

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

In the
Supreme Court of the United States

GERALD LYNN BOSTOCK,
Petitioner,

v.

CLAYTON COUNTY, GEORGIA,
Respondent

WILLIAM MOORE, JR

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

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND
AIMEE STEPHENS,
Respondents.

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

**BRIEF OF THE SOUTHERN POVERTY LAW
CENTER, CHILDREN'S DEFENSE FUND, DOMOS,
ECONOMIC POLICY INSTITUTE, NATIONAL
ASSOCIATION OF SOCIAL WORKERS, NATIONAL
CENTER FOR LAW AND ECONOMIC JUSTICE,
POVERTY & RACE RESEARCH ACTION
COUNCIL, AND 9TO5, NATIONAL ASSOCIATION
OF WORKING WOMEN AS AMICI CURIAE IN
SUPPORT OF THE EMPLOYEES**

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for this Court's subsequent holding that intermediate scrutiny applies to gender-based classifications.

The Children's Defense Fund ("CDF") is a national non-profit child advocacy organization that has worked relentlessly for more than 40 years to ensure a level playing field for all children. CDF champions policies and programs that lift children out of poverty, protect them from abuse and neglect, and ensure their access to health care, quality education, and a moral and spiritual foundation. CDF advocates nationwide on behalf of children to ensure children are always a priority, paying particular attention to the needs of poor children, children of color, and those with disabilities.

D mos is a dynamic think-and-do tank that powers the movement for a just, inclusive, multiracial democracy. Founded in 2000, D mos brings litigation, conducts original research, and engages in advocacy and strategic communications to advance economic justice and remove barriers to political participation. The organization's anti-poverty work focuses on research and policy solutions to overcome racial and economic inequality. The organization is deeply involved in the Black Census Project, which explores economic issues faced by LGBT people of color, including low pay. D mos' race-forward state policy platform, *Everyone's America: State Policies for an Equal Say in Our Democracy and an Equal Chance in Our Economy*, requires, as a component, guaranteed fair employment for LGBT people, precisely because harassment and discriminatory hiring, firing, promotions, and pay continue to shape the U.S. labor markets in ways that systemically disadvantage people of color and LGBT workers, among others.

The Economic Policy Institute (“EPI”) is a non-profit organization with over 30 years of experience analyzing the effects of economic policy on the lives of

children—millions of whom are being raised by LGBT people. These harms are not evenly distributed; LGBT women and people of color are disproportionately harmed.

Discrimination, moreover, takes its toll even when the LGBT person remains employed. Hostile and abusive workplaces are both commonplace and particularly harmful for LGBT people. The fear of having to endure such an environment, paired with the fear of adverse employment actions (that could lead to unemployment), often forces LGBT people to conceal their identities. That, in turn, has a significant impact on their mental health and productivity at work. The decision to conceal one's identity in order to get or keep a job also forces some LGBT people to face an unconscionable choice: should they forego a family or relationships in order to avoid detection? These harms are particularly acute in smaller communities, where work and community life are not easily segregated. For millions of LGBT people, lack of protection against sex-based discrimination may force them to live in a perpetual state of secrecy.

Discrimination against LGBT people pervades and harms the nation. This Court should reject a “categorical rule” (*Oncale*, 523 U.S. at 79) denying LGBT people the protections of Title VII.

ARGUMENT

I. LGBT PEOPLE, AND ESPECIALLY LGBT WOMEN AND PEOPLE OF COLOR, EXPERIENCE SEX-BASED DISCRIMINATION IN THE WORKPLACE.

Empirical evidence shows that LGBT people experience persistent and pernicious employment

discrimination across geographies, industries, and sectors of the nation's workforce. There are real people behind these figures. And LGBT women and people of color suffer from discrimination in the workplace to an even greater degree.

A. LGBT People Face Workplace Discrimination At Alarming Rates.

Despite making up over 4% of the nation's population and around 6% of its workforce,² LGBT people continue to face workplace discrimination at alarming rates. According to the U.S. Commission on Civil Rights, up to 47% of LGBT workers have experienced discrimination because of their sexual orientation or transgender status.³ This discrimination manifests itself in all aspects of employment, including the job application process, promotion, and unequal compensation.⁴ In one study, nearly one in ten LGB employees reported losing a job due to their sexual orientation.⁵ And as many as 37%

² U.S. Comm'n on Civil Rights, *Working for Inclusion 9–10* (2017) (“*Working for Inclusion*”), https://www.usccr.gov/pubs/docs/LGBT_Employment_Discrimination2017.pdf; The Williams Inst., *Adult LGBT Population in the United States 1* (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Population-Estimates-March-2019.pdf>.

³ *Working for Inclusion* 11 & n.52.

⁴ NPR et al., *Discrimination in America: Experiences and Views of LGBTQ Americans 1* (2017), <https://www.npr.org/documents/2017/nov/npr-discrimination-lgbtq-final.pdf>.

⁵ Brad Sears & Christy Mallory, The Williams Inst., *Documented Evidence of Employment Discrimination & Its Effects on LGBT People 1* (2011), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-20111.pdf>.

of gay and lesbian people—and a full 90% of transgender people—have been harassed at work.⁶

Real people with real stories exist behind these numbers. Consider the story of Officer Michael Carney from Springfield, Massachusetts.⁷ At his

Laura Calvo is another real-world example of how even those who put their lives on the line face discrimination and unemployment as a result of LGBT discrimination—whether they chose to live openly or not. Calvo, a transgender woman, hid her gender identity in order to keep her job as a police officer with the Josephine County Sheriff's Department.¹¹ Although she earned numerous commendations during her 16-year tenure, including being named deputy of the year, she was fired when personal items were burgled and her transgender identity was revealed.¹²

And then there is Yolanda Boone from Baltimore, Maryland.¹³ Boone, who is a lesbian, worked as a forklift operator. After a few months on the job she agreed to take on the night shift for extra income. Almost immediately, the night-shift manager began a barrage of verbal harassment against her: “I want to turn you back into a woman”; “I want you to like men again”; or “[a]re you a girl or a man?”¹⁴ Though she endured this harassment for weeks, she eventually complained to human resources—and she was fired the next time she showed up for work.¹⁵

No employee in any sector of the workforce—public or private, white- or blue-collar—is immune

¹¹ *Id.* at 82 (prepared statement of Rea Carey, Executive Director, National Gay and Lesbian Task Force Action Fund).

¹² *Id.*

¹³ *See generally* Complaint, *EEOC v. Pallet Cos.*, No. 1:16-

from LGBT discrimination. In 2014, Brett Bigham was Oregon's first openly gay teacher of the year; the following year, he was fired in retaliation for complaining of LGBT discrimination.¹⁶ Crystal Moore worked in law enforcement for 23 years without a single reprimand and became the Chief of Police; she was fired by a new boss who openly held anti-LGBT beliefs.¹⁷ Dianne Schroer, a 25-year veteran of the Army's Special Forces and recipient of the Defense Superior Service Medal, was offered a position as a terrorism research specialist at the Library of Congress; her job offer was withdrawn when her employer learned she was transgender.¹⁸ As these stories show, LGBT discrimination affects people in all occupations and in workplaces throughout the nation.

B. Discrimination Is Even Worse For LGBT Women And People Of Color

For LGBT women and people of color, workplace discrimination is even more prevalent. Lesbian, bisexual, and transgender women are 30% less likely to be hired than straight women with identical

¹⁶ Laura Frazier, *Multnomah Education Service District terminates 2014 teacher of the year*, *The Oregonian* (Apr. 3, 2015), https://www.oregonlive.com/education/2015/04/multnomah_education_service_di_2.html.

¹⁷ Amanda Sakuma, *South Carolina police chief fired for being gay? Yup, that can happen*, MSNBC (Apr. 24, 2014), <http://www.msnbc.com/msnbc/crystal-moore-south-carolina-29-states-can-fire-you-being-gay>.

¹⁸ *Schroer v. Billington*, 577 F. Supp. 2d 293, 295-96, 299 (D.D.C. 2008).

credentials.¹⁹ Similarly, one survey showed that LGBT people of color are at least twice as likely as white LGBT people to experience LGBT discrimination when applying for jobs.²⁰ They are also paid less than white LGBT workers.²¹

LGBT women and people of color are susceptible to discrimination on multiple grounds—what is known as “intersectional” discrimination. Intersectionality recognizes that when two bases for discrimination exist, they cannot be neatly reduced to distinct components. The combined effects of, for example, race and gender discrimination operate to marginalize individuals in ways different than that experienced by a single race or gender. *See, e.g., Lam*

490 U.S. 228 (1989), at 241 (Price). 1986 WL 108682 (T205 TD-.0001 Tc.144027w)

employers cannot use anti-LGBT bias as a pretext to discriminate against these individuals based on a protected characteristic. Consider the facts of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989): Anne Hopkins’s employer violated Title VII when it denied her a promotion on the ground that she did not conform to sex stereotypes by being too “aggressive” (a protected sex-based characteristic). *See* 490 U.S. at 250. But an adverse decision here would allow the same employer to deny Ms. Hopkins a promotion on the ground that she was “dykish” (an unprotected

relationships. In short, a “categorical rule” excluding LGBT people from Title VII’s protections would have far greater impacts on LGBT people, their families, and their communities than simply denying plaintiffs damages in a few cases.

A. Without Title VII’s Protections, LGBT People Would Face Unemployment And Associated Harms.

1. Unemployment Harms LGBT People.

As the U.S. Commission on Civil Rights has explained, “[w]orkplace discrimination against LGBT communities can cause job instability and high turnover, resulting in greater unemployment and poverty rates.”²²

Unemployment then triggers a variety of harms, especially when it is the result of bias. As perhaps the most obvious consequence, unemployment and persistent joblessness can lead to poverty or a lower income.²³ “[T]he monthly poverty rate for households with a long-term unemployed member (someone unemployed for six months or more) is much higher than the rate for households with no long-term unemployment.”²⁴ This also creates a vicious cycle:

²² *Working for Inclusion* 14.

²³ Lawrence Mishel & Heidi Shierholz, Econ. Pol’y Inst., *Sustained, High Joblessness Causes Lasting Damage to Wages, Benefits, Income, and Wealth* 19 (2011), https://www.epi.org/files/temp2011/BriefingPaper324_FINAL%20%283%29.pdf; *Working for Inclusion* 15.

²⁴ Austin Nichols & Zachary J. McDade, *Long-Term unemployment and poverty produce a vicious cycle*, Urban Inst.: Urban Wire: Income and Wealth (Sept. 17, 2013), <https://www.urban.org/urban-wire/long-term-unemployment-and-poverty-produce-vicious-cycle>.

once an individual experiences long-term unemployment, their ability to find work diminishes substantially.²⁵

Unemployment can also affect LGBT people's access to healthcare, either because the person loses employer-sponsored health insurance or loses an

true for LGBT people; for example, in one survey, 22.7% of LGBTQ respondents reported receiving support from SNAP compared to 9.7% of non-LGBTQ respondents.³³ Relatedly, unemployment often leads to loss of housing.³⁴ In one survey of agencies that provide housing to the homeless, 30% of clients in housing programs identified as LGBT and, on average, 60% of these agencies' funding came from government.³⁵

Unemployment due to discrimination burdens the national economy. "Replacing employees due to discrimination can cost anywhere from \$5,000 to \$10,000 for an hourly worker, and between \$75,000 to \$211,000 for an executive who makes \$100,000 a year."³⁶ One study estimated that, in Georgia alone, an employer loses an average of \$9,100 every time an employee leaves a job because of LGBT

<https://cdn.americanprogress.org/content/uploads/2018/08/10095627/LGBT-BenefitCuts-report.pdf>.

³³ *Id.* at 4.

³⁴ Nat'l Law Ctr. on Homelessness & Child Poverty, *Homelessness in America: Overview of Data and Causes* 3 (2015), https://nlchp.org/wp-content/uploads/2018/10/Homeless_Stats_Fact_Sheet.pdf (citing unemployment as a leading cause of homelessness).

³⁵ Laura E. Durso & Gary J. Gates, The Williams Inst., *Serving Our Youth: Findings from a National Survey of Service Providers Working with Lesbian, Gay, Bisexual, and Transgender Youth Who Are Homeless or At Risk of Becoming Homeless* 3, 6 (2012), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Durso-Gates-LGBT-Homeless-Youth-Survey-July-2012.pdf>.

³⁶ *Working for Inclusion* 15.

LGBT people already struggle to provide for their families. They are more likely to report a lower family income and an income near the poverty level. For example, in 2013, nearly one in five children being raised by same-sex couple

As amici know from their decades of experience working with LGBT people in these communities, fear of employment discrimination often leads LGBT people to remain in the closet in all aspects of their lives. So, as a practical matter, denying LGBT people Title VII protections would force many of them to make an impossible choice: a job or a family.

The inability to be “out” at work, and in one’s community, also makes it difficult for LGBT people to participate in the very political processes by which they might ultimately beat back the tide of discrimination and prejudice against them.⁴⁹ It is difficult to imagine that the many advances won by the LGBT community over the past few decades

⁴⁹ Extensive research shows a robust correlation between social contact with lesbian and gay people and more accepting attitudes toward sexual orientation. See, e.g., Bob Altemeyer, *Changes in Attitudes Toward Homosexuals*, 42 *J. Homosexuality* 63 (2002); Norman Anderssen, *Does Contact with Lesbians and Gays Lead to Friendlier Attitudes? A Two Year Longitudinal Study*, 12 *J. Community & Applied Soc. Psychol.* 124 (2002); Rodney L. Bassett et al., *Being a Good Neighbor: Can Students Come to Value Homosexual Persons?*, 33 *J. Psychol. & Theology* 17 (2005); Andrew Garner, *Ambivalence, the Intergroup Contact Hypothesis, and Attitudes about Gay Rights*, 41 *Pol. & Pol’y* 241 (2013); see also Daniel DellaPosta, *Gay Acquaintanceship and Attitudes toward Homosexuality: A Conservative Test*, 4 *Socius: Sociological Research for a Dynamic World* 1 (2018) (providing results of a conservative test of the contact hypothesis for gay acceptance showing that people who had at least one gay or lesbian acquaintance at baseline exhibited larger attitude changes at two- and four-year follow-ups with regard to support for same-sex marriage and moral acceptance of homosexuality and showing that this contact effect extended even—and perhaps especially—to people who otherwise displayed more negative prior attitudes and lower propensities for gay and lesbian acquaintanceship).

would have been possible if LGBT individuals throughout the nation had stayed in the shadows. And yet that is precisely the position to which today's LGBT community would be relegated under an erroneous reading of Title VII.

CONCLUSION

For all of the foregoing reasons, and those set forth by the employees, this Court should affirm the judgments of the Second and Sixth Circuits, and reverse the judgment of the Eleventh Circuit.

Respectfully submitted,

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