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

IN THE

Supreme Court of the United States

No. 17-1618

GERALD LYNN BOSTOCK,

Petitioner,

—v.—

CLAYTON COUNTY, GEORGIA,

Respondent.

(*Captions continued on inside cover*)

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

BRIEF OF *AMICI CURIAE* NATIONAL LGBT BAR ASSOCIATION, NATIONAL TRANS BAR ASSOCIATION, LGBT BAR ASSOCIATION OF NEW YORK, BAY AREA LAWYERS FOR INDIVIDUAL FREEDOM, AND LGBT BAR ASSOCIATION OF LOS ANGELES IN SUPPORT OF EMPLOYEES

SANFORD JAY ROSEN
Counsel of Record
MICHAEL S. NUNEZ
ROSEN BIEN GALVAN
& GRUNFELD LLP
101 Mission Street, Sixth Floor
San Francisco, California 94105
(415) 433-6830
srosen@rbgg.com

Counsel for Amici Curiae

No. 17-1623

ALTITUDE EXPRESS, INC., and RAY MAYNARD,

Petitioners,

—v.—

MELISSA ZARDA and WILLIAM MOORE, JR.,
Co-Independent Executors of the Estate of Donald Zarda,

Respondents.

No. 18-107

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

Petitioner,

—v.—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
and AIMEE STEPHENS,

Respondents.

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INTEREST OF AMICI[1]

Amici National LGBT Bar Association, National Trans Bar Association, LGBT Bar Association of Greater New York, Bay Area Lawyers for Individual Freedom, and LGBT Bar Association of Los Angeles have thousands of members who are LGBT attorneys and other legal professionals. The Court's decision in these cases will directly affect *Amici's* members and their clients throughout the United States. *Amici* and their members have a strong interest in ensuring that Title VII's anti-discrimination mandate prohibits all forms of sex-based discrimination, including discrimination on the basis of sexual orientation and transgender status, both as members of the LGBT community and as counsel who represent members of the LGBT community.

Amici have experience and expertise directly bearing on the issues before the Court. They and their members are on the front lines enforcing Title VII and other federal and state employment anti-discrimination laws. They frequently encounter employer discrimination against LGBT employees motivated by a desire to appease, or hide behind, customer and client animus. In their experience, shielding employers from liability for such discrimination would undermine the purpose of Title VII.

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[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

Amici urge this Court to confirm that Title VII protects LGBT employees from discrimination on the basis of sex, and to reaffirm the well-established principle that deference to customer bias is no excuse for employment discrimination.

The statements of the five *Amici* are set forth in the Appendix to this Brief.

SUMMARY OF ARGUMENT

Congress enacted the Civil Rights Act of 1964 to eradicate invidious discrimination throughout the American economy and society. Consistent with that goal, Title VII was intended to remake the American labor market and workplace into spheres of equal opportunity, where qualifications and performance prevail over identity. Excluding gay, lesbian, bisexual, and transgender ("LGBT") employees from Title VII's prohibition of discrimination on the basis of sex would undermine the Act's overarching purpose of ensuring equal opportunity in the workplace.

In these cases, three employers subject to Title VII hope to carve out discrimination against LGBT employees from the law's protections. They seek to pare back Title VII's scope and secure the unfettered right to discriminate against LGBT employees. Their efforts, if successful, would place millions of American workers at economic risk, would harm the American economy, and would advance no legitimate business interest.

Both Donald Zarda and Aimee Stephens were terminated from their employment because their

employers—Altitude Express and R.G. & G.R. Harris Funeral Homes ("Funeral Homes")—chose to adopt the real or perceived anti-LGBT prejudices shared by some of their customers. *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108-09 (2d Cir. 2018); *E.E.O.C. v. R.G. &. G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 586-87 (6th Cir. 2018). The fact that some customers may have approved of the discrimination at issue in these cases does not excuse it.

For decades, this Court and others have rejected employers' attempts to justify their discriminatory actions as permissible responses to the alleged biases of their customers. Here, *Amici* marshal examples of courts rejecting such defenses to claims under Title VII, as well as to claims brought under other Federal statutes and the U.S. Constitution. *Amici* also identify the harms that would result if such defenses are validated.

ARGUMENT

I. THIS COURT SHOULD REJECT THE DISCREDITED IDEA THAT EMPLOYERS MAY DISCRIMINATE IN EMPLOYMENT DECISIONS TO APPEASE CUSTOMER PREJUDICE.

The discrimination effected by the employers in *Zarda* and *Funeral Homes*–discriminating to appease customer prejudices–is of a type that this Court has rejected for decades. *See Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073, 1090-

91 (1983) (employers violate Title VII when they discriminate against protected employees "regardless of whether third parties are also involved"); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 667-69 (1987) (union liable for declining to pursue black members' discrimination claims due to perceived third-party hostility to such claims).

For good reason, courts have overwhelmingly rejected these defenses. Discriminating against employees to satisfy actual or perceived customer prejudices undermines the protections afforded by anti-discrimination laws and defeats their purpose of fully and effectively utilizing the nation's labor force.

A. Defendants Have Repeatedly and Unsuccessfully Asserted Inappropriate Customer-Bias Defenses to Sex Discrimination Claims Under Title VII.

It is hornbook law that Title VII bars employment discrimination on the basis of sex, religion, race, color, and national origin. 42 U.S.C. § 2000e-2. The law's broad remedial purpose is to "eradicat[e] discrimination throughout the economy." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975).

In June 1964, the Senate rejected an amendment to Title VII that would have permitted an employer to discriminate on the basis of race, color, religion, sex, or national origin if the employer believed such discrimination would serve the business's "good will." 110 Cong. Rec. 13825-26

(1964). The amendment's sponsor, Senator John McClellan of Arkansas, objected to Title VII on the grounds that it would "deny to the employer the right to exercise his judgment in his own business affairs" and would eliminate "the right of a person to be free in the United States." *Id.* at 13825. New Jersey Senator Clifford Case responded that McClellan's proposed amendment would "destroy" Title VII, and the Senate resoundingly rejected it by a vote of 61-30. *Id.* at 13825-26.

Nevertheless, soon after Title VII was enacted, employers sought to evade its broad sweep by claiming that discrimination was necessary to satisfy customers and thrive in the marketplace. Courts correctly rejected these defenses, recognizing that permitting employers to use customer biases as a shield would be fundamentally at odds with Title VII's goal of overcoming societal biases.

Beginning in the 1970s, the airline industry advanced this defense in support of its systemic discriminatory hiring practices. In *Diaz v. Pan American World Airways, Inc.*, the plaintiff, a male applicant for a flight attendant position, brought a Title VII claim to challenge Pan American's policy of hiring only women as flight attendants. 442 F.2d 385, 389 (5th Cir. 1971). The airline attempted to justify the discriminatory policy by citing customers' preferences for female flight attendants. *Id.* Analyzing Title VII and its implementing regulations, the Fifth Circuit concluded that acceding to customer prejudices was not a valid reason to discriminate on the basis of sex. *Id.*; 29 C.F.R. § 1604.2(a)(1)(iii) (barring discrimination because of client or customer

preferences). Congress' primary goals in passing the Civil Rights Act included providing equal access to the job market and promoting more efficient use of the nation's labor force. *See Diaz*, 442 F.2d at 386-87. The court recognized that creating a customer-bias exception to Title VII's anti-discrimination mandate would run contrary to Title VII because "it was, to a large extent, these very prejudices the Act was meant to overcome." *Id.* at 389.

After *Diaz*, airlines continued to argue that employment policies that discriminated on the basis of sex were needed to appease customers' biases. *See, e.g.*, *Gerdom v. Cont'l Airlines, Inc.*, 692 F.2d 602, 609 (9th Cir. 1982) (weight restrictions applicable only to female flight attendants); *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1199 (7th Cir. 1971) (prohibition on married female flight attendants); *Wilson v Southwest Airlines Co.*, 517 F. Supp. 292, 302-03 (N.D. Tex. 1981) (ban on hiring male flight attendants and ticketing agents). The courts repeatedly rejected these arguments, recognizing that they threatened to "swallow the rule" barring discrimination on the basis of sex. *Wilson*, 517 F. Supp. at 304.

Defendants in other sectors of the economy continued—unsuccessfully—to assert similarly inappropriate defenses to Title VII sex discrimination claims. *See, e.g.*, *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981) (refusal to promote female to executive position at oil company); *Olsen v. Marriott Int'l, Inc.*, 75 F. Supp. 2d 1052, 1063-68 (D. Ariz. 1999) (hotel refusal to hire male massage therapist); *E.E.O.C. v. HI 40 Corp., Inc.*, 953 F. Supp. 301, 305-06 (W.D. Mo. 1996) (weight loss centers'

refusal to hire men as counselors); *Bollenbach v. Monroe-Westbury Central School District*, 659 F. Supp. 1450, 1472 (S.D.N.Y. 1987) (school district's assignment of bus routes to drivers based on sex). That defendants so frequently asserted customer-bias defenses demonstrates that courts were rightly concerned that such defenses would undermine Title VII's bar on sex discrimination.

B. Customer-Preference Defenses to Other Types of Employment Discrimination Claims Also Are Consistently Rejected.

Defendants likewise have unsuccessfully asserted spurious customer-preference defenses to Title VII claims based on racial and religious discrimination. *See, e.g.*, *Bradley v. Pizzaco of Nebraska, Inc.*, 7 F.3d 795, 799 (8th Cir. 1993) (rejecting racially discriminatory grooming policy premised on accommodating customer preferences); *Muhammad v. New York City Transit Auth.*, 52 F. Supp. 3d 468, 487-88 (E.D.N.Y. 2014) (rejecting policy of transferring Muslim bus operators who refused to remove or cover Khimars (headscarves) to non-customer contact position).

Similar defenses to claims under other employment discrimination statutes have been consistently rejected as well. *See Chalk v. U.S. Dist. Court Cent. Dist. of California*, 840 F.2d 701, 711 (9th Cir. 1988) (rejecting possibility of engendering fear in students and teachers as basis for denying injunction under Rehabilitation Act ordering school to return teacher with AIDS to regular duties); *Silver v. North*

Shore Univ. Hospital, 490 F. Supp. 2d 354, 365 (S.D.N.Y. 2007) (rejecting perceived preference of funders for younger researchers as basis for discrimination in violation of Age Discrimination in Employment Act); *Sparenberg v. Eagle Alliance*, No. JFM–14–1667, 2015 WL 6122809, at *6 (D. Md. Oct. 15, 2015) (condemning transfer in violation of Family Medical Leave Act based on client demand); *Mass v. McClenahan*, 893 F. Supp. 225 (S.D.N.Y. 1995) (rejecting defense to liability under 42 U.S.C. § 1981 premised on client concerns about retaining a "New York Jew" as an attorney).

C. Evidence of Acquiescence to Customer Biases Has Been Recognized as Proof of Intentional Discrimination Under Comparable Civil Rights Statutes.

Acceding to customer biases is itself unlawful discrimination under prevailing interpretations of comparable civil rights statutes. Both the Department of Justice and the Department of Housing and Urban Development, for example, interpret the Fair Housing Act, 42 U.S.C. § 3601 *et seq*., to prohibit "practices or decisions that reflect acquiescence to community bias[.]" Joint Statement of the Department of Housing and Urban Development and the Department of Justice, *State and Local Land Use Laws and Practices and the Application of the Fair Housing Act* 3 (Nov. 10, 2016), http://www.justice.gov/crt/page/file/909956/download. "[S]tate and local governments may not act because of the fears, prejudices, stereotypes, or unsubstantiated assumptions that community members may have

about current or prospective residents because of the residents' protected characteristics." *Id.* at 5. *Accord MHANY Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 605-06 (2d Cir. 2016) (affirming judgment for plaintiffs premised on enactment of exclusionary zoning ordinance in response to constituents' "vocal and racially influenced opposition" to proposed housing development).

Evidence that a defendant acquiesced to customer or constituent prejudice also can provide affirmative proof of intentional discrimination under Title IX, 20 U.S.C. § 1681(a). In *Doe v. Columbia University*, 831 F.3d 46 (2d Cir. 2016), a private university allegedly denied a male student accused of sexual misconduct the resources it provided to his female accuser, including support from a student advocate during the university's internal investigation of the matter. The male student sued the university for sex discrimination, claiming that the university denied him these resources for the purpose of appeasing student activists who had denounced the university for "not being firm enough" with male students. *Id.* at 50. The district court dismissed the complaint after concluding that the university's alleged disparate treatment "could equally have been—and more plausibly was—prompted by lawful, independent goals." *Id.* at 57. The Second Circuit vacated the judgment, explaining that the university's alleged desire to appease its critics was sufficient to infer discriminatory intent for purposes of Title IX. *Id.* A university that "adopts, even temporarily, a policy of bias favoring one sex over the other in a disciplinary dispute, doing so in

order to avoid liability or bad publicity, has practiced sex discrimination," the court advised. *Id.* at 58 n.11.

II. DISCRIMINATION TO APPEASE CUSTOMER PREJUDICE IS HARMFUL AND SERVES NO LEGITIMATE PURPOSE.

A. Allowing Employers to Accede to Customers' Discriminatory Preferences Is Counterproductive.

History shows that allowing employers to accommodate customers' biases by discriminating in employment decisions is both unnecessary and short sighted. During the early 1960s, as sit-ins and boycotts pushed the desegregation of public accommodations to the top of the congressional agenda, many businessmen predicted disaster, warning that integration would drive away the more affluent white customers upon whom their businesses depended. *See* Gavin Wright, SHARING THE PRIZE: THE ECONOMICS OF THE CIVIL RIGHTS REVOLUTION IN THE AMERICAN SOUTH 76-79 (2013). But resistance from white customers proved far more limited than many anticipated in the wake of the Civil Rights Act of 1964. Sales increased significantly, and within three years "the overwhelming majority of establishments were committed to compliance." *Id.* at 98.

This success resulted in large part from Congress's decision not to incorporate a customer-preference defense into Title II of the Civil Rights Act. Earlier efforts at voluntary desegregation had mostly failed, because even those businesses that were open

to the possibility of desegregation feared being placed at a competitive disadvantage if they chose to desegregate while their competitors did not. *Id.* at 90-91. Had Congress included a customer-preference defense in Title II, desegregation of public accommodations likely would have proceeded with far more disruption and far less success than it did.

In the employment discrimination context, many businesses initially opposed Title VII. But some presciently viewed Title VII as a "blessing in disguise," because the absence of a customer preference defense assured them that they could benefit from an expanded labor pool without being undercut by competitors in the event of a customer backlash. *Id.* at 109, 121-22

Airlines did not collapse because they were forced to adopt non-discriminatory flight attendant hiring practices. Southwest Airlines argued that barring men from ticketing agent and flight attendant positions was necessary to survive in a cutthroat industry, but Southwest has been profitable every year since it opened these positions to all qualified applicants. *Wilson*, 517 F. Supp. at 294-96, 299; Southwest Airlines Reports Fourth Quarter And Annual Profit; 46th Consecutive Year Of Profitability, Press Release (Jan. 24, 2019), http://investors.southwest.com/news-and-events/news-releases/2019/01-24-2019-113106440. Similarly, United Airlines remains one of the world's largest airlines even after it was forced to abandon its discriminatory flight attendant hiring practices. *Sprogis*, 444 F.2d at 1199; United Continental Holdings on the Forbes Global 2000 List, https://www.forbes.com/companies/united-

continental-holdings/#5520a823479a (last visited June 28, 2019). In fact, research shows that more diverse companies tend to perform better financially than their competitors. Steven A. Ramirez, *Diversity and the Boardroom*, 6 STAN. J. L. BUS. & FIN. 85, 99 (Fall 2000).

Hostility toward working with people of different backgrounds tends to diminish with experience and exposure over time. This is true as to attitudes about LGBT people. Polling shows that public attitudes toward LGBT people have become increasingly positive over time as states have enacted protections for LGBT people and courts have affirmed their right to equal treatment. *See* Pew Research Center, Attitudes on Same-Sex Marriage (May 14, 2019), https://www.pewforum.org/fact-sheet/changing-attitudes-on-gay-marriage/. Empirical evidence shows that legal protections for LGBT people are correlated with higher rates of acceptance. Andrew R. Flores and Scott Barclay, *Backlash, Consensus, Legitimacy, or Polarization: The Effect of Same-Sex Marriage Policy on Mass Attitudes*, 69 POL. RES. Q. 43, 44 (March 2016). Furthermore, research shows that working with employees from different backgrounds is one of the most effective ways to reduce prejudiced attitudes. *See* Kathleen Hale, Toyota v. Williams: *Further Constricting the Circle of Difference*, 4 J. L. SOCIETY 275, 305 (Winter 2003).

Altitude Express and Funeral Homes' professed concerns about customer preferences ignore the obvious fact that many of the most successful businesses in the country now bar discrimination against LGBT employees. HUMAN RIGHTS CAMPAIGN,

CORPORATE EQUALITY INDEX 6 (2019), https://assets2.hrc.org/files/assets/resources/CEI-2019-Full Report.pdf?_ga=2.166794302.1835252856.1560803408-176337270.1560803408. Altitude Express and Funeral Homes' claims that they need to discriminate against LGBT employees because they face competitive pressure to do so are particularly inappropriate in light of other companies' successful implementation of non-discrimination policies. *See HI 40 Corp.*, 953 F. Supp. at 304 (weight loss centers argued that customer preferences justified bar on hiring male counselors even where competitors did not discriminate against men in hiring); *Morris v. Bianchini*, No. 86–0742–A, 1987 WL 11822, at *7 n.3 (E.D. Va. Feb. 24, 1987) (athletic club refused to hire women to cater to perceived customer preference but competitors did not discriminate based on sex).

B. Allowing Employers to Accede to Customers' Discriminatory Preferences Would Marginalize Title VII's Prohibition of Sex Discrimination and Perpetuate Stereotypes.

Permitting employers to disregard federal anti-discrimination protections to pander to customers' real or perceived prejudice against LGBT people would marginalize those protections against sex discrimination and undermine Title VII's core purpose of promoting equal access to the job market. It would enable employers to cherry-pick customer complaints to shield themselves from liability and conceal their own discriminatory intent in mistreating LGBT employees and job candidates.

In Ms. Stephens' case, Funeral Homes concluded that she would distract customers from their grieving without first providing Ms. Stephens the opportunity to work with customers after she transitioned and without her supervisor even seeing Ms. Stephens presenting as the woman she knows herself to be. *Funeral Homes*, 884 F.3d at 586. Funeral Homes' professed concern that Ms. Stephens would distract customers is just the latest in a long line of unsuccessful defenses to discrimination suits based on stereotypes. *Ferrill v. Parker Group, Inc.*, 168 F.3d 468, 474-75 (11th Cir. 1999) (telemarketing firm's race-based call assignments based on stereotype that black voters would respond better to black callers); *Knight v. Nassau County Civil Serv. Comm'n*, 649 F.2d 157, 162 (2d Cir. 1981) (race-based assignment of employee to minority recruitment position based on stereotype that minorities would respond better to black recruiter than white recruiter). Endorsing such defenses would perpetuate stereotypes and enshrine them as permanent exceptions to anti-discrimination laws.

That third-party preferences are often misjudged further underscores the needless harm that would result from permitting discrimination based on perceived customer prejudices. For example, in *Chalk*, 840 F.2d at 711, the district court declined to order the defendant, a school district, to return the plaintiff, a teacher with AIDS, to the class room because the court believed that doing so would inflict fear and trauma on students and teachers. Reversing the district court, the Ninth Circuit noted that several of the parents had actually joined an amicus brief in favor of reinstating the plaintiff to the

classroom, and that the plaintiff was greeted with hugs and gifts when he returned to teaching. *Id.* at 711 n.14. It appears that the trauma the plaintiff suffered when he was transferred away from the classroom was real, but the trauma the transfer supposedly avoided may not have been.

C. Customer-Bias-Based Discrimination Harms Everyone, Not Just Employees and Job Applicants Who Face Discrimination.

Sanctioning employer discrimination aimed at appeasing customer prejudice prevents everyone from benefiting from the talent that people protected by anti-discrimination laws have to offer. In *Chaney v. Plainfield Healthcare Center*, for example, racist nursing home patients objected to receiving care from black staff, so the nursing home barred the plaintiff, a black nursing assistant, from assisting them. 612 F.3d 908, 913 (7th Cir. 2010). The nursing home's discriminatory practice risked violating its duty to provide medical care and resulted in reduced productivity, as the plaintiff devoted time to locating white staff to assist racist patients and forced patients to wait longer for care. *Id.* at 910. Both the nursing home and its patients would have been better off if the plaintiff had been allowed to do her job in a non-discriminatory environment.

In *Morris v. Bianchini*, an athletic club suffered a loss when, based on perceived discriminatory customer preferences, it hired a male athletics director instead of a "far better qualified" and more experienced woman. *Morris*, 1987 WL

11822, at *7. The club fired their new hire just a few months later after he failed to meet expectations, forcing the club to devote additional time and effort to search for another director. *Id.* at 3.

III. THIS COURT HAS LONG DISFAVORED THIRD-PARTY VETOES OF CIVIL RIGHTS AND CIVIL LIBERTIES.

This Court has long held that the government may not suppress constitutionally protected speech, assembly, or religious exercise simply because it elicits or is likely to elicit a hostile reaction from third parties. In *Hague v. C.I.O.*, for example, the City of Jersey City denied labor organizers and their sympathizers a permit for a public demonstration and then summarily "deported" them from the City, citing a series of municipal ordinances and threats of violence that opponents of the organizers had made during a counter-rally organized by the American Legion. 101 F.2d 774 (3d Cir.), *aff'd as modified*, 307 U.S. 496 (1939). The organizers filed suit, the district court enjoined the City's enforcement of the ordinances, and the Third Circuit and this Court each affirmed the injunction with minor modifications. *Id.* For rights to meaningfully exist, the Third Circuit observed, they cannot be "place[d] . . . in the hands of those who would destroy them." *Hague*, 101 F.2d at 782. "If the ill-intentioned threaten riot, speech may not be [h]ad. Under what conditions then would not the cry of riot be raised?" *Id.*

Since *Hague*, this Court has repeatedly confirmed that "[p]articipants in an orderly demonstration in a public place are not chargeable

with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence." *Brown v. State of Louisiana*, 383 U.S. 131, 133 n.1 (1966); *see, e.g.*, *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940); *Edwards v. South Carolina*, 372 U.S. 229 (1963); *Coates v. City of Cincinnati*, 402 U.S. 611 (1971); *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992). Like the Congress that enacted the Civil Rights Act of 1964, which recognized that a customer-preference defense would "destroy" Title VII, *see* 110 Cong. Rec. 13825 (1964), this Court understands that a right whose exercise is subject to a "heckler's veto" is no right at all. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 880 (1997); *Zivotovsky ex rel. Zivotovsky v. Kerry*, 135 S. Ct. 2076, 2115 (2015) (Roberts, C.J., dissenting).

This principle was crucial to the Court's role in desegregating public spaces. Beginning with *Buchanan v. Warley*, which held that a municipal ordinance prohibiting racial integration of residential neighborhoods was not justified merely because it "promote[d] the public peace by preventing racial conflicts," 245 U.S. 60, 73 (1917), the Court consistently rejected arguments from government defendants who engaged in unconstitutional discrimination to appease the prejudices of their constituents. *Wright v. State of Georgia*, for example, involved six black teenagers who had been convicted of breaching the peace for playing basketball in a park customarily used by white people. 373 U.S. 284 (1963). Reversing the convictions, this Court explained that "the possibility of disorder by others cannot justify exclusion of persons from a place if they

otherwise have a constitutional right (founded upon the Equal Protection Clause) to be present." *Id.* at 293; *see also Watson v. City of Memphis*, 373 U.S. 526, 535 (1963) (public hostility not a reason to delay desegregating recreational facilities because "constitutional rights may not be denied simply because of hostility to their assertion or exercise.").

An employer who allows the real or perceived discriminatory preferences of his customers to control his employment decisions is little different from a public official who placates the discriminatory preferences of his constituents. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 798 (1998) (supervisor who "discriminate[s] racially in job assignments in order to placate the prejudice pervasive in the labor force" enforces a "heckler's veto . . . intended to further the employer's interests by preserving peace in the workplace"). Such a veto of LGBT people's rights could not survive constitutional scrutiny in a Section 1983 suit asserting an equal protection claim. *Cf. Lawrence v. Texas*, 539 U.S. 558 (2003); *Romer v. Evans*, 517 U.S. 620 (1996). It should not survive scrutiny in a suit brought under Title VII, either.

CONCLUSION

For the forgoing reasons, this Court should affirm the judgments of the Second and Sixth Circuits and reverse the judgment of the Eleventh Circuit.

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Respectfully submitted,

SANFORD JAY ROSEN
Counsel of Record
MICHAEL S. NUNEZ
ROSEN BIEN GALVAN
& GRUNFELD LLP
101 Mission Street,
Sixth Floor
San Francisco, California
94105-1738
(415) 433-6830
srosen@rbgg.com

Counsel for Amici Curiae National LGBT Bar Association, National Trans Bar Association, LGBT Bar Association of Greater New York, Bay Area Lawyers for Individual Freedom, and LGBT Bar Association of Los Angeles

APPENDIX

The National LGBT Bar Association is a non-profit membership-based 501(c)(6) professional association. The National LGBT Bar Association's more than 10,000 members and subscribers include lawyers, judges, legal academics, law students, and affiliated legal organizations supportive of lesbian, gay, bisexual, and transgender ("LGBT") rights. The National LGBT Bar Association and its members work to promote equality for all people regardless of sexual orientation or gender identity or expression, and fight discrimination against LGBT people as legal advocates. The National LGBT Bar Association is a membership organization and files this brief on behalf of its members, who object to workplace discrimination on the bases of sexual orientation and gender identity or expression.

The National Trans Bar Association ("NTBA") is a non-profit professional association of attorneys promoting equality both in the legal profession and under the law. In addition to directly working with trans and gender non-conforming legal professionals, the NTBA seeks to educate and advocate for legislative changes that expand formal legal protections and access to legal representation for trans and gender non-conforming people.

The LGBT Bar Association of Greater New York ("LeGaL") was one of the nation's first bar associations of the LGBT legal community and remains one of the largest and most active organizations of its kind in the country. Serving the New York metropolitan area, LeGaL is dedicated to

improving the administration of the law, ensuring full equality for members of the LGBT community, and promoting the expertise and advancement of LGBT legal professionals. LeGaL, whose membership includes attorneys who regularly represent LGBT employees in cases of employment discrimination, has a fundamental interest in ensuring that Title VII's protections extend to all LGBT employees.

Bay Area Lawyers for Individual Freedom ("BALIF") is a bar association of approximately 500 lesbian, gay, bisexual, and transgender ("LGBT") members in the San Francisco Bay Area legal community. BALIF promotes the professional interests and social justice goals of its members and the legal interests of the LGBT community at large. For nearly 40 years, BALIF has actively participated in public policy debates concerning the rights of LGBT people and has authored and joined amicus efforts concerning matters of broad public importance.

The LGBT Bar Association of Los Angeles was founded in 1979 in response to Proposition 6, a ballot initiative that would have prohibited homosexuals from working as teachers in the state of California. Today, the LGBT Bar Association of Los Angeles advocates for the interests of lesbian, gay, bisexual, transgender, and queer persons in the legal profession and in the community at large, through education, legal advocacy, and participation in political and civic activities.