**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* MUSLIM BAR ASSOCIATION OF NEW YORK, CAPITAL AREA MUSLIM BAR ASSOCIATION, COUNCIL ON AMERICAN-ISLAMIC RELATIONS—OKLAHOMA CHAPTER, DALLAS FORT WORTH MUSLIM BAR ASSOCIATION, ISLAMIC SOCIETY OF BASKING RIDGE, MUSLIM ADVOCATES, MUSLIM CAUCUS OF AMERICA, MUSLIM PUBLIC AFFAIRS COUNCIL, MUSLIM URBAN PROFESSIONALS (MUPPIES), MUSLIMS FOR PROGRESSIVE VALUES, NEW ENGLAND MUSLIM BAR ASSOCIATION, AND NEW JERSEY MUSLIM LAWYERS ASSOCIATION IN SUPPORT OF EMPLOYEES

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**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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## INTERESTS OF *AMICI CURIAE*[1]

*Amicus curiae* Muslim Bar Association of New York ("MuBANY") is one of the nation's largest and most active professional associations for Muslim lawyers. MuBANY provides a range of services for the legal community and for the larger Muslim community. One of MuBANY's missions is to improve the position of the Muslim community at large by addressing issues affecting the local and national Muslim population, through community education, advancing and protecting the rights of Muslims in America, and creating an environment that helps guarantee the full, fair, and equal representation of Muslims in American society. MuBANY works actively to combat anti-Muslim and anti-Islamic stereotypes in the media, courts, law enforcement, and the greater community. MuBANY believes in equal treatment for all and opposes discrimination in any form.

*Amicus curiae* Capital Area Muslim Bar Association ("CAMBA") is a professional bar association whose diverse membership resides in the Washington, D.C. metro area. CAMBA's mission includes fostering a sense of fellowship amongst Muslim legal professionals, addressing legal issues affecting both the Muslim and non-Muslim

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[1] Pursuant to Sup. Ct. R. 37.6, counsel for *amici curiae* represent that they have authored the entirety of this brief, and that no person other than the *amici curiae* or their counsel has made a monetary contribution to the preparation or submission of this brief. All parties in each of the three cases have provided consent for *amici curiae* to file this brief.

community, and educating and advocating for the constitutional, civil, and human rights of all persons.

*Amicus curiae* Council on American-Islamic Relations – Oklahoma Chapter ("CAIR-Oklahoma") is a nonprofit 501(c)(3) grassroots civil rights and advocacy group. Established in 2006 by a group of local Muslims, CAIR-Oklahoma serves the entire state of Oklahoma through its Oklahoma City office. Through legal representation, community education and outreach, government and legislative advocacy, and youth leadership programs, CAIR-Oklahoma works to empower the state's Muslim community and improve relationships between Oklahoma's many diverse faith and social justice communities. CAIR-Oklahoma is a chapter of the Council on American-Islamic Relations ("CAIR"), America's largest Islamic civil liberties group with chapters nationwide. The national headquarters is located on Capitol Hill in Washington, D.C. CAIR-Oklahoma's mission is to enhance the understanding of Islam, encourage dialogue, protect civil liberties, empower American Muslims, and build coalitions that promote justice and mutual understanding.

*Amicus curiae* Dallas-Fort Worth Muslim Bar Association ("DFW MBA") is a professional bar association whose diverse membership resides in the North Texas area. DFW MBA's members align together to give back through community service, pro bono legal work, and promulgation of legal information as an educational tool of social empowerment and civic engagement. In addition to supporting Muslim legal professionals and law students, DFW MBA's mission is to protect the

constitutional rights of all Americans with a special focus on minority and American-Muslim communities.

*Amicus curiae* Islamic Society of Basking Ridge is dedicated to providing Islamic religious, educational, cultural, and social services to Muslims living or working in Somerset Hills, New Jersey, and the surrounding areas; providing these services in an open, diverse, inclusive, and moderate environment, consistent with the Qur'an and Sunnah; and promoting interfaith and intra-faith dialogue in order to improve relations between Muslims and people of other faiths. We strongly believe as part of our religious outreach that our laws must be applied fairly and justly to all communities.

*Amicus curiae* Muslim Advocates is a national legal advocacy and educational organization that works on the front lines of civil rights to guarantee freedom and justice for Americans of all faiths. Muslim Advocates advances these objectives through litigation and other legal advocacy, policy engagement, and civic education. Muslim Advocates also serves as a legal resource for the American-Muslim community, promoting the full and meaningful participation of Muslims in American public life.

*Amicus curiae* Muslim Caucus of America is a national, non-profit organization that works at a grassroots level to organize and empower diverse American-Muslim voices to engage and represent in local, state, and national politics. Our mission is to promote an equitable democracy that is representative of its constituents. The Muslim

Caucus provides a national organizing structure that connects and supports diverse American-Muslim activists, organizers, civic engagement groups, candidates, and elected officials in a long-term project to build power and advance social change; invest in civic engagement programs that also support the ongoing work to organize; build national infrastructure; and advance an agenda for an inclusive democracy that represents all Americans. We oppose any policy or action that discriminates or prevents us from exercising our freedoms and rights as citizens of this great nation.

*Amicus curiae* Muslim Public Affairs Council ("MPAC") is a national public affairs nonprofit organization working to promote and strengthen American pluralism by increasing understanding and improving policies that impact American Muslims. As a dedicated advocacy group, MPAC strives to protect and support the civil and human rights of all communities. MPAC firmly defends the American and Islamic values of freedom, justice, and equality for all.

*Amicus curiae* Muslim Urban Professionals ("Muppies") is a nonprofit, charitable organization dedicated to empowering and advancing Muslim business professionals to be leaders in their careers and communities. Its mission is to create a global community of diverse individuals who will support, challenge, and inspire one another by providing a platform for networking, mentorship, and career development. Muppies represents an engaged group of Muslim professionals that believes the rights of all Americans, including minorities, should be protected.

We oppose any policy or action that results in a reduction of opportunity and freedom for any individuals or groups.

*Amicus curiae* Muslims for Progressive Values is the oldest and only progressive and Muslim faith-based human rights organization in the United States. Founded in 2007, we embody and advocate for the traditional Quranic values of social justice, an understanding that informs our positions on women's rights, LGBT inclusion, freedom of expression, and freedom of and from belief. Our motto is "Be Yourself. Be Muslim," and in practice that entails creating inclusive communities where everyone's identity and rights are affirmed. Since our inception, we have created inclusive communities in eight cities in the United States with partners in seventeen cities globally.

*Amicus curiae* New England Muslim Bar Association ("NEMBA") was established in 2009 to serve the educational and professional needs of Muslim lawyers and law students in New England, and to serve as a legal resource for Muslim and non-Muslim communities alike. NEMBA promotes equality and strongly opposes discrimination and/or marginalization of any members of a protected class.

*Amicus curiae* New Jersey Muslim Lawyers Association exists to advance the goals, needs, and interests of Muslim-American attorneys in the New Jersey area. As one of the larger Muslim lawyer organizations and representing one of the larger Muslim populations in the United States, we take our responsibility seriously and endeavor to advance the causes of freedom of religion and freedom from

religious discrimination and persecution for all people.

## SUMMARY OF THE ARGUMENT

The employer-defendants (the "Employers") seek to exclude discrimination against lesbian, gay, bisexual, and transgender ("LGBT") employees from the ambit of Title VII's protections against discrimination in the workplace. The Employers argue that the Congress that enacted the law in 1964 never intended to protect LGBT individuals. But straightforward principles of statutory interpretation and the precedents of this Court demand the Court rule for the employee-plaintiffs (the "Employees") in these cases.

The text of Title VII—and in particular, its ban on discrimination "because of … sex"—plainly prohibits discrimination on the basis of sexual orientation and transgender status. It is settled law that Title VII prohibits discrimination against an employee because of their interracial marriage or religious conversion—since such discrimination necessarily involves consideration of the employee's race or religion. Similarly, Title VII prohibits discrimination against an employee because of their sexual orientation or transgender status—since such discrimination necessarily involves consideration of the employee's sex. Because Title VII treats sex the same as it treats race, religion, and other protected classifications, those precedents apply equally here.

*Amici* are American-Muslim organizations, whose members are people of faith acutely conscious of the

challenges that disfavored minorities face in the workplace. Like LGBT individuals, Muslims in the United States disproportionately face workplace discrimination, limiting their job opportunities and chances at advancement. *Amici* thus have an interest in vibrant workplace protections for all disfavored groups, including LGBT individuals, to ensure that all Americans can achieve their full potential under the protections afforded by law. A holding that adopts the Employers' reading of Title VII would necessarily erode aspects of the protections Title VII affords to Muslims and other protected groups. The Court should reject the Employers' invitation to adopt a cramped and infirm view of Title VII's protections on the basis of Congress's presumed "intent" in 1964.

## ARGUMENT

### I. DISCRIMINATION AGAINST AN EMPLOYEE BECAUSE OF THEIR SEXUAL ORIENTATION OR TRANSGENDER STATUS IS DISCRIMINATION "BECAUSE OF … SEX"

The Employers argue that Title VII excludes the acts of discrimination alleged in these cases because they presume that the Congress that enacted the statute did not subjectively intend or expect the statute to protect LGBT persons. But that is not how this Court ordinarily interprets statutes, and that is not how this Court has interpreted Title VII. As Justice Scalia wrote for a unanimous Court in holding Title VII applicable to same-sex sexual harassment, it is the text of our laws, "rather than

the principal concerns of [the enacting] legislators," that guides the statutory analysis. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998). Applying ordinary principles of textual interpretation leads to the conclusion that the discrimination alleged here is cognizable under the statute.

Title VII prohibits employers from "discriminat[ing] against any individual … because of such individual's … sex." 42 U.S.C. § 2000e-2(a)(1). In this context, "'because of' do[es] not mean '*solely* because of'"—in other words, "Title VII … condemn[s]" discrimination where the employee's sex plays any part, even if "other … considerations" also played a role. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241 (1989) (plurality) (emphasis in original); *see* 42 U.S.C. § 2000e-2(m) (codifying *Hopkins* and establishing the "motivating factor" standard). As such, the fact that an employer's discrimination may have been *principally* motivated by animus against lesbian, gay, and bisexual people due to their sexual orientation, or transgender people due to their transgender status—rather than by their sex *per se*—is not conclusive. What matters is whether "the employer relied upon sex-based considerations" at all "in coming to its decision." *Hopkins*, 490 U.S. at 241–42; *see also City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (rejecting argument that employer did not engage in sex discrimination by making decisions based on employees' presumed "longevity," where its longevity assumptions were a function of sex; question was whether the employee was "treat[ed] … in a manner which but for that person's sex would be different").

When an employer discriminates against an employee on the basis of their sexual orientation or transgender status, the employer necessarily "consider[s]" the employee's sex—even if that is not its sole (or even principal) consideration. This is because sexual orientation and transgender status are defined in terms of sex. A homosexual (*i.e.*, gay or lesbian) person is one whose sex is the same as the sex of their partner. A bisexual person is one who is attracted to partners of the same sex and of a different sex. Thus, "discrimination against an employee on the basis of their homosexuality [or bisexuality]"—*i.e.*, the fact that their sex is or may be the same as that of their partner—"is necessarily, in part, discrimination based on their sex." *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 358-59 (7th Cir. 2017) (en banc) (Flaum, J., concurring); *see also Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 113 (2d Cir. 2018) (en banc); *id.* at 132–33 (Jacobs, J., concurring). Likewise, a transgender person is one whose gender differs from the sex they were assigned at birth. Thus, discrimination against an employee on the basis of their transgender status—*i.e.*, the fact that their gender is not the same as the sex they were once assigned—is necessarily, in part, discrimination based on their sex. In either case, "[t]he discriminatory behavior does not exist without taking the victim's … sex … into account," *Hively*, 853 F.3d at 346–47, even if it also requires taking something else into account—namely, the sex of the victim's partner or the gender with which the victim identifies.

This same logic is why all courts agree that Title VII prohibits discrimination against employees on

the basis of their interracial relationships or friendships. An employee in an "interracial" relationship is one whose race is different from the race of their partner. As such, "a plaintiff [who] claims discrimination based upon an interracial marriage or association … alleges, by definition, that he has been discriminated against [in part] because of *his* race." *Parr v. Woodmen of World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986).[2] It is no defense to such a claim that an employer "merely" disapproves of interracial relationships and harbors no ill will toward any particular race *per se*. *See Tetro*, 173 F.3d at 994 ("A white employee who is discharged because his child is biracial is discriminated against on the basis of his race, even though the root animus for the discrimination is a prejudice against [interracial relationships]."); *cf. Loving v. Virginia*, 388 U.S. 1 (1967) (rejecting the argument that a ban on interracial marriage, equally applied to whites and nonwhites, does not "constitute … discrimination based upon race"). Rather, it is sufficient that an interracial relationship is a function of race—a protected characteristic.

For similar reasons, it is unthinkable that Title VII would not protect an employee who is discriminated against because her employer

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[2] *Accord Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d Cir. 2008); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1118 (9th Cir. 2004); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc.*, 173 F.3d 988, 994-95 (6th Cir. 1999); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589, *reinstated in relevant part on reh'g en banc*, 182 F.3d 333 (5th Cir. 1999); *Drake v. 3M*, 134 F.3d 878, 884 (7th Cir. 1998).

disapproves of her *interfaith* marriage, or because her employer disapproves that she has *converted* to a new religion. Here, too, it would be no response that the employer has no animus against any faith *per se*, but "merely" opposes intermarriage or conversion. *Schroer v. Billington*, 577 F. Supp. 2d 293 (D.D.C. 2008), provides an apt example. There, the court noted that an employer who fires an employee because the employee converted from Christianity to Judaism has discriminated against the employee "because of religion," regardless of whether the employer feels any animus against either Christianity or Judaism, because "[d]iscrimination 'because of religion' easily encompasses discrimination because of a *change* of religion." *Id.* at 306 (emphasis in original). By the same token, discrimination "because of sex" inherently includes discrimination against employees because of a change in the sex with which they identify, even if the employer treats both sexes equally. *See id.* at 307–08.

There is no basis on which to distinguish the cases now before the Court, for "[t]he text of [Title VII] draws no distinction … among the different varieties of discrimination it addresses." *Hively*, 853 F.3d at 349 (citing *Hopkins*, 490 U.S. at 244 n.9); *see also Zarda*, 883 F.3d at 125. Like interracial and interfaith relationships, same-sex relationships are defined based on the employee's own protected characteristic vis-à-vis the protected characteristic of someone else. Similarly, transgender status is defined based on the employee's identification with a protected characteristic vis-à-vis their assignment of that protected characteristic at birth. In this

context, as in the racial and religious contexts, it can be no defense that an employer "merely" disapproves of *associations* between people who share (or do not share) a protected characteristic. Nor can it be a defense that an employer "merely" disapproves of *changing* aspects of one's protected characteristic. As with disapproval of interracial relationships or religious conversion, these notions are inherently a function of the employee's protected characteristic.

The Employers may well be correct that the Congress that enacted Title VII in 1964 did not have the protection of LGBT persons in mind when it inserted the word "sex" into the statute. But it is also doubtful that the enacting Congress intended to protect persons in interracial relationships when it inserted the word "race." *Loving*, after all, would not be decided for another three years, and at that time, "16 states [still] prohibit[ed] and punish[ed]" interracial marriages under their criminal laws. 388 U.S. at 6. As the *Oncale* Court explained, none of this matters: "statutory prohibitions often go beyond the principal evil" that Congress was attempting to address "to cover reasonably comparable evils, and it is ultimately the provisions of [the enacted] laws rather than the principal concerns of [the enacting] legislators by which we are governed." 523 U.S. at 79–80; *see also Hively*, 853 F.3d at 345; *Zarda*, 883 F.3d at 115. However surprised the enacting Congress might be that its handiwork protects LGBT employees or those in interracial marriages, the text that it enacted requires such protection, and this Court's precedents establish that that is all that matters.

## II. A CONSTRUCTION OF TITLE VII THAT PROTECTS LGBT EMPLOYEES IS CONSISTENT WITH *AMICI*'S VALUES AND ESSENTIAL TO PROTECT *AMICI* FROM WORKPLACE DISCRIMINATION

### A. *Amici* Muslim Organizations Advocate for Broad Workplace Protections for All Marginalized and Disfavored Groups.

As people of faith, *amici* are compelled to advocate for the rights of marginalized and disfavored groups in our society.

Like LGBT individuals, Muslims often face discrimination in the workplace. A 2011 UCLA study showed that 1 in 4 LGBT employees reported experiencing workplace discrimination.[3] In a 2015 study, 27% of survey respondents who held or applied for a job during that year reported being fired, denied a promotion, or not being hired because of their gender identity or expression.[4] Similarly, in the year following the tragic events of September 11, 2001, the number of EEOC religion-based discrimination charges involving Muslims

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[3] Brad Sears & Christy Mallory, The Williams Institute, *Documented Evidence of Employment Discrimination & Its Effects on LGBT People* (July 2011), https://bit.ly/324IwI1 (last visited July 2, 2019).

[4] Sandy E. James, et al., National Center for Transgender Equality, *The Report of the 2015 U.S. Transgender Survey* (Dec. 2016), https://bit.ly/2kkBtaf (last visited July 2, 2019).

skyrocketed by 250%.[5] Although Muslims make up around 2% of the U.S. population, the percentage of EEOC religion-based discrimination charges involving Muslims has remained above 20% every year since 2001.[6] Employees who are both LGBT and Muslim face an even greater risk of discrimination in the workplace, enduring the perils of homophobia/transphobia and Islamophobia at once.

Some of the Employers have argued below that their faith prohibits them from offering equal treatment to LGBT individuals in the workplace. *See Harris* Pet. 9–10. *Amici*, as people of faith, reject this contention. *See EEOC v. R.G.*, 884 F.3d 560, 587, 589–90 (6th Cir. 2018) (refusing "to treat discriminatory policies as essential to Rost's … religious exercise" and holding that "requiring Rost to comply with Title VII's proscriptions on discrimination does not substantially burden his religious practice"). The same rationale, after all, could easily be used to excuse workplace discrimination against Muslims or adherents of any

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[5] U.S. Equal Emp. Opportunity Comm'n, *What You Should Know about the EEOC and Religious and National Origin Discrimination Involving the Muslim, Sikh, Arab, Middle Eastern and South Asian Communities*, https://bit.ly/2dbu1cU (last visited July 2, 2019).

[6] U.S. Equal Emp. Opportunity Comm'n, *Religion-Based Charges Filed from 10/01/2000 through 9/30/2011 Showing Percentage Filed on the Basis of Religion-Muslim*, https://bit.ly/2RS2Vv7 (last visited July 2, 2019) (listing religion-based charges involving Muslims from FY 2001 through FY 2017).

other religion that an employer's own faith deems heretical or misguided. Regardless of what any individual may believe as to the demands of their faith, fortifying protections for LGBT individuals in the workplace promotes more equal treatment for all.

### B. Adopting the Employers' Interpretation of Title VII Risks Erosion of the Protections That It Affords *Amici* and Others.

Several rationales offered by the Employers to limit the protections of Title VII with respect to sexual orientation and transgender status would call into question important protections currently taken for granted by *amici* (and other minority groups). For example, as discussed above, the Employers' interpretation of Title VII would undermine lower-court precedents protecting a non-Muslim employee who marries a Muslim, a Muslim employee who marries a non-Muslim, or an employee who converts to Islam. *See Schroer*, 577 F. Supp. 2d at 306–07. But that is not the only peril generated by the Employers' arguments.

The Employers also assert that discrimination on the basis of sexual orientation or transgender status cannot be sex discrimination because it applies equally to members of both sexes and does not disfavor men or women *per se*. That logic would mean that discriminatory practices that apply equally to members of all religions—such as a ban on all head coverings or all prayer in the workplace—would not be disparate treatment based on religion. This is not the law. *See EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2034 (2015)

(holding that an employment policy banning all head coverings discriminates against a Muslim employee who wears a hijab). Adopting the Employers' reading of Title VII would suggest otherwise.

Similarly, the Employers' reading of Title VII would permit an employer to discriminate against a Muslim on the basis of a stereotype about all religious people (*e.g.*, that all religious people are intellectually inferior) simply because the employer also discriminates against members of other religions based on the same stereotype. *Cf. Zarda*, 883 F.3d at 123 ("To the contrary, this claim would merely be an admission that the employer has doubly violated Title VII by using gender stereotypes to discriminate against both men and women.").

Also jeopardizing Title VII's protections for *amici* is the argument that the purportedly "subjective" nature of gender identity militates against protections against discrimination against transgender employees. One Employer argues that construing Title VII to encompass transgender status "fosters inconsistency and opens the door to manipulation," as "[a]nyone … can profess a gender identity that conflicts with their sex." *Harris* Pet. 31. In essence, the Employer argues that since one's gender identity is grounded in one's internal experience, plaintiffs will pretend to be transgender when they are not, and courts will be unable to decipher the truth. But religious belief, too, is ultimately grounded in one's internal experience and theoretically subject to "manipulation." Crediting the Employer's argument would cast doubt on the analysis performed by courts in all religious

discrimination cases to determine whether the employee's stated religious belief was "truly held," *United States v. Seeger*, 380 U.S. 163, 185 (1965), and the evidentiary techniques courts use to perform that task, *see Comment: Strange Bedfellows? Sex, Religion, and Transgender Identity Under Title VII*, 104 Nw. U.L. Rev. 1147, 1174 (observing that courts evaluate "whether the [religious] believer's expressions and behavior are consistently in accord with the claimed belief" and that the same is possible in the case of transgender status). Courts are fully capable of testing the genuineness of transgender status-based claims, just as they do religion-based claims.

Ensuring that Title VII is not unduly constrained by atextual considerations, such as the presumed legislative purpose of the enacting Congress, is especially important in today's social and political climate. Under the previous presidential administration, the EEOC added discrimination against Muslims as an area of focus in its strategic enforcement plan, "as tragic events in the United States and abroad have increased the likelihood of discrimination against these communities."[7] Nevertheless, the number of EEOC charges for religious discrimination against Muslims rose to its highest recorded level in 2016, up by more than 50% from the prior year.[8] The need to reinforce Title VII

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[7] U.S. Equal Emp. Opportunity Comm'n, Strategic Enforcement Plan FY 2017-2021, https://bit.ly/2NtAbKU (last visited July 2, 2019).

[8] U.S. Equal Emp. Opportunity Comm'n, *supra* note 6.

protections for all marginalized groups—including LGBT and Muslim individuals—is more important than ever.

## CONCLUSION

For the reasons set forth above, the Court should affirm the judgments of the Second and Sixth Circuits and reverse the judgment of the Eleventh Circuit.

July 3, 2019

Respectfully submitted,

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