

# 15-3775-cv

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United States Court of Appeals  
*for the*  
Second Circuit

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MELISSA ZARDA, co-independent executor of the estate of Donald Zarda; and  
WILLIAM ALLEN MOORE, JR., co-independent executor of the estate of Donald Zarda,  
*Plaintiffs-Appellants,*

v.

ALTITUDE EXPRESS, INC., d/b/a SKYDIVE LONG ISLAND; and RAY MAYNARD,  
*Defendants-Appellees.*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

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*EN BANC* BRIEF OF 50 EMPLOYERS AND ORGANIZATIONS AS  
*AMICI CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLANTS

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June 26, 2017

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## **CORPORATE DISCLOSURE STATEMENT**

**AdRoll, Inc.** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Unilever is the parent corporation of **Ben & Jerry's Homemade Inc.** No publicly held corporation owns 10% or more of its stock.

Betterment Holdings, Inc. is the parent corporation of **Betterment.** No publicly held corporation owns 10% or more of its stock.

**Boston Community Capital** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

National Amusements, Inc., a privately held company, owns a majority of the Class A voting stock of **CBS Corporation.** To CBS Corporation's knowledge without inquiry, according to a Schedule 13D/A filed with the Securities and Exchange Commission on March 15, 2011, GAMCO Investors, Inc. and certain affiliates (any of which may be publicly traded) hold shares representing, as of February 28, 2017, approximately 11.7% of the Class A voting stock of CBS Corporation. CBS Corporation is not aware of any other publicly traded corporation that owns 10% or more of its stock.

**Citrix Systems, Inc.** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

City Winery LLC is the parent of **City Winery**. No publicly held corporation owns 10% or more of its stock.

**Daniel J. Edelman Inc.** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

**Davis Steadman Ford & Mace, LLC** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

**DoorDash, Inc.** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

**Dropbox, Inc.** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Eastern Bank Corporation is the parent corporation of **Eastern Bank**. No publicly held corporation owns 10% or more of its stock.

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**Freedom for All Americans Education Fund** is a 501(c)(3) charitable organization. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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**Greater Burlington Industrial Corporation** is a 501(c)(6) economic development corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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**IHS Markit Ltd.** has no parent corporation. Artisan Partners (Artisan Partners Limited Partnership, Artisan Investments GP LLC, Artisan Partners Holdings LP, and Artisan Partners Asset Management Inc.) has beneficial ownership over approximately 10% of IHS Markit Ltd. common shares.

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**INUS Group LLC (dba Hot Diggity! Seattle)** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

**Johnston, Kinney & Zulaica LLP** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

**Kargo Global, Inc. (d/b/a Kargo)** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

**KEO Marketing Inc.** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

**Kickstarter, PBC** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

**Levi Strauss & Co.** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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**Microsoft Corporation** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

**National Gay & Lesbian Chamber of Commerce** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

**OBOX Solutions** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

**On 3 Public Relations** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

**People's Computer Company (d/b/a Physician's Computer Company)** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

**Pinterest, Inc.** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

**Puma Springs Vineyard, LLC** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

**Quora Inc.** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

**Runtime Collective Limited (d/b/a Brandwatch)** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

**S&P Global Inc.** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

**salesforce.com, inc.** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

**Shutterstock, Inc.** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

**Spotify USA Inc.** is a wholly-owned subsidiary of Spotify AB, a company organized under the laws of Sweden. Spotify AB is a wholly-owned subsidiary of Spotify Technology S.A., a company organized under the laws of the Grand Duchy of Luxembourg. Spotify Technology S.A. does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

Sun Life of Canada (U.S.) Holdings, Inc. is the parent corporation of **Sun Life Financial (U.S.) Services Company, Inc.** Sun Life of Canada (U.S.) Holdings, Inc. and Sun Life Financial (U.S.) Services Company, Inc. are wholly indirectly owned by Sun Life Financial Inc.

**Thumbtack, Inc.** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

**TodayTix, Inc.** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

**Trust Company of Vermont** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

**Vermont Gynecology, PC** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

**Viacom, Inc.** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.



**Wealthfront Inc.** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

**ZenPayroll, Inc. (d/b/a Gusto)** has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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## **STATEMENT OF INTEREST**<sup>1</sup>

The 50 companies and organizations that join this brief share an interest in equality because they know that ending discrimination in the workplace is good for business, their employees, and the economy as a whole. The below businesses and organizations are committed to the belief that everyone should have the opportunity to earn a living, excel in their profession, and provide for their family free from fear of unequal treatment. *Amici* listed below support the notion that no one should be passed over for a job, paid less, terminated, or subject to harassment or any other form of discrimination based on nothing more than their sexual orientation. Creating workplaces in which employees are and feel safe from discrimination frees them to do their best work, with substantial benefits for their employers.

The entities that join this brief are (in alphabetical order):

- |                  |                             |
|------------------|-----------------------------|
| 1. AdRoll, Inc.  | 4. Boston Community Capital |
| 2. Ben & Jerry's | 5. Brandwatch               |
| 3. Betterment    | 6. CBS Corporation          |

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<sup>1</sup> Pursuant to Fed. R. App. P. 29(a)(4)(E) and Local Circuit Rule 29.1(b), *amici* state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person contributed money that was intended to fund preparing or submitting this brief. Pursuant to Fed. R. App. P. 29(a)(2), *amici* state that the Court granted *amici*, as interested parties, leave to file this brief. ECF No. 271 at 2.

7. Citrix Systems, Inc.
8. City Winery
9. Davis Steadman Ford & Mace, LLC
10. DoorDash, Inc.
11. Dropbox, Inc.
12. Eastern Bank
13. Edelman
14. FiftyThree, Inc.
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16. Google Inc.
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30. Lyft, Inc.
31. Mapbox, Inc.
32. Microsoft Corporation
33. National Gay & Lesbian Chamber of Commerce
34. OBOX Solutions
35. On 3 Public Relations
36. Physician's Computer Company
37. Pinterest
38. Puma Springs Vineyards
39. Quora Inc.
40. S&P Global Inc.
41. Salesforce
42. Shutterstock, Inc.
43. Spotify
44. Sun Life Financial U.S.
45. Thumbtack
46. TodayTix
47. Trust Company of Vermont
48. Vermont Gynecology
49. Viacom, Inc.
50. Wealthfront Inc.



## **SUMMARY OF ARGUMENT**

Interpreting Title VII of the Civil Rights Act of 1964 to exclude sexual orientation from protections against sex discrimination has wide-ranging, negative consequences for businesses, their employees, and the U.S. economy. Businesses' first-hand experiences—supported by extensive social-science research—confirm the significant costs for employers and employees when sexual orientation discrimination is not forbidden by a uniform law, even where other policies exist against such discrimination. Our nation's employers and employees would be far better off with a lesbian, gay, bisexual, and transgender (“LGBT”) workforce that need not experience or fear discrimination for simply doing their jobs.

There is no truth to the notion that laws forbidding sexual orientation discrimination are unreasonably costly or burdensome for business. To the contrary, recognizing that Title VII prohibits sexual orientation discrimination as a form of sex discrimination would strengthen and expand benefits, such as the ability to recruit and retain the top talent; to generate innovative ideas by drawing on a greater breadth of perspectives, characteristics, and experiences; to attract and better serve a diverse customer base; and to increase productivity among employees that feel valued, comfortable, and respected.<sup>2</sup>

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<sup>2</sup> See Brad Sears & Christy Mallory, *Economic Motives for Adopting LGBT-Related Workplace Policies*, THE WILLIAMS INST. 2 (Oct. 2011), available at (footnote continued)

Accordingly, the 50 above-listed companies and organizations joining this brief respectfully urge this *en banc* Court to recognize that Title VII prohibits discrimination on the basis of sexual orientation.

## ARGUMENT

### **I. THE U.S. ECONOMY BENEFITS FROM A DIVERSE WORKFORCE**

*Amici* are companies and organizations in wide-ranging sectors of the national and local economy and are committed to building workplaces that value diversity, inclusion, and equality. The U.S. economy is strengthened when all employees are protected from discrimination in the workplace. The absence of full legal protections for LGBT workers hinders the ability of *amici* to compete in all corners of the country and harms the U.S. economy as a whole.

Businesses thrive when LGBT employees are represented. Including diverse viewpoints in the workforce brings unique backgrounds and experiences to the table, fostering creativity and innovation, making such businesses more competitive in the local, national, and global economy.<sup>3</sup> Diversity has been found to “unlock[] innovation by creating an environment where ‘outside the box’ ideas

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<https://tinyurl.com/yd5g6sha> (surveying top 50 Fortune 500 companies (2010) and top 50 federal government contractors (2009)).

<sup>3</sup> See Jon Miller & Lucy Parker, *Open For Business: The Economic and Business Case for Global LGB&T Inclusion* 28 (2015), available at <https://tinyurl.com/y9mtp3of> (“Researchers have found a close correlation between economic development and LGB&T inclusion.”).

are heard.”<sup>4</sup> LGBT individuals come from all backgrounds, offer insights drawn from every walk of life, and bring unique perspectives on these experiences.

A diverse and inclusive workforce likewise furthers businesses’ ability to connect with consumers, particularly given that the buying power of diverse groups has increased substantially over the past 30 years.<sup>5</sup> In 2016, the buying power of LGBT people in the United States stood at over \$900 billion.<sup>6</sup> In “matching the market,” businesses succeed by including diverse employees who “are better attuned to the unmet needs of consumers or clients like themselves,” and “their insight is critical to identifying and addressing new market opportunities.”<sup>7</sup>

LGBT-inclusive workplaces result in stronger work performance by *all* employees. When LGBT employees feel safe to be themselves in the workplace, “everybody’s productivity is enhanced, including straight and non-transgender

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<sup>4</sup> Sylvia Ann Hewlett, et al., *How Diversity Can Drive Innovation*, HARV. BUS. REV. (Dec. 2013), available at <https://tinyurl.com/j8nyu8k>.

<sup>5</sup> Alison Kenney Paul, et al., *Diversity as an Engine of Innovation: Retail and Consumer Goods Companies Find Competitive Advantage in Diversity*, 8 DELOITTE REV. 108, 111 (2011), available at <https://tinyurl.com/ya8nb3rd>.

<sup>6</sup> Jeff Green, *LGBT Purchasing Power Near \$1 Trillion Rivals Other Minorities*, BLOOMBERG (July 20, 2016), available at <https://tinyurl.com/jzdaptl> (“The combined buying power of U.S. lesbian, gay, bisexual and transgender adults rose about 3.7 percent to \$917 billion last year.”).

<sup>7</sup> Sylvia Ann Hewlett, et al., *Innovation, Diversity, and Market Growth*, CTR. FOR TALENT INNOVATION 4 (2013), available at <https://tinyurl.com/htpyqra>.

colleagues.”<sup>8</sup> In a survey of the top 50 Fortune 500 companies and the top 50 federal government contractors, the overwhelming majority of the top-performing, most-innovative companies connect policies prohibiting sexual orientation discrimination with a better bottom line.<sup>9</sup>

Recent studies confirm that companies with LGBT-inclusive workplaces have better financial outcomes.<sup>10</sup> This superior performance extends beyond the walls of the company itself to the larger community in which the company operates; as multiple studies have found, the level of inclusiveness of LGBT employees is strongly correlated with a jurisdiction’s “wealth, prospects for economic investment, and ability to recruit talent.”<sup>11</sup> Recognizing that our uniform federal law protects LGBT employees would benefit individual businesses, and the economy as a whole, by removing an artificial barrier to the recruitment, retention, and free flow of talent.

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<sup>8</sup> Crosby Burns, *The Costly Business of Discrimination*, CTR. FOR AM. PROGRESS 34 (2012), available at <https://tinyurl.com/j2r8wtu>.

<sup>9</sup> See Sears & Mallory, *supra* n.2, at 1.

<sup>10</sup> See, e.g., CREDIT SUISSE ESG RESEARCH, *LGBT: The Value of Diversity* (2016), available at <https://tinyurl.com/ybwhjqe8> (finding that 270 companies that supported and embraced LGBT employees outperformed the market by 3% per annum).

<sup>11</sup> Lauren Box, *It’s Not Personal, It’s Just Business: The Economic Impact of LGBT Legislation*, 48 IND. L. REV. 995, 995-96 (2015) (“While LGBT inclusiveness is not the only factor contributing to a state’s economic vitality, it plays a key role in helping states progress in the economic development race.”).

## II. EXCLUDING SEXUAL ORIENTATION FROM TITLE VII'S PROTECTIONS UNDERMINES BUSINESS INTERESTS

Employment discrimination based on sexual orientation—which still routinely occurs across the nation—has significant, harmful effects on employers, employees, and the bottom line.

### A. Discrimination Based On Sexual Orientation Is Prevalent In Employment Across The Country

As of 2016, approximately 10 million adults in the United States (4.1% of all adults) identify as LGBT.<sup>12</sup> By any measure, the LGBT segment of the U.S. workforce represents a significant number of both public- and private-sector employees. Businesses draw on and benefit from the contributions of LGBT workers at all levels and across industries.

Courts across the country—including in the Second Circuit—have recognized the long and pervasive history of discrimination based on sexual orientation, including in the workplace. *See, e.g., Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013) (“It is easy to conclude that homosexuals have suffered a history of discrimination.”); *Roberts v. United*

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<sup>12</sup> Gary J. Gates, *In US, More Adults Identifying as LGBT*, GALLUP (Jan. 11, 2017), available at <https://tinyurl.com/yb9d8ubd>; *see also* Gary J. Gates, *LGBT Demographics: Comparisons Among Population-Based Surveys*, THE WILLIAMS INST. (Oct. 2014), available at <https://tinyurl.com/y8mn6hju> (summarizing various surveys conducted from 2006 to 2014, the results of which implied that between 5.2 and 9.5 million adults in the U.S. identified as LGBT).

*Parcel Serv., Inc.*, 115 F. Supp. 3d 344, 361-66 (E.D.N.Y. 2015) (surveying empirical literature on the prevalence of workplace discrimination against LGBT employees and the lack of federal protections for gays and lesbians in the workplace). Among the legislative findings in New York’s Sexual Orientation Non-Discrimination Act was that “many residents of [New York] have encountered prejudice on account of their sexual orientation, and that this prejudice has severely limited or actually prevented access to employment ... leading to deprivation and suffering.” 2002 N.Y. Laws ch. 2, § 1.

There is consensus among efforts to measure employment discrimination against LGBT individuals that such discrimination continues to be pervasive.<sup>13</sup> One meta-analysis estimates that over 25% of all lesbian, gay, and bisexual respondents had experienced sexual orientation discrimination (such as harassment and wage discrimination) at the workplace in the past five years—a figure that rose

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<sup>13</sup> See, e.g., Jennifer C. Pizer, et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715, 719-22 (2012); *Employment Non-Discrimination Act: Examining Equality at Work, Including S. 811, To Prohibit Employment Discrimination on the Basis of Sexual Orientation or Gender Identity Before S. Comm. on Health, Educ., Labor, and Pensions*, 112th Cong. 8-10 (2012) (prepared statement of M.V. Lee Badgett) (describing evidence of continuing discrimination in sources such as: (1) official complaints filed in states that prohibit such conduct; (2) controlled experiments to measure the treatment of LGBT job applicants; (3) comparisons of wages earned by LGBT employees and their heterosexual peers; and (4) self-reported experiences), available at <https://tinyurl.com/ycqk6ntb>.

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

Significantly, sexual orientation discrimination tends to be higher in jurisdictions without non-discrimination laws.<sup>18</sup> *See infra* Part III. In addition, workplace discrimination tends to decrease in response to legal rules against it.<sup>19</sup>

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<sup>14</sup> Brad Sears & Christy Mallory, *Documented Evidence of Employment Discrimination & Its Effects on LGBT People*, THE WILLIAMS INST. 4 (July 2011), available at <https://tinyurl.com/ld8w42w>; *id.* at 1-2 (prior work documenting discrimination against LGBT persons has drawn data from “field studies, controlled experiments, academic journals, court cases, state and local administrative complaints, complaints to community-based organizations, and in newspapers, books and other media”).

<sup>15</sup> *Id.* at 4-5; *see also* PEW RESEARCH CTR., *A Survey of LGBT Americans: Attitudes, Experiences and Values in Changing Times* 42 (June 2013), available at <https://tinyurl.com/nmfpx7a> (21% of LGBT persons report unequal treatment by their employer).

<sup>16</sup> Sears & Mallory, *supra* n.14, at 5.

<sup>17</sup> Pizer, *supra* n.13, at 727.

<sup>18</sup> *See* András Tilcsik, *Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States*, 117 AM. J. SOC. 586, 614-15 (2011).

<sup>19</sup> *See* Laura G. Barron & Michelle Hebl, *The Force of Law: The Effects of Sexual Orientation Antidiscrimination Legislation on Interpersonal Discrimination* (footnote continued)

**B. Excluding Sexual Orientation From Title VII’s Scope Leaves Employees Vulnerable To Discrimination And Undermines Inclusive Workplaces**

*Amici* recognize that their employees are essential to their success and are, in many ways, their most valuable assets. Accordingly, *amici* are strong proponents of anti-discrimination laws and policies, which are linked to higher morale and productivity. Sexual orientation discrimination—even the mere *risk* of such discrimination—impedes productivity by instilling unnecessary anxiety in employees and creating a culture that suffocates openness.<sup>20</sup> In the absence of full protection from discrimination, LGBT employees may seek to protect themselves by hiding who they are, a practice linked by substantial research to poor workplace and health outcomes.<sup>21</sup>

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*in Employment*, 19 PSYCH. PUB. POL’Y & L. 191, 200-02 (2013) (summarizing studies finding that antidiscrimination laws reduce discrimination against LGBT individuals by employers, “even after controlling for those community variables shown to affect both the adoption of antidiscrimination laws and prejudice in the absence of legislation”); Luke A. Boso, *Acting Gay, Acting Straight: Sexual Orientation Stereotyping*, 83 TENN. L. REV. 575, 603 (2016) (“[S]tudies have shown that sexual orientation inclusive anti-discrimination laws and policies significantly decrease reports of discrimination in the workplace.”).

<sup>20</sup> M.V. Lee Badgett, et al., *The Business Impact of LGBT-Supportive Workplace Policies*, THE WILLIAMS INST. 26 (May 2013), available at <https://tinyurl.com/y7mtb6um>.

<sup>21</sup> *See id.*; see also Burns, *supra* n.8, at 33 (“Gay and transgender employees who are out at work are 20 to 30% more productive than their closeted counterparts.”); Pizer, *supra* n.13, at 735-37.



Hiding one's sexual orientation is a rational response to the fact that those persons who are out in the workplace are more likely to experience discrimination than their closeted peers.<sup>22</sup> Fear of discrimination has also been shown to exact a significant toll on employees—manifesting in, *inter alia*, attitudes toward one's career; increased stress; difficulty trusting coworkers and superiors; and experiences of isolation, frustration, anxiety, depression, and low self-esteem.<sup>23</sup>

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

“Laws are perhaps the strongest of social structures that uphold and enforce stigma,”<sup>25</sup> and excluding a class of persons from legal protections sends a strong

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<sup>22</sup> See *Sears & Mallory*, *supra* n.14.

<sup>23</sup> *Pizer*, *supra* n.13, at 736-37, 740-41.

<sup>24</sup> HUMAN RIGHTS CAMPAIGN, *The Cost of the Closet and the Rewards of Inclusion: Why the Workplace Environment for LGBT People Matters to Employers* 2-3, 22 (May 2014), available at <https://tinyurl.com/ycbzwzme>. Other ways productivity is negatively affected by an unwelcoming LGBT workplace environment included when LGBT workers responded to this culture by avoiding a specific project, avoiding a social event, or avoiding certain coworkers. *Id.* at 22.

<sup>25</sup> *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 974 (N.D. Cal. 2010).

message in the workplace. Excluding sexual orientation from anti-discrimination protections has a stigmatizing effect on LGBT employees, resulting in negative consequences for employee health and productivity.<sup>26</sup> For example, whereas nearly 10% of LGBT employees reported finding a new job to escape a workplace that was not accepting, over 25% of LGBT employees reported staying in a job *specifically* because it offered an inclusive, safe workplace.<sup>27</sup>

The failure of non-discrimination protections to include LGBT employees takes a heavy toll on businesses' bottom lines and, in the aggregate, hurts economic growth. The U.S. economy could save as much as \$8.9 billion by protecting and welcoming LGBT employees in the workplace—more than any

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<sup>26</sup> See, e.g., Mark L. Hatzenbuehler, et al., *Structural Stigma and All-Cause Mortality in Sexual Minority Populations*, 103 SOC. SCI. & MED. 33, 37 (2014) (finding life expectancy reduced by an average of 12 years for sexual minorities living in communities with high levels of anti-gay prejudice); Mark L. Hatzenbuehler, et al., *Stigma as a Fundamental Cause of Population Health Inequalities*, 103 AM. J. PUB. HEALTH 813, 816 (2013) (noting the corrosive impact of stigma on physical and mental health, social relationships, and self-esteem); Ilan H. Meyer, *Prejudice, Social Stress, and Mental Health in Lesbian, Gay, and Bisexual Populations: Conceptual Issues and Research Evidence*, 129 PSYCHOL. BULL. 674, 679-85 (2003) (summarizing empirical evidence of “minority stress” in LGB populations and attendant health consequences); Vickie M. Mays & Susan D. Cochran, *Mental Health Correlates of Perceived Discrimination Among Lesbian, Gay, and Bisexual Adults in the United States*, 91 AM. J. PUB. HEALTH 1869, 1874 (2001) (finding “robust association between experiences of discrimination and indicators of psychiatric morbidity” and noting that “social factors, such as discrimination against gay individuals, function as important risk factors for psychiatric morbidity”).

<sup>27</sup> See HUMAN RIGHTS CAMPAIGN, *supra* n.24, at 23.

other country.<sup>28</sup> One study, for example, concluded that businesses in one state “risk[ed] losing \$8,800 on average for *each* LGBT employee that leaves the state or changes jobs because of the negative environment.”<sup>29</sup> Such costs can be significantly higher depending on the job.<sup>30</sup>

### **III. THE PATCHWORK OF EXISTING ANTI-DISCRIMINATION LAWS CREATES A FRACTURED WORKFORCE, HARMING BUSINESS INTERESTS**

To be sure, some states and localities have enacted provisions prohibiting sexual orientation discrimination, and some companies have voluntarily enacted similar policies. While laudable, these provisions cannot substitute for a uniform federal law guarding against discrimination. Today, residents of 23 states and the District of Columbia are indisputably protected from sexual orientation discrimination,<sup>31</sup> but the remaining 27 states offer no explicit protection under state law or lack favorable federal precedent.

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<sup>28</sup> Ian Johnson & Darren Cooper, *LGBT Diversity: Show Me the Business Case*, OUT NOW 5, 47 (2015), available at <https://tinyurl.com/ycv8rk5o>.

<sup>29</sup> Christy Mallory & Brad Sears, *Discrimination, Diversity, and Development: The Legal and Economic Implications of North Carolina’s HB2*, THE WILLIAMS INST. 2 (May 2016) (emphasis added), available at <https://tinyurl.com/y6wpzpj3>.

<sup>30</sup> See Burns, *supra* n.8, at 10 (assessing replacement costs as between \$75,000 and \$211,000 for an executive with \$100,000 salary).

<sup>31</sup> Twenty-two states prohibit sexual orientation discrimination in private employment by statute. Cal. Gov’t Code § 12940; Colo. Rev. Stat. § 24-34-402; Conn. Gen. Stat. § 46a-81c; Del. Code Ann. tit. 19, § 711; Haw. Rev. Stat. § 378-2; 775 Ill. Comp. Stat. Ann. 5/1-102; Iowa Code § 216.6; Me. Rev. Stat Ann. tit. 5, (footnote continued)

Moreover, local and state laws often differ in important ways from the established protections under Title VII. For example, “some state laws do not allow for recovery of punitive damages at all, or they impose caps that are lower than those under Title VII.”<sup>32</sup> Although protections against sexual orientation discrimination are evolving, they are treated inconsistently in federal courts and are often under-inclusive or nonexistent at state and local levels.<sup>33</sup>

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§ 4571; Md. Code Ann., State Gov’t § 20–606; Mass. Gen. Laws ch. 151B, § 4; Minn. Stat. § 363A.08; Nev. Rev. Stat. § 613.330; N.H. Rev. Stat. Ann. § 354-A:7; N.J. Stat. Ann. §§ 10:5-4, 10:5-12; N.M. Stat. Ann. § 28-1-7; N.Y. Exec. Law § 296; Or. Rev. Stat. § 659A.030; R.I. Gen. Laws § 28-5-7; Utah Code Ann. § 34A-5-106; Vt. Stat. Ann. tit. 21, § 495; Wash. Rev. Code §§ 49.60.030, 49.60.180; Wis. Stat. § 111.36. The District of Columbia similarly prohibits such discrimination in private employment. D.C. Code § 2-1402.11. Indiana prohibits sexual orientation discrimination under Title VII pursuant to *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017).

<sup>32</sup> Sandra F. Sperino, *The New Calculus of Punitive Damages for Employment Discrimination Cases*, 62 OKLA. L. REV. 701, 716 n.96 (2010) (collecting examples of states with less beneficial punitive damages provisions).

<sup>33</sup> Even where state or local laws exist against sexual orientation discrimination, they do not always provide the same level of protection as Title VII. For example, the state anti-discrimination statutes of Delaware, Vermont, and Washington do not prohibit discrimination based on *perceived* sexual orientation. *See, e.g., Capek v. BNY Mellon, N.A.*, 2016 WL 2993211, at \*3 (S.D.N.Y. May 23, 2016) (agreeing with “the weight of authority in other circuit and district courts, which hold that claims of discrimination based on a mistaken ‘perception’ are cognizable” until Title VII and collecting authority, including 2006 EEOC Compliance Manual); EEOC, COMPLIANCE MAN. § 15-II (2006) (“Discrimination against an individual based on a perception of his or her race violates Title VII even if that perception is wrong.”); EEOC, *Employment Discrimination Based on Religion, Ethnicity, or Country of Origin*, available at <https://tinyurl.com/y7fwz8sj> (footnote continued)

An interpretation of Title VII that excludes sexual orientation from our national civil rights laws against sex discrimination makes it more difficult and expensive for those doing business in those jurisdictions to recruit LGBT employees. Reading sexual orientation out of federal anti-discrimination laws leaves LGBT employees and their families vulnerable to employment discrimination and economic disruption because such employees are guaranteed protection only by (at best) a patchwork of inconsistent, and often under-inclusive, state and local laws. The uncertainty and vulnerability LGBT workers face results in diminished employee health, productivity, job engagement, and satisfaction.<sup>34</sup> LGBT employees risk losing the right to be free from discrimination merely because they transfer offices from one jurisdiction to another.<sup>35</sup>

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(noting that Title VII prohibits “discriminating because of the perception or belief that a person is a member of a particular” group).

<sup>34</sup> See *Sears & Mallory*, *supra* n.14, at 15-16.

<sup>35</sup> Family members of LGBT employees could also be jeopardized by taking a job in or transferring to a jurisdiction without adequate nondiscrimination laws. As of late 2015, there were approximately 972,000 people in a same-sex marriage in the United States, and an estimated 1 million cohabiting same-sex couples. See Jeffrey M. Jones & Gary J. Gates, *Same-Sex Marriages Up After Supreme Court Ruling*, GALLUP (Nov. 5, 2015), available at <https://tinyurl.com/ydgazdcd>; Gary J. Gates & Frank Newport, *An Estimated 780,000 Americans in Same-Sex Marriages*, GALLUP (Apr. 24, 2015), available at <https://tinyurl.com/y9pryqbs>. More than 1 in 4 married same-sex couples are raising children. Gary J. Gates & Taylor N. T. Brown, *Marriage and Same-sex Couples after Obergefell*, THE WILLIAMS INST. 4 (Nov. 2015), available at <https://tinyurl.com/y6ut343k>; see also Gary J. Gates, *Marriage and Family: LGBT Individuals and Same-Sex Couples*, 25 FUTURE OF (footnote continued)

Accordingly, companies conducting businesses in places that offer lesser or no such protections are at a disadvantage in recruiting the best employees for operations in those jurisdictions. Similarly, *amici*'s LGBT employees (and employees who prefer to work in a community that does not tolerate discrimination) are less willing to transfer to locations where such discrimination is permitted, undermining businesses' ability to organize a workforce without regard for such arbitrary legal barriers. In this way, excluding sexual orientation discrimination from Title VII's protections undermines businesses' efforts to recruit, organize, and retain talent.

*Amici* are committed to equal treatment and equal opportunity regardless of sexual orientation. But *amici* cannot create widespread equality in the workplace by themselves; Title VII plays a crucial role in creating and cultivating workplaces that embody equality by affirming the civil right to be free from discrimination.<sup>36</sup> By recognizing that sexual orientation discrimination is prohibited under Title VII, this Court would remove an artificial barrier that restricts the free flow of resources, ideas, and capital. Because businesses benefit from clear, administrable

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CHILDREN, no. 2 at 67 (Fall 2015), available at <https://tinyurl.com/ya6n23yz> ("Though estimates vary, as many as 2 million to 3.7 million U.S. children under age 18 may have a lesbian, gay, bisexual, or transgender parent, and about 200,000 are being raised by same-sex couples."). For LGBT parents, the economic stakes of working in a jurisdiction that lacks legal protections are especially high.

<sup>36</sup> See Barron & Hebl, *supra* n.19 at 192-202; Boso, *supra* n.19 at 603.

rules and a diverse workforce free from discrimination, this *en banc* Court should hold that Title VII prohibits sexual orientation discrimination.

### **CONCLUSION**

The failure to recognize that Title VII provides uniform, urgently needed protection against sexual orientation discrimination in employment is bad for employees, workplace culture, and the bottom line. *Amici* urge this *en banc* Court to hold that Title VII prohibits discrimination on the basis of sexual orientation.

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(g), this brief complies with the type-volume limitations of Fed. R. App. P. 29(a)(5) and Local Circuit Rule 29.1(c) because it contains **4,069** words, based on the Microsoft Word word-count function, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: June 26, 2017

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 26th day of June, 2017, I electronically filed the foregoing brief with the United States Court of Appeals for the Second Circuit via the appellate CM/ECF system and filed 15 copies of the foregoing brief with the Court by next business day delivery, postage pre-paid. I also certify that all counsel of record, who have consented to electronic service, will be served the foregoing brief via the appellate CM/ECF system.

Dated: June 26, 2017

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