

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

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In The  
**Supreme Court of the United States**

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GERALD LYNN BOSTOCK,

*Petitioner,*

v.

CLAYTON COUNTY, GEORGIA,

*Respondent.*

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ALTITUDE EXPRESS, INC. and RAY MAYNARD,

*Petitioners,*

v.

MELISSA ZARDA AND WILLIAM MOORE, JR.,

CO-INDEPENDENT EXECUTORS OF THE

ESTATE OF DONALD ZARDA,

*Respondents.*

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

*Petitioner,*

v.

EQUAL EMPLOYMENT OPPORTUNITY

COMMISSION and AIMEE STEPHENS,

*Respondents.*

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

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**BRIEF OF GEORGIA EQUALITY AS AMICUS CURIAE IN SUPPORT OF THE EMPLOYEES**

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**INTEREST OF AMICUS CURIAE<sup>1</sup>**

Georgia Equality is the largest civil rights organization dedicated to securing full equality for Georgia's lesbian, gay, bisexual, transgender, and queer or questioning (LGBTQ) community. Founded in 1995, Georgia Equality raises the voices of LGBTQ people and allies to Georgia's institutions, striving to create a state that is healthy, just, and fully equal for all LGBTQ people. Georgia Equality advances civil rights through education, advocacy, mobilization, legislation, and policy. Georgia Equality combats discrimination and injustice on the basis of sexual orientation or gender identity or expression and protects the LGBTQ community's needs and interests, as well as advocating for the interests of vulnerable communities of which LGBTQ people are a part. Georgia Equality therefore has an interest in promoting equal opportunity for LGBTQ people in employment.

Georgia Equality files this brief as *amicus curiae* to highlight the importance of preserving the protections the LGBTQ community enjoys against discrimination under federal law. Public and private sector employers throughout Georgia have made tremendous

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<sup>1</sup> Pursuant to Sup. Ct. R. 37.6, the *amicus curiae* and its counsel state that none of the parties to this case nor their counsel authored this brief in whole or part, and that no person, party, party's counsel or entity made a monetary contribution intended to fund the preparation or submission of this brief; and no one other than the *amicus curiae* and its counsel have contributed money for this brief. The *amicus curiae* files this brief with the written consent of all parties. All parties received timely notice of *amicus curiae*'s intention to file this brief.

progress in recognizing and implementing protections for LGBTQ persons against employment discrimination. Title VII's prohibition against discrimination based on sex stands as that framework's cornerstone, and the Court should reinforce and confirm prior judicial and administrative agency rulings guaranteeing employees nationwide legal protection from discrimination and harassment based on their sex, including discrimination based on sexual orientation or transgender status. To supply critical context to the Court, Georgia Equality presents the stories of LGBTQ Georgians who have endured employment discrimination and also draws attention to the growing consensus among employers and governments throughout the state that all people should be protected from discrimination and harassment in the workplace, especially when such discrimination is because of their sex, including their sexual orientation or their being transgender.

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## SUMMARY OF THE ARGUMENT

Courts across the United States have held that Title VII's prohibition against discrimination because of sex protects LGBTQ persons from discrimination based on their sexual orientation or transgender status. Protecting people from discrimination on these bases safeguards the health, safety, and wellbeing of LGBTQ persons. It is not surprising, therefore, that an overwhelming majority of Georgians and Georgia businesses recognize and support the protection of LGBTQ

persons from employment discrimination. The Court should confirm that Title VII’s prohibition on discrimination based on sex shields LGBTQ persons from discrimination based on their sexual orientation or gender identity or expression.

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## ARGUMENT

### I. TITLE VII PROHIBITS DISCRIMINATION BECAUSE OF SEX, INCLUDING DISCRIMINATION ARISING FROM AN EMPLOYEE’S SEXUAL ORIENTATION OR TRANSGENDER STATUS.

Properly understood, Title VII protects employees from discrimination because they are LGBTQ. On its face, Title VII prohibits discrimination because of an employee’s sex. This Court’s Title VII jurisprudence compels the conclusion that Title VII’s prohibition on discrimination because of an employee’s sex encompasses discrimination based on sexual orientation and transgender status.<sup>2</sup> Indeed, in *Price Waterhouse*, this Court emphasized that, “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes.”<sup>3</sup> Thus, under this Court’s decisions, if

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<sup>2</sup> See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), superseded in part by The Civil Rights Act of 1991, Tit. I, § 107(a), 105 Stat. 1075 (codified at 42 U.S.C. § 2000e-2(m)).

<sup>3</sup> *Id.* at 251 (quoting *City of Los Angeles Dep’t of Power & Water v. Manhart*, 435 U.S. 702, 707 n.13 (1978)) (emphasis added).

an employer fires an employee who is a man because he seeks intimate relationships with other men (but would not have done so if that same man sought relationships with women), the employer has fired that person “because of [his] sex.” Only men would face adverse employment action for their attraction to men; other individuals would be able to keep their jobs (although the same employer might fire women because they are lesbians). Gay men in such situations have therefore been “exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”<sup>4</sup> Disparate treatment of this sort is precisely what Title VII and decades of this Court’s precedents are meant to redress.

It is no surprise then that Federal courts across our country have held that Title VII protects LGBTQ employees.<sup>5</sup> And the EEOC, the agency Congress

<sup>4</sup> *Oncake v. Sundowner Offshores Servs., Inc.*, 523 U.S. 75, 80 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)).

<sup>5</sup> See, e.g., *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc); *Hively v. Ivey Tech. Cmty. Coll. of Indiana*, 853 F.3d 339 (7th Cir. 2017) (en banc); *Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem, Ohio*, 378 F.3d 566 (6th Cir. 2004); *Rosa v. Park W. Bank & Tr. Co.*, 214 F.3d 213 (1st Cir. 2000); *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255 (D. Conn. 2016); *U.S. Equal Emp’t Opportunity Comm’n v. Scott Med. Ctr., P.C.*, 217 F. Supp. 3d 834 (W.D. Pa. 2016); *Winstead v. Lafayette Cty. Bd. of Cty. Comm’rs*, 197 F. Supp. 3d 1334 (N.D. Fla. 2016); *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190 (M.D. Ala. 2015); *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151 (C.D. Cal. 2015); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509 (D. Conn. 2016); *Schroer v. Billington*, 577 F. Supp. 2d 293, 308 (D.D.C. 2008).

charged with enforcing Title VII, applied the statute the same way for years.<sup>6</sup>

Despite this established law and widespread public support for measures protecting LGBTQ employees from discrimination, Title VII's protections remain insecure for many LGBTQ employees, and many of them are unaware of the prior rulings on federal courts and the EEOC. Those in states that – like Georgia – lack their own state laws expressly prohibiting employment discrimination based on sexual orientation and transgender status remain especially vulnerable. The experiences of ordinary Georgians confirm how vulnerable our friends and neighbors are to employment discrimination. But their experiences also tell a more hopeful story about what affirming employment can mean for LGBTQ people.

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<sup>6</sup> *Baldwin v. Foxx*, EEOC Appeal No. 0120133080, 2015 WL 4397641, at \*4 (July 15, 2015) (“Title VII’s prohibition of sex discrimination means that employers may not rely upon sex-based considerations or take gender into account when making employment decisions. This applies equally in claims brought by lesbian, gay, and bisexual individuals under Title VII.” (internal citations omitted; alterations and quotation marks omitted)); *Macy v. Dep’t of Justice*, EEOC Appeal No. 0120120821, 2012 WL 1435995 (April 20, 2012).

## **II. GEORGIANS RECOGNIZE THE IMPORTANCE OF PROTECTION FROM WORKPLACE DISCRIMINATION AND THE DISPROPORTIONATE AND SOMETIMES UNIQUE RISKS LGBTQ INDIVIDUALS FACE.**

### **A. Employment Discrimination Further Endangers Already Vulnerable Children.**

The story of Gerald Bostock, one of the employees whose case is before this Court, illustrates how employment discrimination affects not only LGBTQ people, but the communities in which they live and work. Gerald worked in Clayton County as a child welfare services coordinator in the juvenile court until he was fired after his employer learned he is gay. Before he was fired, Gerald worked daily with children in foster care, a population in which – research confirms – LGBTQ youth are overrepresented.

For example, a recent study published in the journal *Pediatrics* showed that LGBTQ youth are overrepresented in foster care by a disproportionality index of more than two to one.<sup>7</sup> In other words, “the proportion of LGBTQ youth in foster care and unstable housing is 2.3 to 2.7 times larger than would be expected from estimates of LGBTQ youth in nationally

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<sup>7</sup> Laura Baams, Bianca D.M. Wilson, Stephen Russell, *LGBTQ Youth in Unstable Housing and Foster Care*, 143 *Pediatrics* 1, 4 (2019), available at <https://www.childrensrights.org/wp-content/uploads/2019/04/2019.02.12-LGBTQ-Youth-in-Unstable-Housing-and-Foster-Care.pdf>.

representative adolescent samples.”<sup>8</sup> And earlier research suggests that number may be increasing: A study published in 2014 that, like the 2019 Pediatrics article analyzed foster care populations in Los Angeles, estimated that there were “between 1.5 to 2 times as many LGBTQ youth living in foster care as LGBTQ youth estimated to be living outside of foster care.”<sup>9</sup> Once in foster and other out-of-home care, LGBTQ youth are more likely to suffer abuse and harassment by social work professionals, foster parents, and their peers than other youth.<sup>10</sup> As one child welfare professional reported to the journal Child Welfare, “In most agencies, it’s just not safe for a gay or lesbian young person to be identified.”<sup>11</sup>

The absence of LGBTQ professionals, like Gerald, within the child welfare system, therefore, has an outsized impact. Discrimination against LGBTQ adults working in the child welfare system shrinks the ranks

<sup>8</sup> *Id.* The Williams Institute’s study of youth in foster care in L.A. found that 19%, or almost 1 in 5, young people in foster care identify as LGBTQ. See [https://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS\\_report\\_final-aug-2014.pdf](https://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_report_final-aug-2014.pdf).

<sup>9</sup> Bianca D.M. Wilson, Khush Cooper, Angeliki Kastanis, Sheila Nezhad, *Sexual & Gender Minority Youth in Los Angeles Foster Care: Assessing Disproportionality and Disparities in Los Angeles*, The Williams Institute, UCLA School of Law (2014), available at [https://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS\\_report\\_final-aug-2014.pdf](https://williamsinstitute.law.ucla.edu/wp-content/uploads/LAFYS_report_final-aug-2014.pdf).

<sup>10</sup> Baams, et al., *supra* note 7, at 1.

<sup>11</sup> Gerald P. Mallon, Nina Aledort, Michael Ferrera, *There’s No Place Like Home: Achieving Safety, Permanency, and Well-Being for Lesbian and Gay Adolescents in Out-of-Home Care Settings*, 2002 Child Welfare 407, 419.

of adults uniquely situated to understand the experiences of and advocate for LGBTQ youth there. Thus, Gerald's wrongful termination not only deprived him of a job he loved and threatens his financial security; it also makes an already vulnerable population of young people even more so.

Jameka Evans, a lesbian, was once one of these vulnerable children living in foster care,<sup>12</sup> and she became an adult who worked with another vulnerable population. Beginning in 2012, Jameka worked as a security guard at Savannah's Georgia Regional Hospital, which is operated by the Georgia Department of Behavioral Health and Developmental Disabilities. At 23 years old, she became the youngest supervisor in her department,<sup>13</sup> handling security for a facility that includes a 24-hour psychiatric emergency room, provides evaluation and treatment to adults living with mental illness and developmental disabilities.<sup>14</sup> The facility also includes a forensic services unit for individuals court ordered to psychiatric treatment.

Jameka found pride and purpose in work. "Every day, [she] made sure these patients were safe," would "de-escalate situations if need be," and made sure patients "had a sense of support" from the security staff,

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<sup>12</sup> <https://www.youtube.com/watch?v=5Fo5qdBU6dI> (foster care mention at 1:26).

<sup>13</sup> *Id.* (supervisor mention at 2:04).

<sup>14</sup> <https://dbhdd.georgia.gov/georgia-regional-hospital-savannah-grhs-savannah-ga>.

who were some of the most constant figures in the patients' daily lives.<sup>15</sup>

And yet, Jameka left a job she loved after harassment made her professional life unbearable. Not only did managers reassign Jameka – and only Jameka – to increasingly undesirable shifts,<sup>16</sup> threatening behavior from colleagues and supervisors made her fear for her physical and emotional safety.<sup>17</sup>

### **B. Allowing Workplace Discrimination Against LGBTQ Workers Would Lead to More Harmful Harassment of LGBTQ People.**

Jameka is not an outlier. A majority of LGBTQ Americans – 60% – report that they have endured slurs because of their sexual orientation.<sup>18</sup> A majority also report experiencing sexual harassment and violence.<sup>19</sup> Another survey showed that, among lesbian,

<sup>15</sup> Out at Work Video, <https://www.youtube.com/watch?v=5Fo5qdBU6dI> (quote at 2:20).

<sup>16</sup> Second Amended Complaint ¶¶ 12–13, *Evans v. Ga. Dep't of Behavioral Health & Developmental Disabilities*, No. 4:15-cv-00103-JRH-GRS (S.D. Ga. Feb. 20, 2018).

<sup>17</sup> *Id.* ¶¶ 14–16.

<sup>18</sup> *Discrimination in America: Experience and Views of LGBTQ Americans*, NPR, Robert Wood Johnson Foundation, and Harvard T.H. Chan School of Public Health, November 2017, at 8, available at <https://www.npr.org/documents/2017/nov/npr-discrimination-lgbtq-final.pdf>.

<sup>19</sup> *Id.* Fifty-one percent of the LGBTQ Americans surveyed reported experiencing sexual harassment; another 51% reported violence.

gay, and bisexual people who are “out” in the workplace, “56% have experienced at least one form of employment discrimination because of their sexual orientation.”<sup>20</sup>

Workplace discrimination and harassment is not a relic of the past. Scott Spencer, a construction manager in DeKalb County, recounts the events of one day in June 2019:

This week on a jobsite, I heard three separate incidents of anti-gay rhetoric tossed around: One by a tradesman, so I said nothing out of fear of disrupting the work force. One by a customer, so I said nothing out of fear of rocking the business relationship. One by my manager’s peer, so I said nothing for fear of being fired. The worst part was that I was not the only one who heard these remarks and observed my silence. There was an LGBTQ college student working with me who also heard everything.

The numbers are even more “staggering” for transgender employees, 90% of whom “report

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<sup>20</sup> Jennifer C. Pizer, Brad Sears, Christy Mallory & Nan D. Hunter, *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, 723 (2012).

experiencing some form of harassment or mistreatment on the job.”<sup>21</sup>

Jordan Bernard is one such woman. Jordan, a transgender woman of color, was fired from her manufacturing job in Pendergrass, Georgia, after she reported violent threats made by a co-worker.<sup>22</sup> Her employer, to whom Jordan had recently come out as transgender, did not terminate the employee who threatened her.

This was not the first time Jordan had experienced harassment and discrimination at work. At an earlier retail job, Jordan enjoyed support and affirmation from the manager who hired her. An inter-company transfer introduced a new manager who insisted – contrary to widely accepted medical recommendations<sup>23</sup> – that Jordan adhere to the dress code for men. Jordan did what the manager demanded, “because [she] need[ed] to survive,” but her new manager nonetheless scheduled her for fewer and fewer shifts, until she was forced to leave

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<sup>21</sup> *Working For Inclusion*, U.S. Comm’n on Civil Rights (Nov. 2017), available at [https://www.usccr.gov/pubs/docs/LGBT\\_Employment\\_Discrimination2017.pdf](https://www.usccr.gov/pubs/docs/LGBT_Employment_Discrimination2017.pdf).

<sup>22</sup> <https://www.youtube.com/watch?v=Wj6G2kdtcVk> (at around 1:30).

<sup>23</sup> Lisa R. Miller and Eric Anthony Grollman, *The Social Costs of Gender Nonconformity for Transgender Adults: Implications for Discrimination and Health*, 20 Sociologica Forum 809-831 (2015); Colton L. Keo-Meier and Christine Labuski, *The Demographics of the Transgender Population*, in International Handbook on Demography of Sexuality 289–327 (Amanda K. Baumle Ed., 2013).

that job for one offering a more stable source of income.<sup>24</sup>

### **C. Employment Discrimination Threatens the Economic Security of LGBTQ People and Their Families.**

Of course, discrimination results in economic insecurity that endangers not only employees, but their dependents. “Child rearing among same-sex couples is more common in the South than in any other region of the country.”<sup>25</sup> Roughly one-in-three LGBTQ people in Georgia is raising at least one child.<sup>26</sup>

Dave Pierce’s experience establishes this point. At his current employer, “a quasi-governmental agency with a strong non-discrimination policy, [he] felt affirmed and valued even *before* [he] accepted the job,” so much so that Dave was “confident enough to mention my husband in the interview.” Previously, Dave worked at a company “that covered domestic partners under the company health plan, but only *opposite-sex couples*. [He] vividly remember[s] that qualifier emphasized in italics during the human resources presentation.” Dave says that qualifier “communicated clearly that my employer did not value me as much as other employees, and the feeling of insecurity

<sup>24</sup> <https://www.youtube.com/watch?v=Wj6G2kdteVk> (at around 1:15–20).

<sup>25</sup> Sabrina Tavernise, *Gay Parents Find the South More Welcoming, Census Says*, N.Y. Times, Jan 18, 2011.

<sup>26</sup> [https://www.lgbtmap.org/equality\\_maps/profile\\_state/GA](https://www.lgbtmap.org/equality_maps/profile_state/GA).

permeated my entire workplace experience.” By contrast, thanks to his current employer, Dave and his “husband feel secure enough to begin thinking about growing our family.”

In short, the ability of LGBTQ to raise and support families depends on secure and safe employment, and single gay, lesbian, bisexual, transgender, and queer adults raising children are uniquely vulnerable, as they are “three times more likely than comparable non-LGBT[Q] individuals to report household incomes near the poverty threshold.”<sup>27</sup> The financial insecurity that comes with discrimination cannot be understated, and the need for financial security – not only for employees, but for the families that rely on them – has led many LGBTQ Georgians to hide their identities at work.

Anna Lange is a woman who is transgender with 22 years of law enforcement experience, currently serving as a Sergeant in the Criminal Investigations Division in a Middle Georgia sheriff’s department. Anna postponed her medical transition for more than a decade because she feared losing a job she loved and the financial security it gave her family.

With a young child, I wasn’t going to risk losing the ability to keep a roof over our heads, food on the table, or medical insurance. Not having clear cut legal protections certainly

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<sup>27</sup> Gary J. Gates, *LGBT Parenting in the United States* (2013), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf>.

delayed me living my true life and threatened my ability to perform my chosen career path as an officer of the law. Carrying this burden for so many years was difficult.

After more than 15 years, Anna could not wait any longer.

I realized that the fear of being ostracized or terminated had driven me to such a dark place, and all I wanted to do was be who I was meant to be and still be a law enforcement officer.

Six months after she began her medical transition in 2016, Anna approached the County's Human Resources Director. With the Director's support, Anna came out to the Sheriff and his Chief Deputy, knowing that the County lacked explicit protections for sexual orientation or transgender status in its employment policies.

In the two years that have followed, Anna has "felt like [she has] a target on [her] back" at work. She "walk[s] on eggshells," convinced that she cannot "give them any reason to find fault with [her] work." While at work, she has endured slurs and "countless jokes" at her expense, but Anna also emphasizes that, even in her mostly rural, Middle Georgia county, the majority of her colleagues have been tolerant and supportive.

**D. Employment Discrimination Exacerbates the Risk of Violence Faced by LGBTQ Individuals.**

If employers are allowed to harass, fire, and otherwise discriminate against LGBTQ employees, that sends a message that prejudice and harm to members of the LGBTQ community is acceptable, and makes more likely that LGBTQ people will be subjected to other bias-based harms, including violence. In addition, the fact that LGBTQ people are disproportionately likely to be victims of crime underscores the need for LGBTQ individuals – like Anna and Jeremy Dailey – to have secure jobs in law enforcement, who are likely to be particularly sensitive to the experiences of these crime victims.

Jeremy Dailey, an Assistant District Attorney in Atlanta, “embraced [his] sexuality not long after” he became a prosecutor. Now, he is “one among a number of openly LGBTQ employees,” but as a first-year associate in a small firm the morning the *Obergefell* decision came down, Jeremy, still in the closet, “silently celebrated while one of the partners loudly” derided the decision. According to Jeremy, “This confirmed that I needed to stay closeted, knowing my sexual orientation would hinder my career.” Now, however, Jeremy says, “it makes a world of difference connecting with my colleagues, knowing that my office will support me every step of the way.”

Affirming and inclusive law enforcement is critical, as F.B.I. data show that lesbian, gay, bisexual, and

transgender people are the most frequent targets of hate crimes in America.<sup>28</sup> LGBTQ people are also at special risk of violence visited upon them by those closest to them. Research from the Centers for Disease Control indicates that sexual minorities experience “intimate partner violence at rates equal to or higher than” their heterosexual-identified peers.<sup>29</sup> The situation is even more dire for bisexual women: Approximately one in three bisexual women, compared to one in six heterosexual women, have experienced stalking “in which they felt very fearful or believed that they or someone close to them would be harmed or killed”,<sup>30</sup> one in five bisexual women report having been raped by an intimate partner, compared to 1 in 10 heterosexual women;<sup>31</sup> and one in three bisexual women, compared to one in seven heterosexual women, have reported injury “as a result of rape, physical violence, and/or stalking by an intimate partner.”<sup>32</sup>

Other research shows that transgender people are at even higher risk for violence. For example, in the largest ever survey of transgender people in America, nearly half – 47% – of respondents reported having

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<sup>28</sup> <https://www.fbi.gov/news/stories/latest-hate-crime-statistics-available> (Nov. 16, 2015); see also <https://www.nytimes.com/interactive/2016/06/16/us/hate-crimes-against-lgbt.html> (analyzing same data).

<sup>29</sup> [https://www.cdc.gov/violenceprevention/pdf/cdc\\_nisvs\\_victimization\\_final-a.pdf](https://www.cdc.gov/violenceprevention/pdf/cdc_nisvs_victimization_final-a.pdf) at 1.

<sup>30</sup> *Id.* at 2.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

“been sexually assaulted at some point in their lifetime.”<sup>33</sup> One in ten “reported being physically attacked in the past year because of being transgender.”<sup>34</sup> And among transgender women of color, the rates of fatal violence – murder – have risen so high, the American Medical Association (AMA) has responded. Just weeks ago, the AMA’s House of Delegates asked the organization to “partner with other medical organizations and stakeholders to immediately increase efforts to educate the general public, legislators and members of law enforcement using verified data related to the hate crimes against transgender individuals highlighting the disproportionate number of Black transgender women who have succumbed to violent deaths.”<sup>35</sup>

Despite these disproportionate rates of violence, LGBTQ people remain reluctant to interact with police. More than half of respondents to the 2015 U.S. Transgender Survey reported “they would feel uncomfortable asking the police for help if they needed it.”<sup>36</sup> Similarly, a 2013 survey showed that only 45% of those who have survived violence visited upon them because of their LGBTQ status reported such crimes to the

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<sup>33</sup> S.E. James, J.L. Herman, S. Rankin, M. Keisling, L., Mottet, & M. Anafi, The Report of the 2015 U.S. Transgender Survey, Washington, DC: National Center for Transgender Equality (2016) at 205, available at <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.pdf>.

<sup>34</sup> *Id.*

<sup>35</sup> <https://www.ama-assn.org/house-delegates/annual-meeting/highlights-2019-ama-annual-meeting>.

<sup>36</sup> <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.pdf> at 188.

police.<sup>37</sup> If LGBTQ people are openly represented in law enforcement agencies, the way Anna and Jeremy are in their respective offices, this is less likely to be true.

#### **E. Employment Discrimination Contributors to Poorer Mental Health.**

Connie Galloway of Blue Ridge, Georgia, and her partner of nearly 20 years have endured what Anna feared – the actual economic toll of discrimination. A pretextual firing months before her retirement plan vested robbed Connie and her partner Dixie of approximately \$25,000 annually to which they would have otherwise been entitled. Though a previous supervisor was supportive of her identity as a lesbian, and despite flawless performance reviews and decades of experience, Connie was fired shortly after an interim CEO took over the agency.

Not only was her termination of great financial consequence, Connie paid an enormous emotional price. Connie devoted 31 years to this community mental health organization, serving people with substance abuse disorders and other mental health needs in the North Georgia Mountains. Connie “gave [her] life to this agency.”

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<sup>37</sup> Lesbian, Gay, Bisexual, Transgender, Queer and HIV-Affected Hate Violence in 2012, National Coalition of Anti-Violence Programs (2013) at 9, available at <http://www.avp.org/wp-content-uploads/2017/04/2013-ncavp-hvreport-final.pdf>.

When I was fired, it was gut-wrenching and humiliating. I had dedicated my life and in one moment, poof, I was gone from there.

I was not only an emotional wreck from being fired after working there for 31 years but the financial impact was sudden and traumatic. My partner was in graduate school full-time and over halfway through her program. I searched for another job but was unable to find one. I was not sure how we were going to make it.

LGBTQ people are as much as 2.5 times more likely to experience depression, anxiety, and substance abuse disorders.<sup>38</sup> They are more likely to rate their own health as poor and live with more chronic conditions and have higher rates and earlier onset of disability than others.<sup>39</sup> Additionally, fear of discrimination imposes obstacles to healthcare for many LGBTQ people. More than half of respondents to one survey of nearly 5,000 LGBTQ people reported that they have experienced discrimination when seeking healthcare, whether “being refused needed care; health care professionals refusing to touch them or using excessive

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<sup>38</sup> David J. Lick, Laura E. Durso, & Kerri L. Johnson (2013), *Minority Stress and Physical Health Among Sexual Minorities*, 8 Pers. on Psychological Sci. 8(5): 521-548; Cochran, S.D., Sullivan, J.G. & Mays, V.M. (2003), *Prevalence of Mental Disorders, Psychological Distress, and Mental Health Services Use Among Lesbian, Gay, and Bisexual Adults in the United States*, 71 J. of Consulting and Clinical Psychology 71(1) 53-61, available at <http://www.stat.ucla.edu/~cochran/PDF/PrevalenceDisordersLGBinUS.pdf>.

<sup>39</sup> Lick, et al.

precautions, health care professionals using harsh or abusive language; being blamed for their health status; or health care professionals being physically rough or abusive.”<sup>40</sup>

#### **F. LGBTQ Educators Are Uniquely Situated to Advocate for Vulnerable LGBTQ Youth.**

For Georgia resident Michael Cabe, his first job after graduating from college was as an admissions counselor at his *alma mater*. His “supervisor told [him] that if [he] did not perform well, she would out [him] as a gay man to [his] family.” She also introduced him as the “gay counselor,” further dehumanizing him. Michael “felt tokenized and marginalized” and could not “imagine how students might feel.”

Amanda Lee, of Clarkston, Georgia, had a markedly different experience in the public secondary school where she works:

Being able to go to work as my authentic self is crucial to my health and well[-]being. I can’t even articulate what it means to not have to constantly change pronouns for my spouse, remember who knows and who doesn’t, and fear losing my job daily. It is such a relief to not have to hide.

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<sup>40</sup> When Health Care Isn’t Caring: Lamda Legalis survey of Discrimination Against LGBT people and People Living with HIV, available at [https://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report\\_when-health-care-isnt-caring.pdf](https://www.lambdalegal.org/sites/default/files/publications/downloads/whcic-report_when-health-care-isnt-caring.pdf) at 5.

As an out educator, I'm also able to advocate for inclusive policies and spaces which improve the well-being of our students, such as increasing our LGBTQ library collection. I show students what the future can hold for them just by living my life.

Michael and Amanda's contrasting experiences underscore the importance of increasing the visibility of LGBTQ adults working in academic settings and ensuring that those formative environments are safe and inclusive spaces for LGBTQ youth. “[Y]outh with same-sex attractions have, on average, poorer academic performance in high school compared to their other-sex attracted peers.”<sup>41</sup> Students who experience same-sex sexual attraction in adolescence are less likely to graduate high school, enroll in college, and complete college than their peers.<sup>42</sup> LGBTQ students are more likely to skip school – defined as being “absent without permission” – than their heterosexual peers.<sup>43</sup> “Given the lasting consequences of the poorer high school performance for many sexual minority students, it is important to create schools that are safe and welcoming for all students.”<sup>44</sup>

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<sup>41</sup> Jennifer Pearson & Lindsey Wilkinson, *Same-Sex Sexuality and Educational Attainment: The Pathway to College*, 64 J. of Homosexuality.

<sup>42</sup> *Id.* at 551.

<sup>43</sup> Joseph P. Robinson & Dorothy L. Espelage, *Inequities in Educational and Psychological Outcomes Between LGBTQ and Straight Students in Middle and High School*, 40 Educational Researcher 315, 315 (2011).

<sup>44</sup> Pearson & Wilkinson, *supra* note 41, at 567.

School being a safe and inclusive place for LGBTQ students is critical, as data establish that the challenges facing such youth follow them far beyond campus. Gay, lesbian, and bisexual youth are also more likely to experience emotional distress and engage in early substance use relative to their peers.<sup>45</sup> Compared with heterosexual-identified youth, those “who identify as lesbian, gay, bisexual, transgender, or questioning . . . are at greater risk of suicidal thoughts, suicide attempts, [and] victimization by peers.”<sup>46</sup>

Further, schools being safe matters because, for LGBTQ students, home too often is not. “[F]amily rejection has a serious impact on LGBT young people’s physical health and behavior health, . . . and is often the cause of LGBT youth becoming homeless.”<sup>47</sup> A study released in 2016 by the Family and Youth Services Bureau of the Department of Health and Human Services confirms that homeless youth are disproportionately LGBTQ; “one-third of street youth reported being lesbian, gay, or bisexual,” while “transgender homeless youth experience higher levels of victimization and non-acceptance, which leads to a relatively higher percentage of them experiencing chronic

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<sup>45</sup> *Id.*

<sup>46</sup> Robinson & Espelage, supra note 43, at 315.

<sup>47</sup> Admin. for Children and Families Family and Youth Services Bureau Street Outreach Program Data Collection Study Final Report (2016), available at [https://www.acf.hhs.gov/sites/default/files/fysb/data\\_collection\\_study\\_final\\_report\\_street\\_outreach\\_program.pdf](https://www.acf.hhs.gov/sites/default/files/fysb/data_collection_study_final_report_street_outreach_program.pdf) at 79.

homelessness and living on the streets.”<sup>48</sup> And while homeless, all LGBTQ youth were more likely than not to experience victimization.<sup>49</sup>

### **III. DESPITE THE DISCRIMINATION THAT INDIVIDUAL LGBTQ PERSONS EXPERIENCE IN GEORGIA, A GROWING CONSENSUS OVERWHELMINGLY SUPPORTS PROTECTING LGBTQ PERSONS FROM WORKPLACE DISCRIMINATION.**

Notwithstanding the experiences presented above, in Georgia, protecting LGBTQ people from employment discrimination is not controversial. Public opinion data, the business community’s steadfast support, and a swelling tide of workplace nondiscrimination protections from local governments all show that Georgians strongly favor guaranteeing the right to be free from employment discrimination.

#### **A. Georgians Support Unambiguous Protections for LGBTQ Employees.**

Protecting LGBTQ colleagues from workplace discrimination is not controversial in Georgia. In fact, support for workplace nondiscrimination protections extends across lines that might otherwise divide us. For example, in 2015, Georgians were asked whether

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<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

they supported protections against workplace discriminations on the basis of sexual orientation, among other things. “Roughly two-thirds (66%) of Georgia residents” supported workplace and other nondiscrimination protections for LGBTQ citizens.<sup>50</sup> “Notably, majorities of all major demographic, religious, and political groups in Georgia favor nondiscrimination laws for LGBT[Q] people, though there are some differences in the intensity of support.”<sup>51</sup> While the issue of marriage equality divided Georgians at the time, support for workplace protections was much more widespread.

Georgians not only support protection from workplace discrimination on the basis of sexual orientation and transgender status, they *overwhelmingly* recognize that federal law already prohibits it. In a poll conducted in 2014, Georgians were asked “[t]o the best of your knowledge, is it LEGAL or NOT LEGAL under FEDERAL LAW to fire or refuse to hire someone because they are gay or transgender?”<sup>52</sup> Seventy-seven percent of those polled responded that such discrimination was “[n]ot legal” under federal law.<sup>53</sup> More than half – 64% – of respondents supported such workplace

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<sup>50</sup> A Profile of Georgia Residents’ Attitudes on LGBT Issues, <https://prri.org/wp-content/uploads/2016/02/PRRI-AVA-Georgia-LGBT-Report.pdf> at 1.

<sup>51</sup> *Id.*

<sup>52</sup> Polling data collected by the Shapiro Group of 400 registered Georgia voters fielded between January 27, 2014 and February 6, 2014.

<sup>53</sup> *Id.*

protections, but even more of them correctly understood that federal law guarantees those protections.<sup>54</sup>

Likewise, in a 2016 survey of likely Georgia voters asked whether it is “legal or illegal under Georgia state law to fire, refuse to hire, or deny housing or public accommodations access to someone because they are gay or transgender.”<sup>55</sup> Seventy-four percent of respondents answered that such discrimination was illegal, and a virtually identical percentage supported state legislation protecting LGBTQ citizens.<sup>56</sup>

Today, even more Georgians understand the law to protect their LGBTQ colleagues and believe these protections *should not be taken away from them*. In a poll conducted from March 5, 2019 through March 7, 2019, pollsters asked randomly selected registered voters about LGBTQ workplace discrimination.<sup>57</sup> Researchers were assessing support for a proposed state law that would insulate private businesses from liability for discriminating against gay and transgender individuals “based upon the [business] owner’s personal belief.”<sup>58</sup> Sixty-four percent of Georgians responded that they do not believe that a person should be able to refuse service to lesbian, gay, bisexual, and

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<sup>54</sup> *Id.*

<sup>55</sup> PRS Georgia Survey conducted by Just Win Research of 600 Georgians fielded between October 16 and December 7, 2016.

<sup>56</sup> *Id.*

<sup>57</sup> Polling data collected by Mason-Dixon Polling & Strategy of 625 Georgia voters fielded between March 5 and March 7, 2019.

<sup>58</sup> *Id.*

transgender individuals based on their personal religious beliefs.<sup>59</sup> As with support for protections against employment discrimination, these responses cross political, age, racial, and geographic lines.<sup>60</sup> Georgia is no outlier. Seven out of ten Americans support protecting LGBTQ individuals from discrimination at work.<sup>61</sup>

What this all means is that confirming that Title VII's ban on employment discrimination because of sex encompasses discrimination against employees because they are LGBTQ – which a supermajority of Georgians believe to be the current state of the law – would be welcomed by most in the state and would not impose federal protections on a state whose residents, on the whole, do not want them.

#### **B. Georgia's Business Community Strongly Supports Protecting LGBTQ Citizens from Discrimination at Work and Elsewhere.**

Alongside the public at large, Georgia's business community also supports consistent and secure laws prohibiting discrimination based on sexual orientation and transgender status. During the Civil Rights Era, Atlanta became known as the city "too busy to hate" in part due to the business community's advocacy for the civil and human rights of African American

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<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> <https://www.hrc.org/blog/major-national-survey-finds-majority-of-americans-in-every-state-oppose-lgbt>.

citizens.<sup>62</sup> Since that time, the “too busy to hate” ethos has expanded beyond Atlanta, and Georgia’s businesses have maintained their commitment to civil and human rights by supporting workplace protections for their LGBTQ neighbors.

As it did in the Civil Rights Era, Georgia’s business community is leading the way in protecting the rights of LGBTQ employees. “Of the 18 Fortune 500 companies headquartered in Georgia, 17 [expressly] include sexual orientation in their non-discrimination policies, and 13 also [expressly] include gender identity.”<sup>63</sup> In 2014, “[n]ine of Georgia’s largest ten private employers ha[d] non-discrimination policies that [expressly] include sexual orientation, and eight of those ten ha[d] policies that include both sexual orientation and gender identity.”<sup>64</sup>

Some of the state’s largest private employers have also thrown their weight behind the Equality Act,<sup>65</sup> which would expressly enumerate – rather than cover only by well-reasoned precedent – Title VII’s coverage of sexual orientation and gender identity as well as expand protection against sex-based discrimination to

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<sup>62</sup> <https://www.coca-colacompany.com/stories/the-night-atlanta-truly-became-the-city-too-busy-to-hate-.>

<sup>63</sup> Williams Institute, The Economic Impact of Stigma and Discrimination Against LGBT People in Georgia, Jan. 2017, at 33 (citations omitted).

<sup>64</sup> Williams Institute, Employment Discrimination Based on Sexual Orientation and Gender Identity in Georgia, October 2014, at 7.

<sup>65</sup> <https://www.hrc.org/resources/business-coalition-for-equality>.

public accommodations and other contexts.<sup>66</sup> As with marriage equality, employers seek to clarify a legal landscape that has been complicated by conflicting state and local protections as well as federal court decisions.

In addition, more than 500 businesses<sup>67</sup> and other institutions, large and small, have signed the Georgia Prospers Business Coalition Pledge, which states:

We believe that treating all Georgians and visitors fairly is essential to maintaining Georgia's strong brand as the premier home for talented workers, growing businesses, entrepreneurial innovation, and a thriving travel and tourism industry.

We believe that in order for Georgia businesses to compete for top talent, we must have workplaces and communities that are diverse and welcoming for all people, no matter one's race, sex, color, national origin, ethnicity, religion, age, disability, sexual orientation, or gender identity.

As signers of the Georgia Prospers pledge, we are committed to promoting an attractive,

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<sup>66</sup> <https://www.congress.gov/114/bills/hr3185/BILLS-114hr3185ih.xml>.

<sup>67</sup> According to CNN, in 2016, “[a] total of 440 companies in the Fortune 500 ha[d] a presence in Georgia.”

prosperous, and economically vibrant Georgia. A united Georgia is a prosperous Georgia.<sup>68</sup>

Employees of these organizations reap the benefits of these protections. Rolando Guzman, of Norcross, Georgia, worked for one of Georgia's Fortune 500 businesses. Rolando says, "Working for a company that embraces the LGBTQ community levels the field for employees. I was confident applying for promotions and negotiating salary increases because I knew my sexuality was not an impediment."

Now, as in the past, Georgia's businesses know that diversity is good for business, and it is worth the fight.<sup>69</sup> That is why they adopt nondiscrimination policies and why they push for uniform understanding of Title VII to prohibit sexual orientation and gender identity discrimination.

### **C. Local governments offer their own protections in increasing numbers.**

Finally, cities and counties across the state have passed their own nondiscrimination ordinances to

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<sup>68</sup> Georgia Prospers Pledge, available at <https://www.georgiaprospers.org/our-business-coalition/>.

<sup>69</sup> *C.f., e.g.*, Obergefell Amicus Brief at 20 ("The value of diversity and inclusion in the workplace has been well-documented following rigorous analyses. Amici and others recognize that diversity is crucial to innovation and marketplace success."); *see also* Williams Institute, The Economic Impact of Stigma and Discrimination against LGBT People in Georgia, January 2017.

protect LGBTQ citizens.<sup>70</sup> At present, there are over fifty such ordinances in effect. These cities and counties recognize that discrimination against LGBTQ citizens can lead to poorer health outcomes, poverty, greater public expenditure, and larger scale negative economic impacts.

However, cities and counties can only do so much, and relying on local law as a floor for workplace dignity leads to an even more dizzying and insecure patchwork of uncertain protections across the state and nation.<sup>71</sup> For example, although some of Georgia's cities have passed laws expressly prohibiting private employers from discriminating on the basis of sexual orientation or transgender status, most local nondiscrimination laws only apply to government entities – specifically, municipal or county government entities – and not to private employers.<sup>72</sup> Some local laws do not provide a private cause of action, and most local governments do not have the resources of the EEOC to investigate, seek to conciliate, or file suit on complainants' behalf. In addition, local law is not secure.<sup>73</sup> Even in Georgia, where the public overwhelmingly supports legal protections

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<sup>70</sup> See Appendix A.

<sup>71</sup> Williams Institute, *supra* note 69, at 13. "Several localities in Georgia have enacted local ordinances or personnel policies that prohibit discrimination based on sexual orientation and gender identity, creating a patchwork of legal protections for LGBT people in the state."

<sup>72</sup> Appendix A.

<sup>73</sup> *Id.*

for LGBTQ citizens at work, nondiscrimination ordinances are vulnerable to state “preemption” laws, by which state legislatures seek to nullify local laws passed by cities or counties – usually passed by political minorities in the state. For that additional reason, ensuring that Title VII’s reach is as broad as possible is necessary to protect LGBTQ persons here in Georgia and elsewhere from workplace discrimination.

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## CONCLUSION

Title VII’s protections against sex-based workplace discrimination are critically important for LGBTQ persons, and this Court should unambiguously confirm the well-reasoned conclusions of numerous lower courts that discrimination based on sexual orientation or transgender status is discrimination “because of sex” and therefore unlawful. So holding would bring Georgia and this country one step closer to a society free of the heartbreakingly injustices some LGBTQ Georgians have survived. Georgia’s citizenry, businesses, and governments overwhelmingly oppose sex-based discrimination in all forms, including discrimination against LGBTQ workers. This Court should embrace that principle too and should affirm

the judgments of the Second and Sixth Circuits and reverse the judgment of the Eleventh Circuit.

Respectfully submitted,

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