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

IN THE

Supreme Court of the United States

GERALD LYNN BOSTOCK,
Petitioner,
v.
CLAYTON COUNTY, GEORGIA,
Respondent.

ALTITUDE EXPRESS, INC., et al.,
Petitioners,
v.
MELISSA ZARDA, as Executor of the Estate of Donald Zarda, et al.,
Respondents.

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,
Petitioner,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, et al.,
Respondents.

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

BRIEF FOR STATES OF ILLINOIS, NEW YORK, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAI'I, MAINE, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON, AND THE DISTRICT OF COLUMBIA AS AMICI CURIAE IN SUPPORT OF THE EMPLOYEES

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QUESTIONS PRESENTED

These cases respectively present the following questions:

Bostock v. Clayton County, Ga., No. 17-1618

Whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination "because of . . . sex" within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.

Altitude Express, Inc. v. Zarda, No. 17-1623

Whether the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), against employment discrimination "because of . . . sex" encompasses discrimination based on an individual's sexual orientation.

R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission, No. 18-107

Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF AMICI STATES 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. Employment Discrimination Based on Sexual Orientation and Transgender Status Harms the Amici States and Their Residents. . 5

A. Pervasive Discrimination Against LGBT Workers Thwarts the States' Ability to Create Inclusive Communities and Protect Vulnerable Groups. 5

B. The Effects of Discrimination Cost the States Millions of Dollars Each Year in Public Assistance. 9

C. Inefficiencies Created by Discrimination Further Impair the Economies and Fiscs of the States. 10

II. The Amici States Rely on Title VII to Protect Their Residents from Workplace Discrimination. 14

A. States Rely on Title VII's Supplemental Enforcement Tools. 17

1. States benefit from Title VII enforcement actions spearheaded by the EEOC. 18

2. Title VII enables States to enter into joint enforcement actions with the EEOC. 22

Page

3. States use Title VII to bring their own Title VII actions. 24

B. Rolling Back Title VII Coverage Would Disrupt the Joint Administration of State and Federal Nondiscrimination Laws. 26

1. States enter into worksharing agreements with the EEOC. 27

2. States rely on the EEOC's research efforts and litigation positions. 30

C. Title VII's Nationwide Coverage Eliminates Regulatory Gaps That Would Otherwise Leave States' Residents Unprotected from Discrimination. 33

CONCLUSION 37

TABLE OF AUTHORITIES

Cases **Page(s)**

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§ 2000e-5 28
§ 2000e-7 17
§ 2000e-8 26,30

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5/2-101 34

Ill. Rev. Stat ch. 48, § 851 et seq. (1961) 17

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INTEREST OF AMICI STATES

The States of Illinois, New York, California, Colorado, Connecticut, Delaware, Hawai'i, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia (collectively, the "amici States"), urge this Court to confirm that the prohibition on employment discrimination "because of . . . sex" contained in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., encompasses discrimination on the basis of sexual orientation and transgender status.[1] The States have a vital interest in the continued availability of Title VII as a mechanism for combatting employment discrimination against the millions of our residents who identify as lesbian, gay, bisexual, or transgender (individuals whose gender identity differs from their sex assigned at birth).[2] Such discrimination severely harms both its immediate victims and the States in which they live.

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[1] This brief is filed in support of the following parties: petitioner Gerald Bostock in *Bostock v. Clayton County, Ga.*, No. 17-1618; respondents Melissa Zarda and William Moore, Jr., in *Altitude Express, Inc. v. Zarda*, No. 17-1623; and respondent Aimee Stephens in *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107.

[2] *See* Movement Advancement Project, *LGBT Populations* (June 6, 2019); Williams Inst., *LGBT Data & Demographics* (2017); *see also* Gary J. Gates, *How Many People Are Lesbian, Gay, Bisexual, and Transgender?* 6 (Williams Inst. 2011) (estimating that more than eight million adults in the United States are gay, lesbian, or bisexual). (For authorities available on the internet, URLs are listed in the table of authorities. All sites were last visited on July 3, 2019.)

Employment discrimination against lesbian, gay, bisexual, and transgender (LGBT) workers is a "deprivation of personal dignity" and a "stigmatizing injury," *Roberts v. United States Jaycees*, 468 U.S. 609, 625 (1984) (quotation marks omitted), that the States have a "compelling interest to prevent," *id.* at 628. Such discrimination unfairly penalizes LGBT workers for characteristics unrelated to their ability to perform their jobs and leaves them unemployed, underemployed (working in positions for which they are overqualified), and underpaid. It also impairs their health and imposes significant burdens on the amici States. When discrimination causes LGBT workers to experience financial insecurity, many turn to public assistance programs, increasing the States' costs for those programs by millions of dollars each year. States also incur indirect harms from employment discrimination against LGBT workers, which reduces the productivity and profitability of businesses taxed by the State, thereby costing the States millions of dollars in lost tax revenues.

To promote inclusive communities and prevent the "unique evils" caused by "invidious discrimination in the distribution of publicly available goods, services, and other advantages," *id.*, many of the amici States have adopted their own laws prohibiting discrimination against LGBT people. These laws have redounded to the benefit of the amici States and their residents, economies, and fiscs without imposing significant costs on employers or jeopardizing public safety. Yet Title VII remains an essential safeguard in the States' antidiscrimination efforts. Some States—including Michigan (at the time Stephens's case arose)—rely exclusively on Title VII and local ordinances to protect LGBT people from

discrimination in the workplace. And even in States that have enacted their own laws, including New York (where Zarda and Moore's case arose), Title VII plays a crucial complementary role by supplying additional enforcers—the Equal Employment Opportunity Commission (EEOC) and the federal courts—to root out invidious discrimination based on sexual orientation and transgender status. Title VII also protects residents of the amici States who are not covered by our antidiscrimination laws, such as federal employees or residents who work in other States.

As with other types of misconduct policed by both the States and the federal government, employment discrimination against LGBT workers is extensive and harmful enough to require a dual enforcement regime. The amici States and their LGBT residents will thus be exposed to significant harms absent this Court's recognition that Title VII bars employment discrimination based on sexual orientation and transgender status nationwide.

SUMMARY OF ARGUMENT

Employment discrimination on the basis of sexual orientation and transgender status causes significant harm both to LGBT people and to the amici States. LGBT workers face exceptionally high rates of discrimination and mistreatment at work, ranging from the denial of jobs and promotions to physical and sexual assault. The amici States are harmed by such discrimination in three key ways. *First*, invidious discrimination against LGBT workers impedes the States' ability to foster welcoming communities, promote equality, and protect their residents' dignity, economic security, and mental health. *Second*, the

denial of economic opportunities to workers based on their sexual orientation or transgender status needlessly causes many of them to rely on public assistance programs that directly cost the States millions of dollars each year. *Third*, the States suffer indirect injuries from discrimination against LGBT workers because such discrimination decreases business productivity and increases health costs, thereby inhibiting economic growth and reducing tax revenues.

Many of the amici States have adopted antidiscrimination laws protecting LGBT workers, but Title VII remains an essential tool in the States' comprehensive antidiscrimination efforts. Title VII makes the resources of the EEOC available to fight invidious discrimination, allowing the States to benefit from enforcement actions led by the EEOC and joint enforcement actions taken with the EEOC. In addition, States may combat discrimination by bringing their own Title VII suits. Excluding LGBT workers from Title VII protection would deny the States and their residents these important benefits. It would also disrupt the joint administration of state and federal antidiscrimination law in other key ways. Many States have worksharing agreements with the EEOC to coordinate the activities of state and federal civil rights enforcers responsible for the same geographic area. States additionally rely on the EEOC's research, technical expertise, and litigation efforts. Finally, Title VII's comprehensive, nationwide coverage ensures protection for LGBT workers who are not shielded by state law and thus would otherwise be vulnerable to discrimination without recourse.

ARGUMENT

I. Employment Discrimination Based on Sexual Orientation and Transgender Status Harms the Amici States and Their Residents.

A. Pervasive Discrimination Against LGBT Workers Thwarts the States' Ability to Create Inclusive Communities and Protect Vulnerable Groups.

The amici States have important interests in promoting inclusiveness and protecting their LGBT residents from the indignity of employment discrimination and its many attendant harms, including economic injury and adverse health effects. As this Court has recognized, the States have compelling interests in "removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups." *Roberts*, 468 U.S. at 626; *see also*, *e.g.*, *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 742 (1983) (recognizing "the substantial State interest in protecting the health and well-being of its citizens" (quotation marks omitted)); *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996) ("The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance.").

Yet despite the amici States' commitment to fostering equality and opposing invidious discrimination against LGBT workers, pervasive discrimination persists. In a 2008 survey, 42% of a nationally representative sample of LGB people reported having suffered at least one form of employment discrimination based

on their sexual orientation.[3] Survey data from this year show that non-transgender LGB people remain 50% more likely as their non-transgender heterosexual counterparts to be fired from or denied a job, and also 50% more likely to be denied a promotion or receive a negative evaluation.[4] As a result, many LGB people conceal their sexual orientation at work.[5]

Transgender workers fare even worse: the 2011 National Transgender Discrimination Survey (NTDS) found that nearly all of those surveyed (90%) had experienced "harassment or mistreatment on the job or [taken] actions to avoid it."[6] A majority of the survey respondents (57%) had delayed their gender transition and even more (71%) felt compelled to hide their transgender status for some period of time.[7] The 2015 NTDS confirmed that transgender workers continue to face "pervasive mistreatment, harassment, and discrimination in the workplace and during the hiring

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[3] *See* Brad Sears & Christy Mallory, *Documented Evidence of Employment Discrimination and its Effects on LGBT People* 4 (Williams Inst. 2011).

[4] Ilan H. Meyer, *Experiences of Discrimination Among Lesbian, Gay and Bisexual People in the US* 1 (Williams Inst. 2019).

[5] Human Rights Campaign Found., *A Workplace Divided: Understanding the Climate for LGBTQ Workers Nationwide* 10, 15 (2018).

[6] Jaime M. Grant et al., *Injustice at Every Turn: A Report of the National Transgender Discrimination Survey* 51, 56 (Nat'l Ctr. for Transgender Equality and Nat'l Gay & Lesbian Task Force 2011).

[7] *Id.* at 63.

process."[8] Such discrimination and mistreatment include firing, denial of jobs and promotions, verbal harassment, and physical and sexual assault.[9] More than three quarters (77%) of those surveyed who had a job in the past year reported taking steps to avoid mistreatment at work, including hiding or delaying their gender transition or quitting a job.[10]

Employment discrimination costs LGBT workers jobs, promotions, and wages.[11] For instance, studies have shown that gay and bisexual men in the United States earn from 11% to 16% less than similarly qualified heterosexual men.[12] Similarly, the household income of transgender wage earners is 12% less than average.[13] And transgender people's unemployment rate is three times the national average.[14]

This denial of economic opportunities for LGBT workers translates into disproportionate rates of economic hardship. For example, lesbians and bisexual women are approximately 48% more likely than their heterosexual counterparts to experience economic

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[8] Sandy E. James et al., *The Report of the 2015 U.S. Transgender Survey* 147 (Nat'l Ctr. for Transgender Equality 2016).

[9] *Id.*

[10] *Id.* at 148.

[11] *See* Sears & Mallory, *Documented Evidence*, *supra*, at 2, 4; Christy Mallory et al., *The Impact of Stigma and Discrimination Against LGBT People in Michigan* 62 (Williams Inst. 2019); Grant et al., *Injustice at Every Turn*, *supra*, at 55.

[12] Marieka Klawitter, *Meta-Analysis of the Effects of Sexual Orientation on Earnings*, 54 Indus. Rel. 4, 13 (2015).

[13] Mallory et al., *Impact of Stigma and Discrimination (Michigan)*, *supra*, at 40.

[14] James et al., *2015 U.S. Transgender Survey*, *supra*, at 140-41.

hardship, such as food insecurity, eviction, or an inability to pay rent or utility expenses.[15] The poverty rate of transgender people is twice that of the population as a whole.[16] Home ownership among transgender people is one fourth of that of the population as a whole.[17] Nearly one-third of transgender people have been homeless at some time in their lives—a rate that far exceeds the national average.[18]

Discrimination harms LGBT people in other ways, too. Stigma has "a corrosive influence on health" and can impair a person's social relationships and self-esteem.[19] Thus, several studies have "suggested higher rates of depression, anxiety, and suicidal ideation among gay, lesbian, and bisexual individuals."[20] Transgender people likewise have elevated rates of depression, anxiety disorders, and suicide attempts.[21] Attempted suicide rates for transgender people are

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[15] Kerith J. Conron et al., *Socioeconomic Status of Sexual Minorities* (Williams Inst. 2018).

[16] James et al., *2015 U.S. Transgender Survey*, *supra*, at 56, 144.

[17] *Id.* at 176-77.

[18] *Id.* at 178.

[19] Mark L. Hatzenbuehler, et al., *Stigma as a Fundamental Cause of Population Health Inequalities*, 103 Am. J. of Pub. Health 813, 815-16 (2013).

[20] The Fenway Inst., *Improving the Health Care of Lesbian, Gay, Bisexual and Transgender People: Understanding and Eliminating Health Disparities* 4 (2012); *see also* Mark L. Hatzenbuehler et al., *State-Level Policies and Psychiatric Morbidity in Lesbian, Gay, and Bisexual Populations*, 99 Am. J. Pub. Health 2275, 2277 (2009).

[21] Mallory et al., *Impact of Stigma and Discrimination (Michigan)*, *supra*, at 43.

nine times the national average: 40% of transgender people have attempted suicide.[22]

B. The Effects of Discrimination Cost the States Millions of Dollars Each Year in Public Assistance.

Discrimination on the basis of sexual orientation and transgender status—including in the workplace—causes a range of significant harms to LGBT people. In doing so, it frustrates the States' ability to protect their residents' health, welfare, and economic security. It also imposes substantial costs on the States themselves.

When discrimination causes LGBT people to experience greater economic instability, including poverty and homelessness (see *supra* at 7-8), it forces them to rely on state-sponsored benefits programs.[23] For instance, the sums that States must expend on Medicaid programs increase when employment discrimination prevents LGBT people from obtaining or keeping jobs that provide or enable them to afford private insurance.

Thus, a series of studies has shown that discrimination against transgender people translates into higher Medicaid costs in States around the country. For example, Michigan incurs an estimated $250,000 a year in increased state Medicaid expenditures due to such discrimination.[24] In New York, the estimated

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[22] James et al., *2015 U.S. Transgender Survey*, *supra*, at 112.

[23] Mallory et al., *Impact of Stigma and Discrimination (Michigan)*, *supra*, at 56.

[24] *Id.* at 64.

increase was approximately $1,000,000 a year prior to New York's prohibiting such discrimination.[25] Similarly, States incur additional expenses each year to address homelessness caused by discrimination against their transgender residents. Prior to banning such discrimination, New York paid as much as an estimated $5,900,000 a year in increased homeless shelter and related costs.[26]

C. Inefficiencies Created by Discrimination Further Impair the Economies and Fiscs of the States.

Discrimination in employment also results in LGBT workers being less productive and less likely to remain in their jobs.[27] The associated costs harm the States directly in their capacities as employers, and also cause the States to lose significant amounts in tax revenues by reducing the economic output of private employers.

For instance, research shows that LGB workers who are free from discrimination have higher job satisfaction, and that when those employees feel free to disclose their sexual orientation at work, they are more engaged, have better relationships with

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[25] Jody L. Herman, *The Cost of Employment and Housing Discrimination Against Transgender Residents of New York* 1, 3 (Williams Inst. 2013). New York adopted regulations banning discrimination based on transgender status in 2016 and legislation banning such discrimination in 2019. See *infra* note 43.

[26] *Id.* at 5.

[27] Mallory et al., *Impact of Stigma and Discrimination (Michigan)*, *supra*, at 62.

coworkers, and have increased productivity.[28] The same is true for transgender workers. Many improve their job performance when their transgender status is respected and they can safely transition at work.[29] In other words, when LGBT employees "are required to suppress far less," they "can bring far more of themselves to their jobs," thereby "increas[ing] the total human energy available to the organisation."[30]

It is the amici States' experience that laws protecting their LGBT residents—far from proving impractical or harmful to employers—have provided significant economic benefits to the businesses in their States. In fact, research has shown a "significant increase in innovation output" in States that have passed antidiscrimination laws protecting LGBT workers.[31] By one metric, companies headquartered in States with antidiscrimination laws "experienced an 8% increase in the number of patents and an 11% increase in the number of patent citations" as compared with companies in States without these protections.[32] Moreover, when States have passed nondiscrimination laws protecting their LGBT residents, "a large

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[28] M.V. Lee Badgett et al., *The Business Impact of LGBT-Supportive Workplace Policies* 1-3, 11-17, 19, 26 (Williams Inst. 2013).

[29] Grant et al., *Injustice at Every Turn*, *supra*, at 3, 64, 68.

[30] *See* Deloitte, *Only Skin Deep? Re-examining the Business Case for Diversity* 7 (Sept. 2011) (quotation marks omitted).

[31] Huasheng Gao & Wei Zhang, *Non-Discrimination Laws Make U.S. States More Innovative*, Harvard Business Review (Aug. 17, 2016).

[32] *Id.*

number of inventors relocated from other states to that state within three years."[33]

Studies have likewise shown that when private firms implement LGBT-friendly policies, they experience increases in firm value, productivity, and profitability.[34] In addition to allowing LGBT workers to devote more of their energy to their jobs, diverse workforces help to attract new clients and customers, consisting of persons identifying as LGBT and persons who value an inclusive workplace.[35]

Conversely, discrimination against LGBT workers causes concrete economic harm. For example, surveys have shown that transgender workers experience decreased job performance and increased dissatisfaction when they feel compelled to hide their transgender status at work,[36] and harassment can result in transgender workers changing or quitting jobs, having excessive absences and tardiness, and otherwise experiencing poor job performance.[37] And when an LGBT employee leaves a job due to discrimination, his or her employer must incur significant costs to find a replacement. The average cost of replacing an

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[33] *Id.*

[34] Shaun Pichler et al., *Do LGBT-Supportive Corporate Policies Enhance Firm Performance?*, 57 Human Resource Mgmt. 263, 263 (2018).

[35] Forbes Insights, *Global Diversity and Inclusion: Fostering Innovation Through a Diverse Workforce* 11-12 (2011).

[36] Badgett et al., *Business Impact of LGBT-Supportive Workplace Policies*, *supra*, at 18-19.

[37] *See* Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People's Lives*, 19 J. Pub. Mgmt. & Soc. Pol'y 65, 75 (Spring 2013).

employee can range from 20% of that employee's annual salary up to more than 200% for highly skilled or high ranking employees.[38] Thus, a recent study of Michigan residents found that "public and private employers are at risk of losing approximately $9,660, on average, for each employee who leaves the state or changes jobs because of the negative environment facing LGBT people."[39]

Discrimination against LGBT workers thus denies employers valuable benefits and imposes significant costs, in turn depriving the States of economic growth and tax receipts. For instance, prior to banning discrimination against transgender people, New York lost "millions in income tax revenues" that could have been generated annually if such discrimination were reduced.[40]

Finally, as noted above (see *supra* at 8), discrimination in the workplace and elsewhere results in LGBT people experiencing poorer health outcomes and increased rates of depression and anxiety. These public health disparities cost state economies millions of dollars a year. For instance, reducing the rate of major depression among transgender people in Michigan would save the state economy as much as

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[38] Heather Boushey & Sarah Jane Glynn, *There Are Significant Business Costs to Replacing Employees* 1-2 (Ctr. for Am. Progress 2012).

[39] Mallory et al., *Impact of Stigma and Discrimination (Michigan)*, *supra*, at 61.

[40] Herman, *Cost of Employment and Housing Discrimination*, *supra*, at 5.

$163 million annually.[41] Similar gains could be realized in other States.[42]

II. The Amici States Rely on Title VII to Protect Their Residents from Workplace Discrimination.

To reduce discrimination against their LGBT residents, at least 21 States and the District of Columbia have enacted protections against workplace discrimination based on sexual orientation and transgender status,[43] with six additional States taking the

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[41] Mallory et al., *Impact of Stigma and Discrimination (Michigan)*, *supra*, at 65-66.

[42] For example, reducing the rate of major depressive disorder among Georgia's LGBT population could save the state economy up to $147.3 million a year. Christy Mallory et al., *The Economic Impact of Stigma and Discrimination against LGBT People in Georgia* 64-65 (Williams Inst. 2017).

[43] Twenty-one States and the District of Columbia have expressly prohibited discrimination on the basis of sexual orientation and transgender status by statute or regulation. *See* Cal. Gov. Code §§ 12926, 12940; Colo. Rev. Stat. §§ 24-34-301(7), 24-34-402; Conn. Gen. Stat. §§ 46a-51(21), 46a-60, 46a-81c; Del. Code Ann. tit. 19, § 711; Haw. Rev. Stat. § 378-2(a); 775 Ill. Comp. Stat. 5/1-102(A), 5/1-103(O-1); Iowa Code §§ 216.2(10), (14), 216.6; Me. Rev. Stat. tit. 5, §§ 4553(9-C), 4571; Md. Code Ann., State Gov't § 20-606; Mass. Gen. Laws ch. 4, § 7, Fifty-ninth; *id.* ch. 151B, § 4; Minn. Stat. §§ 363A.03(44), 363A.08; Nev. Rev. Stat. §§ 613.310(4), (7), 613.330; N.H. Rev. Stat. Ann. §§ 354-A:2, 354-A:6–354-A:7; N.J. Stat. Ann. §§ 10:5-4, 10:5-5(hh)-(kk), (rr), 10:5-12; N.M. Stat. Ann. § 28-1-7; N.Y. Exec. Law §§ 291, 296; N.Y. Comp. Codes R. & Regs. tit. 9, § 466.13; Or. Rev. Stat. §§ 174.100(7), 659A.006; R.I. Gen. Laws §§ 28-5-6(11), (16), 28-5-7; Utah Code Ann. § 34a-5-106; Vt. Stat. Ann. tit. 1, §§ 143-144; *id.* tit. 21, § 495; Wash. Rev. Code §§ 49.60.040(26), 49.60.180; D.C. Code §§ 2-1401.02(12A), (28), 2-

step of barring that discrimination in state employment.[44] These state-specific protections are necessary components of the amici States' comprehensive strategy for reducing employment discrimination and remedying its harms. State laws and policies provide residents with a state forum to resolve their charges, promote tolerance and inclusion, and enable training and oversight at the local level. In the amici States'

1402.11. Additionally, two States have issued agency interpretations including sexual orientation and gender discrimination in their sex discrimination statutes. *See* Mich. Comp. Laws §§ 37.2201, 37.2202; Mich. Civil Rights Comm'n, *Interpretive Statement 2018-1* (May 21, 2018); 43 Pa. Cons. Stat. § 955(a); Pa. Human Relations Comm'n, *Guidance on Discrimination on the Basis of Sex Under the Pennsylvania Human Relations Act* 3. And another State has allowed claims raised by LGBT individuals to proceed as sex discrimination claims. *See Lampley v. Missouri Comm'n on Human Rights*, 570 S.W.3d 16, 24-26 (Mo. 2019) (allowing a gay man's sex discrimination charge to proceed on a sex stereotyping theory); *R.M.A. by Appleberry v. Blue Springs R-IV Sch. Dist.*, 568 S.W.3d 420, 428-29 (Mo. 2019) (reversing dismissal of sex discrimination claim raised by transgender student). Finally, Wisconsin has expressly prohibited discrimination based on sexual orientation. *See* Wis. Stat. § 111.31.

[44] *See* Relating to Equal Employment Opportunities and Non-Discrimination in Employment in Kentucky State Government, Ky. Exec. Order No. 2008-473 (2008); Equal Opportunity and Non-Discrimination, La. Exec. Order No. JBE 2016-11 (2016); Equal Opportunity in State Employment, Mich. Exec. Dir. 2007-24 (2007); Prohibiting Discrimination in State Employment and Contracts, Mont. Exec. Order No. 04-2016 (2016); Equal Employment Opportunity, Pa. Exec. Order No. 2016-04 (2016); Equal Opportunity, Va. Exec. Order No. 1 (2018).

experience, these protections further their antidiscrimination goals without imposing substantial costs on businesses or compromising public safety.[45]

But state-level protections alone are often insufficient to protect all residents and ensure effective enforcement in every instance. States therefore rely on the "interrelated and complementary state and federal enforcement" scheme established by Congress in enacting Title VII. *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 65 (1980). It is the amici States' experience that a comprehensive and coordinated nondiscrimination system achieves broader and more consistent results than would a patchwork approach resulting from state experimentation.

In particular, States depend on Title VII to supplement and extend their own protections in three ways. *First*, Title VII facilitates expansive, coordinated enforcement efforts by the EEOC, between the EEOC and States, and by States acting individually. *Second*, Title VII enables States to coordinate with the EEOC on the day-to-day administration of their nondiscrimination laws to promote efficiency. *Third*, Title VII—which creates nationwide protections against discrimination—fills in jurisdictional and regulatory gaps in the state-specific antidiscrimination laws.

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[45] *See*, *e.g.*, Amicus Curiae Br. by 68 Companies Opposed to H.B. 2 & in Support of Pl.'s Mot. for Preliminary Injunction at 11-12, *United States v. North Carolina*, No. 1:16-cv-425 (M.D.N.C. July 8, 2016), ECF No. 85-1; Crosby Burns, *The Costly Business of Discrimination: The Economic Costs of Discrimination and the Financial Benefits of Gay and Transgender Equality in the Workplace* 23-25 (Ctr. for Am. Progress 2012).

A. States Rely on Title VII's Supplemental Enforcement Tools.

In enacting Title VII, Congress indicated "that it considered the policy against discrimination to be of the highest priority." *Alexander v. Gardner-Denver Co*., 415 U.S. 36, 47 (1974) (quotation marks omitted). "Consistent with this view, Title VII provides for consideration of employment-discrimination claims in several forums." *Id.* From this perspective, the "clear inference is that Title VII was designed to supplement rather than supplant, existing laws and institutions relating to employment discrimination." *Id.* at 48-49; *see also* 42 U.S.C. § 2000e-7. Indeed, by the time Title VII was enacted, many States had already established state fair employment practices agencies and outlawed invidious discrimination within their borders.[46] Title VII thus built on these state practices to create a system of "cooperative federalism" in which the EEOC and state authorities share responsibility to enforce civil rights laws.[47]

At present, the amici States depend on all facets of this comprehensive enforcement system that Congress created. For example, States benefit from federal enforcement efforts under Title VII. Specifically, Title VII (1) empowers the EEOC to investigate charges of discrimination, which in turn

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[46] *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 472 (1982) ("At the time Title VII was written, over half of the States had enacted some form of equal employment legislation."); *see also*, *e.g.*, Act 180, 1963 Haw. Sess. Laws 223; Act 44, 1964 Haw. Sess. Laws 45; Ill. Rev. Stat ch. 48, § 851 et seq. (1961); Ch. 183, 1949 Wash. Sess. Laws 506; Ch. 37, 1957 Wash. Sess. Laws 107.

[47] *See* Phillip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. Rev. 663, 671 (2001).

advances States' important interest in ending discrimination within their borders; (2) serves as the legal basis for joint enforcement actions between States and the EEOC; and (3) provides States access to a federal forum and additional remedies in their efforts to reduce discrimination. Rolling back Title VII protections would remove these enforcement mechanisms from the amici States' arsenal and hinder their ability going forward to prevent discrimination based on sexual orientation and transgender status.

1. States benefit from Title VII enforcement actions spearheaded by the EEOC.

As an initial matter, States rely on the EEOC to investigate charges of discrimination, conciliate, and bring enforcement actions against employers not in compliance with the law. To date, the EEOC has used its broad statutory authority to obtain significant victories enforcing Title VII against employers that discriminate against LGBT employees. These victories include federal judgments, *see*, *e.g.*, *EEOC v. Scott Med. Health Ctr., P.C.*, No. 16-cv-225, 2017 WL 5493975 (W.D. Pa. Nov. 16, 2017), as well as settlements requiring employers to cease their discriminatory conduct against LGBT employees, undergo antidiscrimination training, promulgate nondiscrimination policies, and pay substantial damages for past misconduct, *see*, *e.g.*, Consent Decree, *EEOC v. Bojangles Rests., Inc.*, No. 5:16-cv-00654 (E.D.N.C. Dec. 4, 2017), ECF No. 45; Consent Decree, *EEOC v. Deluxe Fin. Servs. Corp.*, No. 0:15-cv-02646 (D. Minn. Jan. 20, 2016), ECF No. 37; Consent Decree, *EEOC v. Pallet Cos.*, No. 1:16-cv-00595 (D. Md. June 28, 2016),

ECF No. 9; Order, *EEOC v. Lakeland Eye Clinic, P.A.*, No. 8:14-cv-02421 (M.D. Fla. Apr. 9, 2015), ECF No. 33.

The EEOC is able to achieve these and other significant results for a variety of reasons arising from its unique position in the comprehensive scheme. As envisioned by Congress, the EEOC uses its broad statutory authority and panoply of national enforcement tools to supplement state nondiscrimination efforts.[48] Among other powers, the EEOC has independent investigative authority to pursue enforcement actions on behalf of employees. This authority allows the EEOC to bring suit in federal court without many of the constraints that would otherwise apply to individuals or States, such as arbitration clauses, time bars, or class certification requirements. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 287-89 (2002).

Furthermore, the EEOC is often best situated to take on nationwide investigations and enforcement actions. Unlike States, which typically focus on conduct occurring within their borders, the EEOC is able to recognize and investigate national trends in discrimination, whether by various companies or single, multistate entities. In fact, the EEOC has an entire program specifically designed to strategically eradicate systemic discrimination nationwide. This program is "one of EEOC's top priorities."[49]

Historically, the EEOC has achieved important successes for advancing civil rights nationally by

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[48] *See* EEOC, Strategic Enforcement Plan, FY 2013-2016, at 2-3, 5-6, 18-19.

[49] *See* EEOC, Strategic Enforcement Plan, Fiscal Years 2017-2021, at 5.

bringing large employers into compliance with civil rights laws. In 2017, for example, the EEOC entered into a consent decree that required an operator of a restaurant chain with locations throughout the southeastern United States to cease discriminatory practices against transgender individuals.[50] Similarly, the EEOC entered into a consent decree covering the plants of an employer in Maine, Maryland, Massachusetts, New Jersey, and Virginia after the employer was charged with sexual-orientation discrimination. Consent Decree, *Pallet Cos.*, No. 1:16-cv-00595 (D. Md. June 28, 2016), ECF No. 9.

And these recent successes are just a few of the available examples. *See* Consent Decree, *Deluxe Fin. Servs. Corp.*, No. 0:15-cv-02646 (D. Minn. Jan. 20, 2016), ECF No. 9 (consent decree required employer with locations across country to cease discriminating on basis of transgender status); *cf.* Consent Decree, *EEOC v. Bass Pro Outdoor World, LLC*, No. 4:11-cv-03425 (S.D. Tex. July 25, 2017), ECF No. 378 (multi-state retailer required to pay $10.5 million to roughly 50,000 victims after EEOC filed charge of pattern or practice in hiring and employment discrimination); Consent Decree, *EEOC v. Morgan Stanley & Co.*, No. 01-cv-08421 (S.D.N.Y. July 12, 2004), ECF No. 236 (consent decree between EEOC and national entity addressing alleged pattern or practice of discriminating against a class of female employees throughout the country).

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[50] *See* Consent Decree, *Bojangles Rests., Inc.*, No. 5:16-cv-0065 (E.D.N.C. Dec. 4, 2017), ECF No. 45; EEOC, Press Release, *Bojangles' To Pay $15,000 To Settle EEOC Sexual Harassment and Retaliation Lawsuit* (Dec. 20, 2017).

Another way in which the EEOC achieves broad and meaningful results is by efficiently coordinating contemporaneous lawsuits across jurisdictions. *See* Sean D. Lee, *EEOC Settles Sex Discrimination Lawsuits in Minnesota and New York*, 13 Fed. Emp. L. Insider 6 (May 2016) (describing settlement of charges brought against two multistate corporations that routinely refused to hire women). As one example, the EEOC recently filed fourteen Title VII harassment actions in less than two months raising similar allegations of sexual harassment against employers in various States.[51]

Finally, the EEOC has used its resources to combat discrimination based on sexual orientation and transgender status that occurs entirely within a State's borders. *See* Order, *Lakeland Eye Clinic, P.A.*, No. 8:14-cv-02421 (M.D. Fla. Apr. 9, 2015), ECF No. 33 (settlement with Florida company that discriminated against employee after she revealed her transgender status). These suits are part of a long line of EEOC actions directed at invidious discrimination in all contexts. *See, e.g.*, *EEOC v. Green*, 76 F.3d 19, 20 (1st Cir. 1996) (Massachusetts law firm sued for sexual and racial harassment of female paralegal); *EEOC v. Metal Serv. Co.*, 892 F.2d 341, 343 (3d Cir. 1990) (Pennsylvania steel company sued for racially discriminatory hiring). As one example, the EEOC sued a construction company in Louisiana for its site supervisor's relentless harassment of a male employee who did not confirm to the supervisor's sex stereotypes for men. *See EEOC v. Boh Bros. Constr. Co.*, 731 F.3d

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[51] *See* EEOC, Press Release, *EEOC Files Seven More Suits Against Harassment* (Aug. 9, 2018); EEOC, Press Release, *EEOC Files Seven Suits Against Harassment* (June 14, 2018).

444, 449 (5th Cir. 2013) (en banc). And in another case, a New York grocer was sued for "egregious" sexual harassment of ten employees. *See EEOC v. KarenKim, Inc.*, 698 F.3d 92, 94 (2d Cir. 2012) (per curiam).

States benefit from these EEOC enforcement actions addressing egregious discriminatory acts, including such acts directed at their LGBT residents. Accordingly, the EEOC's routine handling of not only interstate but also intrastate discrimination claims is a critical supplement to state enforcement actions aimed at ending discrimination based on sexual orientation and transgender status.

2. Title VII enables States to enter into joint enforcement actions with the EEOC.

Additionally, States use Title VII to enter into joint enforcement actions with the EEOC. These federal-state actions are a prime, present-day example of the cooperative system that was envisioned by Congress. *See New York Gaslight Club, Inc.*, 447 U.S. at 64 (explaining that Title VII contemplated that the federal government would "cooperate" with state enforcement agencies to remedy employment discrimination). The ability to collaborate with the EEOC increases States' reach and affords them greater resources when investigating, conciliating, and bringing enforcement actions to redress the most pervasive acts of discrimination by the largest employers.

In 2015, for instance, the EEOC and New York reached a multimillion-dollar joint settlement with Consolidated Edison Company of New York—which employs nearly 15,000 people as one of the world's largest power suppliers—to resolve allegations of

sexual harassment and other forms of sex discrimination.[52] This partnership made it possible for the State to bring comprehensive charges, and also allowed for a jointly administered claims process that distributed millions of dollars to hundreds of employees who had worked in various locations for nearly a decade.[53]

In addition to entering into formal joint enforcement actions, States also collaborate with the EEOC at the investigation stage. California's Department of Fair Employment and Housing, for instance, recently coordinated with the EEOC to investigate gender equity in employee compensation. Similarly, the Vermont Attorney General's Office and the EEOC entered into an agreement to jointly investigate a charge of discrimination based on transgender status under Title VII and Vermont law. There, an employee had alleged that a large, multistate employer subjected her to a hostile work environment when she revealed that she was transgender. Finally, States may collaborate with the EEOC by transferring discrete cases for inclusion in systemic EEOC investigations against nationwide and regional employers. The Hawai'i Civil Rights Commission, for example, has transferred several dual-filed cases to the EEOC while also exploring joint investigation opportunities.

If Title VII protections are rolled back, resulting in a discrepancy between federal and state protections, the EEOC will discontinue its investigations of discrimination against LGBT people. State agencies

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[52] *See* EEOC, Press Release, *Con Edison to Pay $3.8 Million to Resolve Sex Discrimination/Harassment Charges Filed with New York A.G. and U.S. EEOC* (Sept. 9, 2015).

[53] *Id.*

would lose a federal partner and, in turn, necessary enforcement resources. Many incidents of discrimination would go unremedied as a result. See *infra* at 24-35.

3. States use Title VII to bring their own Title VII actions.

Furthermore, States rely on the federal scheme to bring their own enforcement actions under Title VII. When proceeding under Title VII, States act in their *parens patriae* capacity. *See*, *e.g.*, *EEOC v. Federal Express Corp.*, 268 F. Supp. 2d 192, 198 (E.D.N.Y. 2003) (Congress, "by authorizing state governments to bring suit under Title VII, must have envisioned such suits being brought in the states' capacity as *parens patriae*"). Litigating under Title VII gives States the additional option of proceeding under a federal statute, in a federal forum. States may elect to proceed in federal court for any number of reasons, including the additional remedies offered by Title VII or the convenience of proceeding in federal court against a defendant with statewide or multistate locations. Losing this option would hinder States' ability to prosecute discriminatory conduct in a manner tailored to the circumstances at hand. States also benefit from this additional forum when acting as employer. Having a federal decision maker available to adjudicate discrimination charges removes any appearance of bias or perceived conflict of interest on the part of the State, which promotes confidence in the States as employers.

Although States do not use this option frequently, Title VII provides a powerful vehicle to bring suit where appropriate. *See, e.g.*, Consent Decree, *Washington v. Horning Bros.*, No. 2:17-cv-00149 (E.D. Wash.

Oct. 26, 2018), ECF No. 176 (enforcement action challenging agricultural employer's sex-segregated workplace and pattern of discriminatory and harassing employment practices). In one recent example of Title VII's use in the race discrimination context, the Illinois Attorney General brought an action under Title VII and state law against several employment agencies, one of which was advertising its ability to "provide the best Mexicans" and "[l]ots of Mexicans." *Illinois v. Xing Ying Emp't Agency*, No. 15-cv-10235, 2018 WL 1397427, at *1 (N.D. Ill. Mar. 20, 2018). Ultimately, this business was enjoined from operating, while other defendants were required to compensate the victims and comply with orders for broad equitable relief, including employment discrimination training and reporting quarterly to the Illinois Attorney General's Office. *See* Consent Decrees, *Xing Ying Emp't Agency*, No. 15-cv-10235 (N.D. Ill. Sept. 5, 2017), ECF Nos. 125-127; Consent Decree, *Xing Ying Emp't Agency*, No. 15-cv-10235 (N.D. Ill. Oct. 10, 2018), ECF No. 155.

In addition to single-state actions, Title VII also provides the States with a common cause of action for multistate enforcement efforts. This enables States to better coordinate with each other when investigating and bringing suit against employers whose discriminatory acts occur in multiple States. Without Title VII, multistate enforcement cases conceivably would vanish. Indeed, it is difficult to envision multistate nondiscrimination enforcement actions in the absence of Title VII. States would be armed primarily with causes of action under state law that could be brought in their own courts for relief within their own State.

B. Rolling Back Title VII Coverage Would Disrupt the Joint Administration of State and Federal Nondiscrimination Laws.

Additionally, States rely on the coordinated, day-to-day administration of federal and state antidiscrimination laws. *See Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 470 n.8 (1982) (explaining that Title VII "provisions are directed toward administrative cooperation"). As discussed, Title VII specifically grants the EEOC the authority "to cooperate with and, with their consent, utilize regional, State, local, and other agencies." 42 U.S.C. § 2000e-4(g)(1); *see id.* § 2000e-8(b). The EEOC exercises this authority by coordinating with nearly one hundred state and local agencies on an administrative level.[54] States, in turn, have come to rely on this collaboration in crafting their own antidiscrimination laws, allocating resources to prevent discrimination, and establishing workable administrative procedures. Relatedly, States also depend on the EEOC's coordinated research efforts and data, as well as its litigation efforts, technical assistance, and expertise. A rollback of protections against discrimination based on sexual orientation and transgender status would disrupt this well-curated system in a way that would cause States and their residents significant harm.

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[54] *See*, *e.g.*, EEOC, Strategic Plan for Fiscal Years 2018-2022, at 6 (noting that the EEOC has worksharing agreements with 92 state and local agencies).

1. States enter into worksharing agreements with the EEOC.

States coordinate with the EEOC on many of the daily administrative tasks that enable their agencies to function effectively. This arrangement is typically governed by a worksharing agreement between a state fair employment practices agency and the EEOC. States enter into these agreements "to minimize duplication of effort . . . and to achieve maximum consistency of purpose and results." *Sofferin v. American Airlines, Inc.*, 923 F.2d 552, 555 (7th Cir. 1991) (quotation marks omitted). The terms of each worksharing agreement differ depending on the specific needs of the agency, but as a general matter they effectuate a division of labor in accepting and investigating charges. Coordination under these agreements is best achieved when States and the EEOC have overlapping substantive protections; there can be a division of labor in resolving sexual-orientation and gender-identity discrimination charges only where both jurisdictions proscribe that conduct.

In States that have entered into these agreements, "a complainant ordinarily need not file separately with federal and state agencies" to satisfy the jurisdictional requisites of each. *Fort Bend Cty., Texas v. Davis*, 139 S. Ct. 1843, 1846 (2019). Instead, she "may file her charge with one agency, and that agency will then relay the charge to the other." *Id.* This arrangement facilitates filing charges for the employees while also benefitting the state agencies, by allowing States to depend on the EEOC to conduct the intake process and transfer charges to them as appropriate. Dual-filed charges often involve discrimination

based on sexual orientation and transgender status.[55] If the EEOC were no longer able to investigate charges based on sexual orientation and transgender status, the coordinated intake and screening process would likely need to be revised in many States. Shifting those tasks to state agencies would be an extensive and complicated process given the number of charges filed with the EEOC annually as compared with the number of charges filed with the States. The charges filed by transgender people with the EEOC, for instance, are almost double those received by state investigators.[56]

To avoid duplicative work, States may waive their exclusive right to process charges "so that the EEOC can take immediate action." *Sofferin*, 923 F.2d at 554; *see* 42 U.S.C. § 2000e-5(c) (exclusive 60-day right for state agencies to process charges dual-filed with the EEOC). In these situations, state agencies rely on the EEOC to receive, investigate, and enforce charges in cases where federal and state jurisdiction overlaps. To be sure, States generally retain the right to conduct

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[55] In fiscal year 2018, for example, Michigan resolved 740 dual-filed employment cases pursuant to its worksharing agreement with the EEOC, a substantial number of which involved discrimination against its LGBT residents. Indeed, since May 2018 alone, Michigan received 31 charges involving discrimination based on transgender status and sexual orientation. Washington, too, experienced a similar pattern: during the most recent fiscal year, 534 complaints were dual-filed, twenty of which alleged sexual orientation discrimination. Finally, New Mexico resolved nearly 300 dual-filed charges in 2018. And under New Mexico's worksharing agreement with the EEOC, its Department of Workforce Solutions is entitled to reimbursement for resolving those charges.

[56] James et al., *2015 U.S. Transgender Survey*, *supra*, at 152.

their own review of charges that are dismissed by the EEOC and to exercise initial jurisdiction in cases where they have expressed an interest. *See EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 112, 118 (1988). But in most cases falling under both state and federal jurisdiction, the EEOC takes on the bulk of the work, allowing States to focus on state-specific charges, as well as on training, outreach, and other tasks. In 2016, for instance, the EEOC resolved nearly 70,000 Title VII charges,[57] whereas all state and local enforcement agencies combined resolved approximately 36,000.[58]

If the EEOC were to stop investigating and enforcing charges alleging discrimination based on transgender status and sexual orientation, investigation and resolution of these charges would fall entirely to state agencies. California's Department of Fair Employment and Housing, for example, expects that its workload would increase by 100 or more additional charges of discrimination annually were the EEOC no longer investigating discrimination based on transgender status or sexual orientation. This forced reallocation of responsibilities to the States would leave States less well equipped to redress all forms of discrimination and strain their limited resources, which they have allotted in reliance on longstanding worksharing agreements. For example, even before charges are filed, inquiries involve a "significant amount of staff time" in terms of interviews and

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[57] *See* EEOC, *Title VII of the Civil Rights Act of 1964 Charges, FY1997-FY2018*.

[58] EEOC, Strategic Plan for Fiscal Years 2018-2022, *supra*, at 6.

counseling.[59] And in fiscal year 2018, for instance, the EEOC received more than 519,000 calls to its toll-free number, as well as more than 200,000 inquiries in field offices and 34,600 emails.[60] If Title VII protections based on sexual orientation and transgender status were eliminated, only one forum would remain available to employees to make an initial inquiry about their rights and, ultimately, to file charges.

2. States rely on the EEOC's research efforts and litigation positions.

Worksharing agreements aside, States also depend on the EEOC's research, data collection, expertise, and litigation efforts. This reliance and coordination, too, is contemplated by the text of Title VII, which allows for the EEOC to "engage in and contribute to the cost of research and other projects of mutual interest undertaken by [state and local] agencies, and utilize the services of such agencies and their employees." 42 U.S.C. § 2000e-8(b). The EEOC understands data collecting, analyzing, and sharing are central to its enforcement and educational efforts.[61] The EEOC thus conducts timely, relevant research on emerging trends in employment discrimination and shares its results with state and local agencies.[62] It does so as part of its commitment to an "integrated

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[59] EEOC, *2018 Performance and Accountability Report* 30 (Nov. 2018).

[60] *Id.* at 30-31.

[61] *See* EEOC, Strategic Enforcement Plan, FY 2013-2016, *supra*, at 18-19.

[62] *See id.*

approach" that furthers collaboration and coordination through broad sharing and consideration of ideas, strategies, and best practices.[63] States use this research and shared data to improve their investigative, enforcement, and prevention efforts.

In 2012, for example, the EEOC formed a working group to coordinate its efforts and provide training, advice, and input to its staff and external stakeholders on preventing sexual-orientation and gender-identity discrimination.[64] The EEOC has also provided technical guidance that States are able to apply to their own investigative and enforcement endeavors in protecting their LGBT residents from workplace discrimination.[65]

Moreover, the EEOC hosts an annual conference for state and local enforcement agencies where States are able to gain insight into cutting-edge issues and receive guidance from the EEOC on enforcement practices. This conference assists state and local enforcement agencies in reducing discrimination and also encourages the different entities to work together. If Title VII is interpreted to exclude sexual orientation and transgender status from its protections, the conference and other EEOC events and publications foreseeably will exclude these topics. Similarly, these

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[63] *Id.* at 18.

[64] *See* EEOC, Fact Sheet: Recent EEOC Litigation Regarding Title VII & LGBT-Related Discrimination (updated July 8, 2016).

[65] *See*, *e.g.*, EEOC, Brochure: Preventing Employment Discrimination Against Lesbian, Gay, Bisexual or Transgender Employees; U.S. Office of Personnel Mgmt. et al., Addressing Sexual Orientation and Gender Identity Discrimination in Federal Civilian Employment (June 2015).

types of discrimination could go unmentioned entirely during the EEOC's outreach efforts to employees, which reached at least 398,650 workers at more than 3,900 workplaces in the 2018 fiscal year.[66]

Finally, States rely on the EEOC's litigation positions, as well as the case law developed from those efforts. After the EEOC prioritized combating sexual-orientation and gender-identity discrimination in 2012, it contributed to this area of law by filing amicus briefs in a number of cases where LGBT employees brought claims against their employers. These litigation positions, as well as the enforcement actions brought by the EEOC, contribute to the development of nondiscrimination law. In many States, adjudicative bodies borrow principles established in Title VII cases, both because the legal standards overlap with the standards set forth in state antidiscrimination laws and because "federal courts have considerable experience" with antidiscrimination cases. *Furukawa v. Honolulu Zoological Soc.*, 85 Haw. 7, 13 (1997); *see also*, *e.g.*, *Portland State Univ. Ch. of the Am. Ass'n of Univ. Professors v. Portland State Univ.*, 352 Or. 697, 710-11 (2012) (en banc); *Zaderaka v. Illinois Human Rights Comm'n*, 131 Ill. 2d 172, 178 (1989). If the EEOC ceases participating in cases alleging sexual-orientation and gender-identity discrimination, then this body of law will be underdeveloped as compared with the case law concerning other forms of discrimination. In sum, the work that the EEOC does in court—coupled with its research and expertise—has a meaningful impact on state practice that will be

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[66] *See* EEOC, *2018 Performance and Accountability Report*, *supra*, at 8.

much missed if federal protections for LGBT employees are rolled back.

C. Title VII's Nationwide Coverage Eliminates Regulatory Gaps That Would Otherwise Leave States' Residents Unprotected from Discrimination.

In addition to facilitating enforcement efforts and joint administration, Title VII serves state interests by providing protections for LGBT residents who would otherwise fall through the regulatory cracks in state-specific laws. This gap includes, of course, employees who live and work in States that do not presently have laws proscribing discrimination based on sexual orientation or transgender status. And it also includes those individuals who live in States with antidiscrimination laws and policies, but who are not covered by their state laws for any number of reasons—for example, because they commute to another State for work or are federal employees. *See*, *e.g.*, *Mathis v. Henderson*, 243 F.3d 446, 450-51 (8th Cir. 2001).

These gaps in coverage cannot be remedied by a state legislative fix; indeed, they arise out of structural and jurisdictional limitations imposed on States "by their status as coequal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980). Furthermore, as detailed below, the variety of ways in which these gaps emerge demonstrates that there is no single, state-specific solution to ensure that all individuals residing within a State are protected. In addition, relying solely on state protections creates a fact-specific and time-consuming threshold inquiry into whether an employee can even access a State's protections. Nationwide

protections are necessary to avoid these difficulties and protect all of the amici States' residents from the harms associated with workplace discrimination.

Gaps in regulatory coverage are seen in a wide variety of circumstances. There is, for example, the common scenario where an individual lives in one State, but commutes across the border to work in another. Even if that person resides in one of the 22 jurisdictions with express protections for LGBT employees, she still may not be protected from discrimination if the State where she works does not have the same antidiscrimination laws. Indeed, States are often limited to investigating discrimination and bringing enforcement actions based on conduct that occurs within their borders. *See Hoffman v. Parade Publ'ns*, 15 N.Y.3d 285, 290-91 (2010) (holding that employee who lived and worked in Georgia for a company headquartered in New York City was not protected by the New York City Human Rights Law or the New York Human Rights Law).

Without nationwide protections, States would also be unable to protect individuals who typically work in their home State, but are discriminated against when on assignment in an out-of-state office. *See*, *e.g.*, 775 Ill. Comp. Stat. 5/2-101(A)(1)(a) (defining "employee" as "[a]ny individual performing services for remuneration within this State"). This same problem would be faced by LGBT students who attend college out-of-state and work a part-time job. Likewise, seasonal workers who spend a significant portion of the year working in another State would be susceptible to these gaps in jurisdiction. For example, they may not be covered by a State's nondiscrimination laws if their employer lacked sufficient contact with the State. *See*, *e.g.*, *id.* 5/2-101(B)(1)(a) (defining "employer" as

employing persons "within Illinois during 20 or more calendar weeks within the calendar year of or preceding the alleged violation").

And, finally, these gaps extend to residents of one State who telecommute or work remotely for an employer in another State. As this Court has recognized, the "Internet has caused far-reaching systemic and structural changes in the economy." *Direct Marketing Ass'n v. Brohl*, 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring). One of those effects is the increased popularity of telecommuting: according to one estimate, telecommuting rose 79% between 2005 and 2012.[67] Among other regulatory challenges presented by this trend, States are faced with new difficulties in protecting their residents and employees from discrimination. A nationwide rule, like the one in Title VII, is the most effective way to ensure complete coverage.

A different, but related, set of issues emerges when the relevant States have nondiscrimination laws, but there are differences among those laws. *See Jacobs v. Cider Miller Farms Co.*, No. 99-cv-40210, 2003 WL 25945258, at *8 (D. Mass. Feb. 4, 2003) (dismissing claim for failure to exhaust administrative remedies under Massachusetts law after determining that New Jersey antidiscrimination law did not apply to New Jersey resident for harassment in Georgia, Massachusetts, and Illinois). Depending on the different statutes at issue, the inevitable choice-of-law analysis may bar an employee's claim or limit her ability to fully

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[67] *See* Alina Tugend, *It's Unclearly Defined, but Telecommuting Is Fast on the Rise*, N.Y. Times (Mar. 7, 2014).

recover.[68] Under Title VII, however, an employee may file a charge with the EEOC without any worry about differences in the potentially applicable standards.

The lessons from these scenarios are twofold. First, rolling back Title VII protections for LGBT individuals not covered by state laws would leave these individuals exposed to discrimination. With no ability to use the protections in their home State, and without any recourse in the State where they work, they would be subject to discrimination and its harmful effects. And these harms, as discussed above (see *supra* at 5-13), will adversely affect the amici States in which they reside.

Second, losing these federal protections would risk introducing into charges involving interstate work arrangements threshold questions about the applicability of state protections. State adjudicative bodies could thus be forced to delve into fact-specific inquiries that do not involve the merits of the case, which could slow the resolution of hearings and place additional strains on state resources.

An individual's employment may often require working in two or more States that do not all afford protection against discrimination. Given the changing nature of the workplace and the rise in telecommuting, this situation may occur with increasing frequency. In Illinois, for example, approximately 7% of constituent complaints to the Attorney General's Workplace Rights Bureau from 2018 to June 2019 involved interstate work relationships. But with nationwide coverage

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[68] *See* Jerome Hunt, *A State-by-State Examination of Nondiscrimination Law and Policies* 7-14 (Ctr. for Am. Progress Action Fund 2012).

under Title VII, individuals are protected regardless of where they live or work. In short, it is in the best interests of the amici States and their residents to maintain nationwide protections for employees based on sexual orientation and transgender status.

CONCLUSION

This Court should reverse the judgment below in *Bostock* and affirm those in *Altitude Express* and *Harris*.

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