice, one need look no further than these cases. Indeed, Judge Cabranes regarded *Zarda* as a “straightforward case of statutory construction,” requiring just three short sentences of analysis to conclude that the employee should prevail. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 135 (2d Cir. 2018) (opinion concurring in the judgment). The question in *Zarda*, as in *Bostock*, is whether a male employee would have been fired for being attracted to men if he had instead been a woman. The answer is no, as the Second Circuit expressly held. *Id.* at 119 (majority). As to the transgender employee in *Harris Funeral Homes*, the question is whether Aimee Stephens would have been fired for living openly as a woman if she instead had been identified at birth as

⁵ This test is the same for all disparate-treatment claims, whether the discrimination is overt (*e.g.*, the employer admits he terminated an employee because of a protected characteristic), *see, e.g.*, *Manhart*, 435 U.S. at 711; *Trans World Airlines*, 469 U.S. at 121 (discussing an employer policy that was “discriminatory on its face”), or hidden from view (*e.g.*, the employer claims he fired the employee because “he was bad at his job” but the evidence reveals the worker’s race was the true motivation, *see e.g.*, *McDonnell Douglas*, 411 U.S. at 804). Where an employee lacks “direct evidence of discrimination,” *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002), it may be more difficult to prove a Title VII violation, but the “ultimate question” is the same: whether there was disparate treatment on the basis of a protected characteristic, *Cooper v. Fed. Reserve Bank of Richmond*, 467 U.S. 867, 875 (1984).

female rather than male. As the Sixth Circuit recognized, “[t]he answer quite obviously is no.” *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 575 (6th Cir. 2018).

The employees in these cases were thus terminated “because of ... sex.” That is what the statutory text unambiguously forbids. As this Court has “stated time and again,” “a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, ... this first canon is also the last: ‘judicial inquiry is complete.’” *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 461-62 (2002) (some quotation marks omitted).

C. Title VII’s history reinforces the plain meaning of the statutory text, which proscribes discrimination on the basis of sex, just as on the basis of other protected characteristics.

Because the Court’s inquiry in these cases should be complete after examining the statutory text, there is no need to consider the statute’s history. But that history, to the extent relevant, fully supports the straightforward application mandated by the text.

Sex discrimination may not have been the primary impetus for Title VII’s passage, but the statutory history still shows that Congress had a genuine interest in stamping out sex-based workplace discrimination. Once-prevalent accounts suggesting the addition of “sex” to Title VII was “the gambit of a congressman seeking to scuttle adoption of the Civil Rights Act,” *see, e.g., Ulane v. E. Airlines, Inc.*, 742

F.2d 1081, 1085 (7th Cir. 1984), are apocryphal. Careful work of legal historians and scholars has debunked this notion.⁶

The “poison pill amendment” story typically focuses on the fact that the sponsor of the amendment, Representative Howard W. Smith, was opposed to civil-rights legislation. But the reality is that, while Smith was opposed to progress on race relations, there are indications he supported women’s rights. Cary Franklin, *supra*, at 1318 & n.36. For example, he supported the Equal Rights Amendment, and his constituency included “Virginia textile mills employ[ing] large numbers of women”—mills that stood to benefit if “protective” legislation limiting women’s working hours were invalidated. Louis Menand, *How Women Got in on the Civil Rights Act*, New Yorker (July 14, 2014), <https://tinyurl.com/y2cqzcfk>.

Moreover, once Smith had introduced the “sex” amendment, it was taken seriously and debated deliberately. It was not rushed to final passage. After the amendment was added to the House bill in February 1964, 110 Cong. Rec. 2584 (1964), the bill moved to the Senate, where the addition of “sex” was carefully considered for months before the final Senate vote in June, 110 Cong. Rec. 14,511 (1964). During this time, the amendment’s position was tenuous.

⁶ See, e.g., Serena Mayeri, *Intersectionality and Title VII*, 95 Boston Univ. L. Rev. 713, 716-18 (2015); Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 Denv. Univ. L. Rev. 995, 1014-15 (2015).

Senate Minority Leader Everett Dirksen, for example, reportedly sought to eliminate “sex” from Title VII’s coverage. Menand, *supra*.

Women’s rights advocates, including the National Women’s Party and civil-rights leader Pauli Murray, advocated passionately for the provision to remain. Schultz, *supra*, at 1017; Mayeri, *supra*, at 717-18. Murray, for example, penned an influential memorandum that circulated in Congress and the Johnson administration. Mayeri, *supra*, at 718. She called for “bold,” “imaginative” leadership to protect the millions of women who had become “a permanent sector of the labor force”—a sector that would “not diminish but increase.” And she emphasized the breadth of the amendment, explaining that, if enacted, it would require equivalent protections against race and sex discrimination with the narrow exception for BFOQ. Pauli Murray, *Memorandum in Support of Retaining the Amendment to H.R. 7152 Title VII (Equal Employment Opportunity) to Prohibit Discrimination in Employment Because of Sex* 16, 25, 43-44 (April 14, 1964), <https://tinyurl.com/y6kk82po>.

Congressional supporters from both parties also ardently defended the amendment, all the while accentuating, instead of obscuring, its sweeping consequences. For example, rather than shying from criticism of opponents that Title VII might render unenforceable state-level “protective” legislation (laws supposedly designed to shield women from workplace harms), Representative Katharine St. George argued that protective legislation was either based on outmoded stereotypes or a subterfuge to prevent women “from going into the higher salary brackets.” 110

Cong. Rec. 2580; *see also id.* (statement of Rep. Griffiths) (“Most of the so-called protective legislation has really been to protect men’s rights in better paying jobs.”).

In short, the history of Title VII shows the statutory text means what it says: Apart from the BFOQ exception, the prohibition on sex discrimination is unqualified and stands on equal footing with the statute’s other protected characteristics. Applied here, Title VII requires protection against LGBTQ discrimination as part of Title VII’s ban on discrimination because of sex.

II. LGBTQ Employees Of Color Are Among Those In Greatest Need Of Title VII’s Protections.

People of color, including people of color who identify as LGBTQ, represent a growing part of the U.S. population. The Census Bureau estimates that as of 2017, 41.3 million people (12.7%) are African American, 58.8 million (18.1%) are of Hispanic or Latino origin, and 21.6 million (6.6%) are Asian.⁷ Gallup reports show that 5% of African-Americans identify as LGBT, along with 6.1% of Hispanics and 4.9% of Asians.⁸ Nonwhites are now more likely than whites

⁷ *ACS Demographic and Housing Estimates*, U.S. Census Bureau, <https://tinyurl.com/y4r5bvfc> (2017 ACS 1-Year Estimates) (last visited June 28, 2019).

⁸ Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%*, Gallup News (May 22, 2018), <https://tinyurl.com/y8cp2c3l>.

to identify as LGBT, and people of color comprise 42% of all LGBT-identified adults.⁹

Today, there are nearly two million LGBTQ people of color in America's workforce.¹⁰ They are far more likely to suffer discrimination than their white counterparts. If Title VII is not construed according to its plain text so that it covers LGBTQ discrimination, such discrimination would go unchecked by federal law, and biased employers would have a convenient pretext for discriminating against LGBTQ persons of color. It is thus impossible to carve out LGBTQ discrimination from Title VII's ambit without inflicting severe harm on countless employees of color.

⁹ *Id.*; *LGBT Data & Demographics*, Williams Institute (Jan. 2019), <https://tinyurl.com/y5b8l38h>. It bears noting that LGBTQ people of color “played outsized roles during many of the earliest milestones of the gay rights movement,” such as the Stonewall uprising. Scott James, *Queer People of Color Led the L.G.B.T.Q. Charge, but Were Denied the Rewards*, N.Y. Times (June 22, 2019), <https://tinyurl.com/y2v9lhav>.

¹⁰ *U.S. LGBTQ Paid Leave Survey*, Human Rights Campaign Foundation (2018), <https://tinyurl.com/yxevwczu>.

A. Excluding LGBTQ status from Title VII's coverage would hit LGBTQ people of color the hardest.

While significant discrimination against the LGBTQ population writ large has been widely documented,¹¹ the millions of LGBTQ persons of color in the workforce suffer disproportionately.

LGBTQ persons of color are more than twice as likely to report discrimination as compared to their white peers. Whereas 13% of white LGBTQ persons report experiencing slurs or insensitive comments about their LGBTQ status during the job-application process, that figure is 32% for LGBTQ people of color.¹² Similarly, 27% of LGBTQ persons of color report being afraid to take time off work to care for a loved one for fear it would reveal their LGBTQ status at work (compared to 16% of white LGBTQ employees). Human Rights Campaign Foundation, *supra*. And the extraordinary rates of workplace discrimination against transgender people—including 26% reporting they have been fired based on anti-

¹¹ See, e.g., M.V. Lee Badgett et al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination*, Williams Institute (June 2007), <https://tinyurl.com/aff3h6p>; M.V. Lee Badgett et al., *Evidence from the Frontlines on Sexual Orientation and Gender Identity Discrimination*, Center for Employment Equity (July 2018), <https://tinyurl.com/y6t4savg>.

¹² *Discrimination in America: Experiences and Views of LGBTQ Americans*, NPR/Robert Wood Johnson Foundation/Harvard T.H. Chan School of Public Health (Nov. 2017), <https://tinyurl.com/y5n778nw>.

transgender bias and 50% that have been harassed on the job—are even higher for transgender people of color, who face “up to twice or three times the rates of various negative outcomes” as compared to white transgender employees.¹³

The consequences of such discrimination are all the more severe because LGBTQ people of color continue to be economically disadvantaged. They suffer disproportionately from housing insecurity, lack of quality, affordable healthcare, and fewer educational opportunities.¹⁴ A 2012 report found that 32% of children being raised by black same-sex couples live in poverty, compared to 14% for white same-sex couples, 13% for heterosexual black parents, and just 7% for heterosexual white parents. *Id.* LGBTQ people of color also face higher unemployment than their white counterparts,¹⁵ and are more likely to have poor

¹³ Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 51 (2011), <https://tinyurl.com/y4m37rag>; see also, e.g., *Issues: Non-Discrimination Laws*, National Center for Transgender Equality, <https://tinyurl.com/yye3y6vh> (last visited June 28, 2019); Badgett, *Bias in the Workplace*, *supra*, at 3 (reporting similar evidence of pronounced discrimination against LGBTQ employees of color); Badgett, *Evidence from the Frontlines*, *supra* (same).

¹⁴ *LGBT Families of Color: Facts at a Glance*, Movement Advancement Project, Family Equality Council & Center for American Progress (Jan. 2012), <https://tinyurl.com/yy2kmmjj>.

¹⁵ *Paying an Unfair Price: The Financial Penalty for LGBT People of Color*, Movement Advancement Project (June 2015), <https://tinyurl.com/yxk9jc94>.

credit.¹⁶ The unemployment rate for black transgender people is also twice the rate of the overall transgender population, and over four times the general-population unemployment rate.¹⁷

It is no coincidence that LGBTQ persons of color face disproportionate rates of discrimination. People who identify as members of multiple categories subject to discrimination tend to be the most visible in the workplace and elsewhere. They thus become “targeted for discrimination.” *Lam*, 40 F.3d at 1562. As one legal scholar put it, “[w]orking women who are members of racial minorities are frequently victimized by discrimination *precisely because* they are women of color.” Judith A. Winston, *Mirror, Mirror on the Wall: Title VII, Section 1981, and the Intersection of Race and Gender in the Civil Rights Act of 1990*, 79 Cal. L. Rev. 775, 796-97 (1991) (emphasis added).

Anecdotal perspectives bear out these statistics and understandings. Indeed, many LGBTQ people of color understand their experience with discrimination as different, not only in degree, but in kind, relative to forms of discrimination suffered by other people of color and other LGBTQ persons. Naturally, then,

¹⁶ Devah Pager & Hana Shepherd, *The Sociology of Discrimination: Racial Discrimination in Employment, Housing, Credit, and Consumer Markets*, 34 Ann. Rev. of Soc. 181 (2008), <https://tinyurl.com/y6brzh2o>.

¹⁷ *New Analysis Shows Startling Levels of Discrimination Against Black Transgender People*, National LGBTQ Task Force (2011), <https://tinyurl.com/y6njbt3e>.

many do not identify themselves based on rigid categories, *i.e.*, sorting their experiences and perspectives into separate “black” and “LGBTQ” boxes. They instead identify uniquely as “LGBTQ people of color.”

For example, one scholar writes, “Today, the way I navigate the world in a same-sex interracial relationship as a black lesbian is different than the way a black heterosexual man in an interracial relationship navigates it. My experiences as a black lesbian are not the same as the experiences of a black heterosexual man, and to make the assumption of sameness marginalizes the unique experiences of black women and men” Catherine Smith, *Queer As Black Folk?*, 2007 Wis. L. Rev. 379, 380-81 (2007).

B. Denying protection on the basis of LGBTQ status will facilitate pretextual race discrimination against LGBTQ people of color.

LGBTQ people of color could face greater workplace *racial* discrimination if Title VII is not construed to prohibit *LGBTQ* discrimination. Although Title VII plainly protects against race-based discrimination in the workplace, employers could mask disparate treatment of LGBTQ people of color by depicting it as discrimination based on (legal) disapproval of LGBTQ status, rather than (unlawful) racial discrimination. And in cases where LGBTQ discrimination is used as a pretext, problems of proof could inhibit minority employees from invoking the statute’s protections against race discrimination.

This concern is not foreign to Title VII. A near-identical fear was an important part of the case for including “sex” in Title VII to begin with. Supporters of the “sex” amendment argued that, if the law prohibited only racial discrimination, it would fail to deter discriminatory employers from targeting black women by claiming that discrimination was on the basis of sex, not race.

Civil-rights leader Pauli Murray, for example, reasoned in her 1964 memo to Congress (discussed above at 19) that the “inclusion of the ‘sex’ amendment” in Title VII was “necessary to protect negro women.” Murray, *supra*, at 19. Based on “prevailing patterns” of race-based discrimination, employers could continue to discriminate against black women based on their race, and those women would be left legally defenseless. After all, she emphasized, “it is exceedingly difficult for a Negro woman to determine whether or not she is being discriminated against because of race or sex.” *Id.* at 20. “Without the addition of ‘sex,’” Murray later observed, “Title VII would have protected only half the potential Negro work force.” Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 Geo. Wash. L. Rev. 232, 243 (1965); *see also* 110 Cong. Rec. 2579 (1964) (statement of Rep. Griffiths) (similar).

The same logic demands that Title VII place every form of proscribed workplace discrimination, including both race- and sex-based discrimination, on equal footing to ensure robust protection for LGBTQ people of color. The discrimination such employees face in the workplace is one of today’s most pressing challenges to Title VII’s promise of equal treatment. This

Court should not dilute Title VII’s potency as a remedy for race-based discrimination by carving out LGBTQ workers from its protections.

III. Excluding LGBTQ Discrimination From Title VII’s Scope Would Depart From Settled Title VII Law Protecting Against Other Forms Of Discrimination.

Denying Title VII protection against LGBTQ discrimination would not merely facilitate pretextual discrimination against LGBTQ people of color. It would also deviate from Title VII’s stable doctrinal framework for other protected characteristics. The protections the employees seek here are fully consistent with several well-settled areas of Title VII law.

A. Title VII proscribes disparate treatment based on a protected characteristic without requiring a separate inquiry into whether the employer is acting with “invidious,” “racist,” or “sexist” intent.

In arguing that Title VII excludes LGBTQ discrimination from its protections, dissenting judges in the Second and Seventh Circuits have maintained that discrimination must be “invidious”—and specifically, in the context of sex-discrimination claims, “sexist”—to be actionable. *Zarda*, 883 F.3d at 156-157 (Lynch, J., dissenting); *see also Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 368 (7th Cir. 2017) (Sykes, J., dissenting) (“Sexual orientation discrimination ... is not inherently *sexist*.”); *id.* at 367 (distinguishing miscegenation laws from LGBTQ workplace discrimination because “[m]iscegenation laws plainly

employ invidious racial classifications”). This reasoning is mistaken. While amici certainly believe that LGBTQ bias is an invidious form of discrimination, it is unnecessary for courts to make this judgment in passing on an LGBTQ discrimination claim under Title VII.

As explained above (at 15-16), Title VII’s disparate-treatment test has never been an inquiry whether discrimination is “racist,” “sexist,” or otherwise reflecting animus tied to a protected characteristic. The relevant question is instead whether there is disparate treatment “because of” the protected characteristic. *See Zarda Br.* 34-35. If so, the employer’s reason does not matter (unless a narrow exception, such as BFOQ, applies).¹⁸

In *Manhart*, for example, the Court concluded that it violated Title VII to require women employees to

¹⁸ Because “[t]he ultimate question in every employment discrimination case involving a claim of disparate treatment is whether the plaintiff was the victim of intentional discrimination,” *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 153 (2000), an employer may defeat disparate-treatment liability when it can show it made a challenged employment decision for a “legitimate, *nondiscriminatory* reason,” *McDonnell Douglas*, 411 U.S. at 802 (emphasis added); *see also supra* at 16 n.5. Importantly, this burden-shifting framework does *not* permit an employer to justify an employment decision that was made on the basis of a protected characteristic as somehow being non-biased. For example, an employer is entitled to prove it fired an employee for bad performance, not her sex. However, no employer is permitted to argue “yes, we terminated the employee because of her sex, but it was permissible because we didn’t act with a ‘sexist motive.’”

contribute in greater amounts to a pension fund because, statistically, women tend to live longer. There was no suggestion the employer's motive was "invidious" or "sexist." It was simply a matter of "actuarial" analysis. 435 U.S. at 716. Still, Title VII prohibited the practice because the employer's contribution plan "on its face[] discriminated against individual employees because of their sex." *Id.* Beyond narrow exceptions like BFOQ, "[n]either Congress nor the courts have recognized ... a defense" permitting an employer to offer a "justification" for disparate treatment. *Id.* at 716-17. Applying *Manhart* here, LGBTQ discrimination straightforwardly constitutes discrimination "because of ... sex."

B. Associational-discrimination precedent applies across Title VII's protected characteristics and supports the employees here.

"It is now accepted that a person who is discriminated against because of the protected characteristic of one with whom she associates is actually being disadvantaged because of her own traits." *Hively*, 853 F.3d at 347. That theory, known as associational discrimination, confirms that Title VII outlaws adverse employment action based on an employee's sexual orientation. *Id.*; *Zarda*, 883 F.3d at 128; *accord, e.g., Hively*, 853 F.3d at 359 (Flaum, J., concurring). Yet, echoing the argument that discrimination must reflect "racist" prejudice or similar animus to be actionable under Title VII, the employers, the United States, and lower-court dissenting judges have tried to cabin associational discrimination to the context of race discrimination or other forms of discrimination

that reflect “discriminatory animus.”¹⁹ That is misguided.

In the associational-discrimination cases, courts have recognized Title VII liability if an employer “takes action against an employee because of the employee’s association with a person of another race.” *Zarda*, 883 F.3d at 124. For example, in *Holcomb v. Iona College*, the Second Circuit held that “an employer may violate Title VII if it takes action against an employee because of the employee’s association with a person of another race,” such as when a white employee is fired because he is married to a black woman. 521 F.3d 130, 131-32 (2d Cir. 2008).²⁰

¹⁹ See *Zarda*, 883 F.3d at 159 (Lynch, J., dissenting); see also, e.g., *Hively*, 853 F.3d at 368 (Sykes, J., dissenting) (distinguishing miscegenation laws as resting on “invidious racial classifications”); Brief of Amicus Curiae United States, *Zarda*, 2017 WL 3277292, at *21 (treating race-based associational discrimination as distinctive because in that context, “the employer deems the employee’s own race to be either inferior or superior to the partner’s race”) Petition for Writ of Certiorari, *Zarda*, at 29 (“any employer that discriminates against an employee in a same-sex relationship has not engaged in sex-based treatment of women as inferior to men”).

²⁰ See also, e.g., *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994-95 (6th Cir. 1999) (white employee with biracial child); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (white job applicant married to black person); *Morales v. NYS Dep’t of Labor*, 865 F. Supp. 2d 220, 226, 242 (N.D.N.Y. 2012) (white employee discriminated against based on associations “with persons of Mexican, Cuban, Puerto Rican, Columbian, Dominican, Ecuadorian, and Honduran national origin”); *Wiggins v. Social Security Administration*, EEOC Appeal No. 07A30048 (Jan.

The same logic dictates treating sexual-orientation discrimination as discrimination on the basis of sex. As in *Holcomb* and similar cases, gay, lesbian, and bisexual Title VII claimants suffer discrimination based on a protected characteristic of the person they date or marry in relation to their own protected characteristic—except, the discrimination is tied to the fact that their romantic partners are of the same sex, rather than a different race or national origin. The distinction makes no difference, however, because as explained above (at 14-15), Title VII principles “apply with equal force to discrimination based on” any of the protected characteristics. *Price Waterhouse*, 490 U.S. at 243 n.9 (plurality opinion). Accordingly, to fire an employee for being lesbian, gay, or bisexual is an action “based on an employer’s opposition to association between particular sexes and thereby discriminates against an employee based on their own sex.” *Zarda*, 883 F.3d at 128; *accord id.* at 133 (Jacobs, J., concurring).

Challenging this understanding, the employers, the United States and lower-court dissenters instead read the associational-discrimination cases narrowly to turn upon a showing of “bigotry against” a “disfavored race.” *Id.* at 159 (Lynch, J., dissenting). Certainly, anti-miscegenation policies reflect “bigotry” against a “disfavored race.” See *Loving v. Virginia*, 388 U.S. 1, 11 (1967). But animus of that character is

22, 2004), <https://tinyurl.com/y3ohcd22> (black employee punished by black manager because the employee “aligned herself” with white members of management rather than black managers).

not necessary for a Title VII disparate-treatment violation. The statute instead asks a more basic question: whether disparate treatment of an employee was “because of such individual’s race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a).

The “reason is simple” why this statutory standard is satisfied in the associational-discrimination cases. *Holcomb*, 521 F.3d at 139. These cases reflect the same longstanding test from *Manhart* for identifying unlawful disparate treatment. *See* Zarda Br. 31-36. Take *Holcomb*, for example, which involved discrimination against a white employee because of his marriage to a black woman. There, the court explained, “where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination *because of the employee’s own race*.” 521 F.3d at 139 (emphasis added); *see also* Paula Rene Bruner, *Race Discrimination in the 21st Century Workplace*, in EEOC, Digest of Equal Employment Opportunity Law (2017), <https://tinyurl.com/yxmhsses> (same). In other words, Title VII was violated in *Holcomb* because the employee—a white man discharged as a result of the employer’s aversion to interracial marriage—would not have been discharged if he were a black person married to a black person.

Accordingly, in associational-discrimination cases, just as in other Title VII cases, the ultimate legal inquiry is straightforward. Courts do not inquire whether the employer’s motive was “racist,” “sexist,” or based on impermissible “animus.” It is enough that

the employee is being subjected to disparate treatment because of his or her race, color, sex, national origin, or religion.

C. The employers’ attempts to evade Title VII disparate-treatment liability echo the discredited “customer preference” defense.

Since Title VII’s enactment, employers have tried to justify discrimination by claiming it was not “racist,” “sexist,” or otherwise “invidious.” In particular, they have shifted the blame to their customers, alleging that their customers legitimately need, desire, or benefit in some way from employees of a certain race, sex, or other protected characteristic. But it “is now widely accepted that a company’s desire to cater to the perceived racial preferences of its customers is not a defense under Title VII.” *Chaney v. Plainfield Healthcare Ctr.*, 612 F.3d 908, 913 (7th Cir. 2010); *see, also, e.g.*, 29 C.F.R. § 1604.2(a)(1) (EEOC regulation).

In urging here that Title VII requires a showing of animus or invidiousness beyond disparate treatment itself, the employers and court of appeals dissents rely on arguments similar to this repudiated customer preference theory.²¹ Those advancing customer preference defenses likewise attempted to drive a wedge between disparate treatment and Title VII liability. Most famously, in *Diaz v. Pan Am. World Airways, Inc.*, an airline argued that hiring only

²¹ For example, the owner of Harris Funeral Homes has asserted that “[a] male funeral director dressing in a female uniform would disrupt our clients’ healing process.” J.A. 130 ¶ 37.

women as flight attendants was lawful because its (mostly male) passengers preferred women. 442 F.2d 385, 389 (5th Cir. 1971). The Fifth Circuit emphatically rejected that notion: “While we recognize that the public’s expectation of finding one sex in a particular role may cause some initial difficulty,” the court observed, “it would be totally anomalous if we were to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid. Indeed, it was, to a large extent, these very prejudices the Act was meant to overcome.” *Id.*

Even today, employers continue to invoke such customer preference defenses, but courts uniformly recognize their incompatibility with Title VII. As recently as 2010, for example, the Seventh Circuit rejected a nursing home’s defense of allowing patients to opt for an all-white nursing staff, “foster[ing] ... a racially-charged environment” by providing its employees with an “assignment sheet that unambiguously, and daily, reminded [staff] ... that certain residents preferred no black [nurses].” *Chaney*, 612 F.3d at 912-13; *see also Significant EEOC Race/Color Cases*, EEOC, <https://tinyurl.com/y5zk5eqh> (last visited June 28, 2019) (detailing other similar recent cases).

Other employers have raised comparable defenses, claiming disparate treatment was not unlawful because it did not reflect impermissible animus. In *Knight v. Nassau County Civil Service Commission*, for example, a black employee was reassigned to a “minority recruitment” position. 649 F.2d 157, 162 (2d Cir. 1981). The employer argued this race-based assignment was permissible because it was trying to

“attract more minority applicants” and the black employee would be more effective than a white employee because “blacks work better with blacks.” *Id.* “No matter how laudable the [employer’s] intention might be,” the Second Circuit held, the assignment was unlawful because the employee “was assigned a particular job (against his wishes) because his race was believed to specially qualify him for the work.” *Id.*; *see also, e.g., Ferrill v. Parker Grp., Inc.*, 168 F.3d 468, 471 (11th Cir. 1999) (similar).

The door to customer preference defenses and similar arguments has long been barred shut. The same logic should defeat the similar attempts in these cases to contend that disparate treatment is not actionable where it is not “sexist” or otherwise “invidious.”

D. Artificial limitations on stereotyping claims are inconsistent with existing protections against sex- and race-based stereotyping.

“[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.” *Price Waterhouse*, 490 U.S. at 251 (plurality opinion); *supra* at 12. For that reason, *Zarda* and *Harris Funeral Homes* correctly held that Title VII prohibits the sex stereotyping inherent in discrimination against LGBTQ persons.²²

²² Discrimination on the basis of LGBTQ status is highly bound up in gender stereotypes. Cases involving LGBTQ dis-

Resisting this straightforward application of *Price Waterhouse*, the employers, United States, and lower-court dissenters have suggested restricting Title VII’s scope such that stereotyping would be legally relevant only where the trait in question (*e.g.*, “aggressiveness” for the management position in *Price Waterhouse*, 490 U.S. at 251) is essential to the job at issue. In other words, they think stereotyping may be the basis for a Title VII claim only when the employee would be placed in a “catch 22” (fired for exhibiting the trait and failing to conform to a stereotype or fired for conforming with the stereotype and not exhibiting the trait). *Zarda*, 883 F.3d at 157 (Lynch, J., dissenting); *see also e.g.*, U.S. Br., *Zarda*, 2017 WL 3277292, at *19 (2d Cir. July 26, 2017); Harris Funeral Homes Cert. Pet. 21-22.

This narrow reading of *Price Waterhouse* is at odds with how that decision has rightly been applied to protect employees from both sex-based and race-based stereotypes—as well as combinations of the two. For example, in *Heard v. Board of Trustees of*

crimination commonly involve allegations, for instance, of epithets like “fem” and “sissy” alongside demeaning terms like “fag,” *Zarda*, 883 F.3d at 121 (collecting cases), or “butch” alongside “dyke,” *e.g.*, *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1221, 1224 (D. Or. 2002). It makes scant sense, and would yield highly arbitrary results, to require courts to determine whether such evidence speaks to gender stereotyping or LGBT discrimination. *See Zarda Br.* 27-31. Courts should avoid drawing “arbitrary and unprincipled line[s].” *Apple Inc. v. Pepper*, 139 S.Ct. 1514, 1522 (2019); *see also Republic of Sudan v. Harrison*, 139 S. Ct. 1048, 1061 (2019) (courts should “maintain[] ... clear, administrable rule[s],” rather than creating “difficult line drawing problems”).

Jackson Community College, a black woman employee brought a Title VII suit alleging that she was subject to poor reviews and terminated based on race- and sex-based stereotyping. In particular, she objected to supervisors' comments that she was "completely out of control," "would either scowl or grunt during ... interactions," "bullied her colleagues," and adopted an inappropriate "tone"—comments that, she alleged, reflected her employer's stereotype-tainted view that she was an "angry black woman." No. 11-cv-13051, 2013 WL 142115, at *12 (E.D. Mich. Jan. 11, 2013). Recognizing that Title VII bars "discrimination ... based on" stereotyping, including "racial stereotyping," the court held that the employee's claim could proceed to trial. *Id.*²³

Holdings like *Heard* are consistent with what *Price Waterhouse* recognized decades ago: "[A]n employer who discriminates against employees based on assumptions about [protected characteristics]" violates Title VII, without need for a further showing that the stereotype operates as a "double-edged sword." *Zarda*, 883 F.3d at 123. There is no reason to engraft special limitations on stereotyping claims that operate to the detriment of LGBTQ employees.

²³ See also, e.g., *Kang v. U. Lim Am., Inc.*, 296 F.3d 810, 817 (9th Cir. 2002) (recognizing Title VII claim based on Korean worker's failure to conform to employer's "stereotypical notions" about Koreans); *Kimble v. Wis. Dep't of Workforce Dev.*, 690 F. Supp. 2d 765, 777-78 (E.D. Wis. 2010) (finding evidence to establish Title VII violation based on employer's reliance on "uncomplimentary stereotype" about black males).

* * *

Title VII's text and history reflect a simple yet critical goal: "to assure equality of employment opportunities." *McDonnell Douglas*, 411 U.S. at 800. As the United States becomes increasingly multicultural and diverse, it is all the more important to eradicate bias from the workplace, and to ensure that all employees are evaluated on the merits of their contributions. The employers in the present cases would instead have this Court contort basic principles of Title VII law and disregard the plain statutory text in the name of denying basic protections to LGBTQ employees. That misguided request should be denied.

CONCLUSION

The judgments in *Harris Funeral Homes* and *Zarda* should be affirmed, and the judgment in *Bostock* reversed.

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APPENDIX A — STATEMENTS OF INTEREST FOR ALL OTHER AMICI

Advocates for Youth (Advocates) partners with youth leaders, adult allies, and youth-serving organizations that promote policies and champion programs related to young people’s sexual and reproductive health and rights. Advocates works alongside thousands of young people here in the United States and around the globe as they fight for civil rights on the topics of sexual health, rights, and justice. Advocates envisions a world in which marginalized young people are not discriminated against based on their actual or perceived sexual orientation or gender identity and expression. Advocates has a strong interest in safeguarding Title VII’s prohibition of sex discrimination in the workplace, including discrimination against LGBTQ people.

Alaska Public Interest Research Group (AKPIRG) is an organization that advocates in the public interest. From employees’ rights, consumer protection, identity theft and fraud, to voting rights, ethical government and clean energy, AKPIRG has been pursuing policies that give ordinary Alaskans a voice that can be heard. AKPIRG works to ensure every person’s voice is amplified equally. If individuals and communities are not recognized for who they are, those people are disempowered and unable to participate in a public process that does not reflect acceptance of their humanity.

American Association for Justice (AAJ) is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve

the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest trial bar. AAJ members primarily represent plaintiffs in personal injury actions, consumer cases, employment rights cases, and other civil actions. For over 70 years, AAJ has served as a zealous advocate for the right of all Americans to seek legal recourse under both state and federal law for wrongful injury. AAJ believes that broad enforcement of antidiscrimination laws, including Title VII, benefits all Americans by removing obstacles to achieving workplace dignity and advancement according to ability.

The **American Association of University Professors** (AAUP) is a nonprofit organization of over 42,000 faculty, librarians, graduate students, and academic professionals in public and private sector higher education. Its purpose is to advance academic freedom and shared university governance; define fundamental professional values and standards for higher education; promote the economic security of all those engaged in teaching and research in higher education, including eliminating unlawful discrimination; and ensure higher education's contribution to the common good.

The **American Association of University Women** (AAUW) was founded in 1881 by like-minded women who had defied society's conventions by earning college degrees. Since then, it has worked to increase women's access to education through research, advocacy, and philanthropy. Today, AAUW has more than 170,000 members and supporters, 1,000

branches, and 800 college and university partners nationwide. AAUW plays a major role in mobilizing advocates nationwide on its priority issues to advance gender equity. AAUW supports equitable access and advancement in employment, free from systemic barriers and biases, including vigorous enforcement of employment discrimination statutes.

The **American Humanist Association (AHA)** is a national organization that advances the ethical and life-affirming worldview of humanism, which—without beliefs in gods or other supernatural forces—encourages individuals to live informed and meaningful lives that aspire to the greater good of humanity. The AHA promotes progressive values as well as equality for humanists, atheists, and other nontheistic Americans. In its exercise of these commitments, the AHA defends the civil and human rights of those who face the brunt of employment discrimination, including LGBTQ people of color, through advocacy, education, and legal work.

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving religious freedom and the constitutional principle of separation of religion and government. Americans United represents more than 125,000 members and supporters nationwide. Since its founding in 1947, Americans United has participated as a party, as counsel, or as an amicus curiae in the leading church–state cases decided by this Court and by the lower federal and state courts throughout the country. As a defender of religious freedom, Americans United has long fought

to uphold the critical protections of Title VII, including those that prohibit religious discrimination. Americans United believes that Title VII's vital protections against workplace discrimination can and should apply to LGBTQ persons without undermining the religious freedom of employers.

Andrew Goodman Foundation is a civil rights nonpartisan organization that supports youth leadership development, voting accessibility, and social justice initiatives on campuses across the country with mini-grants to select institutions of higher learning and other financial assistance to students. The Foundation's vision is that young people will become active, engaged citizens who ensure a just democracy and sustainable future.

Anti-Defamation League (ADL) was founded in 1913 to combat anti-Semitism and other forms of prejudice, and to secure justice and fair treatment to all. Today, it is one of the world's leading organizations fighting hatred and bigotry and eradicating discrimination. At issue in this case are core issues of equality and discrimination. ADL has filed amicus briefs in numerous cases addressing the unconstitutionality or illegality of discriminatory practices or laws and worked closely with coalition partners to help pass the Civil Rights Act of 1964. As such, ADL maintains a strong interest in ensuring that its provisions, such as Title VII, are interpreted in accordance with the law's intent to protect individuals—including LGBTQ people—from discrimination.

The **Arab American Institute (AAI)** is a non-profit, nonpartisan national civil rights organization

established under Section 501(c)(4) of the Internal Revenue Code. It represents the policy and community interests of Arab Americans across the United States, and was created to nurture and encourage the direct participation of Arab Americans in political and civic life. In particular, AAI serves as a central resource for government officials, the media, political leaders, and community groups on a variety of public policy issues that concern Arab Americans and U.S.-Arab relations. As a leading national civil rights organization, AAI is committed to the civil rights of all Americans, especially in how they may impact the Arab American community.

The Autistic Self Advocacy Network (ASAN) is a national, private, nonprofit organization, run by and for autistic individuals. ASAN provides public education and promotes public policies that benefit autistic individuals and others with developmental or other disabilities, a disproportionate number of whom are LGBTQ and do not meet typical gender expectations. ASAN's advocacy activities include combating stigma, discrimination, and violence against autistic people and others with disabilities, including in the workplace. ASAN takes a strong interest in cases that affect the rights of autistic individuals and others with disabilities, including LGBTQ autistic individuals, to participate fully in community life and enjoy the same rights as others without disabilities.

Bend the Arc: A Jewish Partnership for Justice is the nation's leading progressive Jewish voice empowering Jewish Americans to be advocates for the nation's most vulnerable. Bend the Arc mobilizes Jewish Americans beyond religious and institutional

boundaries to create justice and opportunity for all, through bold leadership development, innovative civic engagement, and robust progressive advocacy.

Campaign for Accountability is a 501(c)(3) nonpartisan, nonprofit watchdog organization that uses research, litigation, and aggressive communications to expose misconduct and malfeasance in public life. Campaign for Accountability is dedicated to ensuring that laws are upheld and strives to hold powerful actors who compromise the public interest accountable.

The **Center for Popular Democracy** (CPD) is a high-impact, national organization dedicated to creating equity, opportunity, and democracy in partnership with base-building organizations. CPD builds the power of communities to ensure a pro-worker, pro-immigrant, racial and economic justice agenda. CPD is nationally recognized for its policy and research expertise on issues relating to workers' rights. CPD works closely with affiliates and allies rooted in communities of low wage workers, living at the intersection of LGBTQ and other marginalized identities, to support their advocacy for strong worker-protection policies and effective enforcement of those laws.

CenterLink was founded as a member-based coalition to support the development of strong, sustainable LGBT community centers. The organization plays an important role in supporting the growth of LGBT centers and addressing the challenges they face, by helping them to improve their organizational and service delivery capacity and increase access to public resources. These centers are often the only

staffed nonprofit LGBTQ presence in the area and the first point of contact for people seeking information, coming out, accessing services, or facing discrimination. CenterLink and the local centers are there to aid, guide and connect to other resources when LGBTQ individuals face discrimination whether at home, school and at times their homes.

Color of Change is the nation's largest online racial justice organization. The organization's work is dedicated to creating a more human and less hostile world for Black people in America. Color of Change works to challenge injustice, hold corporate and political leaders accountable, commission game-changing research on systems of inequality, and advance solutions for racial justice that can transform our world.

The **Equal Justice Society** (EJS) is a national legal organization focused on restoring constitutional safeguards against discrimination. EJS's goal is to help achieve a society where race is no longer a barrier to opportunity. Specifically, EJS is working to fully restore the constitutional protections of the Fourteenth Amendment and the Equal Protection Clause, which guarantees all citizens receive equal treatment under the law. By combining legal advocacy, outreach and coalition building, and education through effective messaging and communication strategies, EJS aims to broaden conceptions of present-day discrimination to include unconscious and structural bias by using cognitive science, structural analysis, and real-life experience.

Equal Rights Advocates (ERA) is a national nonprofit legal organization dedicated to protecting

and expanding economic and educational access and opportunities for women and girls. Since its founding in 1974, ERA has sought to end gender discrimination in employment and education and advance equal opportunity for all by litigating historically significant cases in both state and federal courts, including two of the first U.S. Supreme Court cases addressing Title VII's prohibition of discrimination "because of sex" and its application to pregnant workers. ERA has participated as amicus curiae in scores of other cases involving the interpretation of Title VII and other anti-discrimination laws. ERA has supported the recognition and application of antidiscrimination laws and the constitutional principles of equal protection and due process to LGBTQ persons in amicus briefs filed in this Court.

Fair Count, Inc. works to ensure a fair and accurate count of all people in the Census, particularly in hard-to-count communities like LGBTQ persons and other historically marginalized and disenfranchised groups. Recognizing that structural discrimination plays an integral role in keeping many groups and populations from civic participation, Fair Count is committed to alleviating systematic oppression, discrimination, and fear to ensure all voices are heard—and counted—equally.

Family Values @ Work is a network of coalitions in 27 states working to win paid sick & safe days, family & medical leave insurance and other policies that value families at work. Family Values @ Work grew out of the recognition that valuing caregiving and enabling people to be good providers and good family

members is key to achieving racial, gender, and economic equity. Family Values @ Work organizes with partners across racial, gender and economic justice movements to ensure that these policies support LGBTQ workers and are inclusive of their families.

The **Hispanic National Bar Association** (HNBA) has a membership comprised of thousands of Latino lawyers, law professors, law students, legal professionals, state and federal judges, legislators, and bar affiliates across the country. HNBA regularly participates as amicus curiae in this Court. HNBA supports Hispanic legal professionals and is committed to advocacy on issues of importance to the millions of people of Hispanic heritage living in the United States, including the important civil rights issues presented in these cases.

In Our Own Voice: National Black Women's Reproductive Justice Agenda is a national-state partnership with eight Black women's Reproductive Justice organizations: The Afiya Center, Black Women for Wellness, Black Women's Health Imperative, New Voices for Reproductive Justice, SisterLove, Inc., SisterReach, SPARK Reproductive Justice NOW, and Women with a Vision. In Our Own Voice focuses on lifting up the voices of Black women leaders on national, regional, and state policies that impact the lives of Black women and girls. The reproductive justice framework is rooted in the human right to control our bodies, our sexuality, our gender, and our reproduction. The ability to work in an employment environment free from discrimination is essential to ensuring this right.

Founded in 1929, the **Japanese American Citizens League** (JACL) is the nation's oldest and largest Asian American civil rights organization. JACL's perspective is framed by the Japanese American community's experience of discrimination that led to mass incarceration during World War II. Today JACL works to protect the rights of all people to be free from discrimination, including on the basis of sex in the workplace.

Justice in Aging is a national organization with a principal mission to protect the rights of low-income older adults through advocacy, litigation, and the education and counseling of legal aid attorneys and other local advocates. Since 1972, Justice in Aging has sought to ensure the health and economic security of older adults with limited income and resources, especially women, members of the LGBTQ community, people of color, and people with limited English proficiency. The organization works to ensure access to Medicaid, Medicare, Social Security, and other benefits programs that allow low-income older adults to live with dignity and independence. Justice in Aging has an interest in ensuring that its LGBTQ clients are able to challenge discrimination in healthcare settings.

LatinoJustice PRLDEF (LJP) is a nonprofit organization that champions an equitable society by using the power of the law together with advocacy and education. Since its founding as the Puerto Rican Legal Defense and Education Fund, LJP has advocated for and defended the constitutional rights and the equal protection of all Latinos under the law. LJP has also engaged in and supported law-reform civil-rights

litigation on a wide variety of issues in state and federal courts across the country.

League of Women Voters of the United States (LWVUS) is a grassroots, nonpartisan, non-profit organization that has for nearly 100 years encouraged informed, active, and inclusive participation in government in order to promote political responsibility and to better serve the democratic interests and principles of all peoples of the United States. LWVUS supports equal rights for all under state and federal law and advocates for laws that prohibit discrimination against the LGBTQ community in jobs, housing, and public accommodations.

Matthew Shepard Foundation is a nonprofit organization with a mission to erase hate by replacing it with understanding, compassion, and acceptance. By amplifying the story of Matthew Shepard, the Foundation inspires individuals, organizations, and communities to embrace the dignity and equality of all people. As an organization fighting for the civil rights of all people, the Matthew Shepard Foundation has an interest in ensuring that LGBTQ employees are protected from discrimination in the workplace.

The **NAACP Legal Defense & Educational Fund, Inc.** (LDF) is the nation's first and foremost civil rights legal organization. Through litigation, advocacy, and public education, LDF strives to enforce the United States Constitution's promise of equal protection and due process for all Americans. Since the enactment of the Civil Rights Act of 1964, LDF has helped Americans vindicate their rights under Title

VII to be free from discrimination on the basis of, inter alia, race and sex. LDF has represented plaintiffs in cases such as *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975), *Pullman-Standard v. Swint*, 456 U.S. 273 (1982), *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), and *Lewis v. City of Chicago*, 560 U.S. 205 (2010). LDF has also participated as amicus curiae in several cases addressing the rights of LGBTQ individuals. See, e.g., *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018); *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 570 U.S. 744 (2013); *Romer v. Evans*, 517 U.S. 620 (1996). LDF has a strong interest in the proper interpretation and application of Title VII.

National Action Network [SOI TK].

National Asian Pacific American Women’s Forum (NAPAWF) is a multi-issue, progressive, community organizing and policy advocacy organization for Asian American and Pacific Islander (AAPI) women and girls in the United States. NAPAWF’s mission is to build collective power so that all AAPI women and girls can have full agency over their lives, families, and communities. NAPAWF’s work is centered in a reproductive justice framework that acknowledges the diversity within the community and ensures that different aspects of identity are considered in tandem when addressing the community’s social, economic, and health needs. The Forum’s work includes fighting for economic justice for AAPI women and advocating for the adoption of policies and laws

that protect the dignity, rights, and equitable treatment of AAPI women workers.

Founded in 1909, the **National Association for the Advancement of Colored People** (NAACP) is the country's largest and oldest civil rights organization. The mission of the NAACP is to ensure the equality of political, social, and economic rights of all persons, and to eliminate racial hatred and racial discrimination. Throughout its history, the NAACP has used the legal process to champion equality and justice for all persons. *See generally NAACP v. Alabama*, 357 U.S. 449 (1958); *Morgan v. Virginia*, 328 U.S. 373 (1946); and *Town of Huntington v. Huntington Branch NAACP*, 488 U.S. 15 (1988).

The **National Center for Youth Law** (NCYL) is a nonprofit law firm that uses the law to help children in need nationwide. For more than 40 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support, and opportunities they need to become self-sufficient adults. NCYL values diversity in all forms, including sexual orientation and gender identity, and believes interpreting federal laws to prohibit discrimination on those bases would reduce bias and harassment for the youth they serve.

The **National Coalition for Asian Pacific American Community Development** (National CAPACD) is a progressive coalition of more than 100 community based organizations across 21 states and the Pacific Islands. CAPACD advocates for and organizes in low-income Asian American Pacific Islander (AAPI) communities to advance economic security

through a focus on housing stability. Implicit in CAPACD's vision of economic and social justice are the principles of equity and fairness, especially as they relate to gender and race discrimination. Available data suggest that at least 325,000 LGBTQ AAPIs are living in the United States. LGBTQ AAPIs face the dual burden of race and sex/gender/sexual orientation discrimination. CAPACD believes strongly that LGBTQ citizens—including LGBTQ AAPIs and other LGBTQ communities of color—deserve equal protection under the law from discrimination on the basis of gender identity and sexual orientation in the workplace.

The **National Consumer Law Center (NCLC)** is a nonprofit organization widely recognized as an expert in consumer and civil rights issues. For the past 50 years, NCLC has drawn on this expertise to provide information, legal research, policy analyses, and market insights to federal and state legislatures, administrative agencies, and the courts. NCLC also publishes a twenty-volume Consumer Credit and Sales Legal Practice Series, including *Credit Discrimination* (6th ed. 2013), which examines and applies the ECOA, Fair Housing Act, civil rights statutes, HMDA, Community Reinvestment Act, and state discrimination laws. A major focus of NCLC's work is to increase public awareness of discriminatory practices perpetrated against protected classes of consumers and to combat such discrimination through the enforcement of civil rights laws.

National Council on Independent Living
[SOI TK].

Founded in 1883, **National Crittenton** is a national advocacy organization that is dedicated to advancing and protecting the rights of girls, young women and women who face chronic adversity, violence and injustice. National Crittenton's mission has been to catalyze social and systems change to ensure they have the rights, opportunities and support to achieve their potential, including their right to live and work without fear of injustice and discrimination on the basis of race, ethnicity, sexual orientation, and gender identity. Protecting LGBTQ workers from discrimination is critical to National Crittenton's mission and the achievement and maintenance of justice.

The **National Domestic Workers Alliance** (NDWA) is the leading voice for dignity and fairness for domestic workers in the United States. Founded in 2007, NDWA works for respect, recognition and inclusion in labor protections for domestic workers. NDWA is powered by over 60 affiliate organizations and local chapters and by a growing membership base, including individuals who identify as LGBTQ. The majority of domestic workers in the United States are women of color and immigrants. Domestic workers often suffer discrimination, including sexual harassment, and other labor violations against them. NDWA strongly believes that domestic workers and all workers deserve to work free of discrimination or any other violations, including discrimination based on their sex and sexual orientation.

National Fair Housing Alliance, Inc. (NFHA) is a national organization dedicated to ending all forms of discrimination in housing. As a consortium of private, nonprofit fair-housing organizations, state

and local civil rights groups, and individuals, NFHA engages in efforts to ensure equal housing opportunities for all people through leadership, education and outreach, membership services, public policy initiatives, community development programs, advocacy, and enforcement. As part of its enforcement activities, NFHA participates in federal and state court litigation involving claims under the Fair Housing Act and other civil rights laws, monitors federal cases brought under the Fair Housing Act, and files amicus briefs in cases in which it has an interest.

The **National Health Law Program** (NHeLP) is a 50-year old public interest organization that works to advance access to quality health care and to protect the legal rights of lower-income individuals and families, persons with disabilities, and other vulnerable populations. NHeLP has long history of helping to ensure that individuals and families can obtain the quality health care to which they are entitled, through policy advocacy, education, and litigation. NHeLP engages in education, policy analysis, administrative advocacy, and litigation at both state and federal levels. NHeLP's mission is to ensure that all people in the United States have access to affordable, accessible, and dependable health care not impeded by discrimination, including discrimination based upon an individual's sexual orientation and gender identity.

National Hispanic Media Coalition (NHMC) is the media watchdog for the Latino community, ensuring that this community is fairly and consistently represented in news and entertainment and that its

voices are heard over the airwaves and on the internet. NHMC works to bring decision-makers to the table to open new opportunities for Latinos to create, contribute and consume programming that is inclusive, free from bias and hate rhetoric, affordable, and culturally relevant.

The **National Housing Law Project** (NHLP) is a nonprofit organization that advances housing justice for poor people and communities through technical assistance and training to legal aid attorneys, policy advocacy, and co-counseling on key litigation. NHLP works to strengthen and enforce tenants' rights, increase housing opportunities for underserved communities, and preserve and expand the nation's supply of safe and affordable homes. Ensuring that workplaces across the country are free from discrimination against LGBT employees important to is NHLP because of the connection between job security and housing security. Ensuring equal access and enjoyment of housing for LGBT persons and families is also central to NHLP's mission, and is directly implicated by this case because housing anti-discrimination laws, such as Fair Housing Act, are generally interpreted consistently with Title VII.

Founded in 1973, the **National LGBTQ Task Force** is a progressive social justice organization that works to build power, take action, and create change to achieve freedom and justice for LGBTQ people and our families. The Task Force works toward a society that values and respects the diversity of human expression and identity and achieves equity for all.

The **National Queer Asian Pacific Islander Alliance** (NQAPIA) is a federation of lesbian, gay, bisexual, and transgender Asian American, South Asian, Southeast Asian, and Pacific Islander (AAPI) organizations. NQAPIA seek to build the organizational capacity of local LGBT AAPI groups, develop leadership, promote visibility, educate our community, enhance grassroots organizing, expand collaborations, challenge anti-LGBTQ bias and racism, and add a racial justice lens to current LGBTQ issues.

The **National Urban League** is a historic civil rights organization dedicated to economic empowerment in historically underserved urban communities. The mission of the Urban League movement is to enable African Americans to secure economic self-reliance, parity, power and civil rights. Founded in 1910 and headquartered in New York City, the National Urban League improves the lives of more than two million people annually through direct service programs, including education, employment training and placement, housing, and health, which are implemented locally by 90 National Urban League affiliates in 300 communities across 36 states and the District of Columbia. The Urban League seeks to implement that mission by actively working to eradicate all barriers to equal participation in all aspects of American society, whether political, economic, social, educational or cultural.

The **National Workrights Institute** is a not-for-profit research and advocacy organization dedicated to improving protection for human rights in the workplace. The Institute's creation grew from the belief that the workplace is a critical front in the fight for

human rights. As such, the Institute has a strong interest in preventing LGBTQ discrimination in the workplace.

New Voices for Reproductive Justice is a human rights and reproductive justice advocacy organization with a mission to build a social change movement dedicated to the full health and well-being of Black women, femmes, and girls in Pennsylvania and Ohio. Since 2004, the organization has served over 125,000 Black women, women of color, and LGBTQIA+ people of color through leadership development, community organizing, policy advocacy, and culture change. New Voices for Reproductive Justice strives to build a future where people are protected from all forms of discrimination and are able to provide for themselves and their families without fear of retaliation where they work, live, learn, shop or any other public accommodation.

People for the American Way Foundation (PFAWF) is a nonpartisan civic organization established to promote and protect civil and constitutional rights, including equality and non-discrimination for all. Founded in 1981 by a group of civic, educational, and religious leaders, PFAWF now has hundreds of thousands of members nationwide. Over its history, PFAWF has conducted extensive education, outreach, litigation, and other activities to promote these values. PFAWF strongly supports full enforcement of Title VII of the 1964 Civil Rights Act, as well as the principle that discrimination against LGBTQ people is discrimination “because of ...sex” that is prohibited under Title VII.

PolicyLink is a national research and action institute that advances racial and economic equity. As the nation moves toward becoming majority people of color, achieving equity—just and fair inclusion into a society in which all can participate, prosper, and reach their full potential—is the moral imperative, a potent antidote to inequality, and the superior growth model. To advance equity, PolicyLink advocates for groundbreaking policy changes that enable everyone, especially people of color, to be economically secure, live in healthy communities of opportunity, and benefit from a just society.

Public Counsel is the nation's largest public interest law firm, with over 70 attorneys and hundreds of pro bono partners and volunteers. Founded in 1970, Public Counsel is dedicated to advancing equality, justice and economic opportunity by delivering pro bono legal services and impact litigation to low-income individuals and communities. In 2018, Public Counsel staff and pro bono partners served more than 16,000 clients and conducted impact litigation on behalf of over 12 million people. Public Counsel advocates for the rights of people of color and LGBTQ individuals across program areas, including employment, immigration, housing, education and civil rights.

The **Religious Coalition for Reproductive Choice** (RCRC) is a broad-based, national, interfaith movement that brings the moral force of religion to protect and advance reproductive health, choice, rights and justice through education, prophetic witness, pastoral presence, and advocacy. RCRC values

and promotes religious liberty which upholds the human and constitutional rights of all people to exercise their conscience to make their own reproductive health decisions without shame and stigma. RCRC challenges systems of oppression and seeks to remove the multiple barriers that impede individuals, especially those in marginalized communities in accessing comprehensive reproductive health care with respect and dignity.

The **Sikh Coalition** is the largest community-based Sikh civil rights organization in the United States. Since its inception on September 11, 2001, the Sikh Coalition has worked to defend civil rights and liberties for all people, empower the Sikh community, create an environment where Sikhs can lead a dignified life unhindered by bias or discrimination, and educate the broader community about Sikhism.

Treatment Action Group (TAG) is an independent, activist and community-based research and policy think tank fighting for better treatment, prevention, a vaccine, and a cure for HIV, tuberculosis, and the hepatitis C virus. TAG works to ensure that the communities most directly affected by these issues, including LGBTQ people, no longer have to face discrimination and oppression that places them at heightened risk.

Unite for Reproductive & Gender Equity (URGE) is a non-profit grassroots advocacy organization that works to mobilize young people through a reproductive justice framework. URGE builds infrastructure through campus chapters and city activist networks, where we invite individuals to discover

their own power and transform it into action. URGE members educate their communities and advocate for local, state, and national policies around issues of reproductive justice and sexual health.

The Washington Lawyers' Committee for Civil Rights and Urban Affairs (Committee) is a non-profit civil rights organization established to eradicate discrimination and poverty by enforcing civil rights laws through litigation and public policy advocacy. In furtherance of this mission, the Committee represents some of the most vulnerable persons and populations, including individuals who are discriminated against on the basis of their race, national origin, gender, and other intersecting identities who are unaware of their legal rights and protections. The Committee fights discrimination and endeavors to create legal, economic, and social equity preventing employment discrimination and harassment so that clients have the economic security essential to a productive, healthy and safe life. Title VII is an essential tool in the Committee's advocacy.