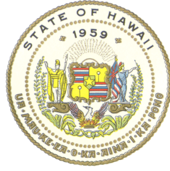

DEPARTMENT OF THE ATTORNEY GENERAL

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HAWAII AMONG 18 STATES ON BRIEF TO PROTECT LGBTQ WORKERS FROM EMPLOYMENT DISCRIMINATION

HONOLULU – Hawaii Attorney General Doug Chin joined an amicus brief filed with the U.S. Supreme Court by 18 attorneys general, arguing that employment discrimination on the basis of sexual orientation violates Title VII of the Civil Rights Act.

The attorneys general argue that their states have strong interests in protecting their citizens against employment discrimination on the basis of sexual orientation. The lack of nationwide recognition that Title VII bars such discrimination blocks the full protection of LGBTQ workers – particularly given divisions between the Equal Employment Opportunity Commission (which takes the position that Title VII protects workers from sexual orientation) and the federal Department of Justice (which has taken the opposite position).

“Discrimination of any kind is unacceptable. This is why the State of Hawaii is one of 18 states standing up for the civil rights of workers in Hawaii and across America,” said **Governor David Ige**.

Attorney General Chin said, “It is unacceptable in the year 2017 that someone could face employment discrimination because of his or her sexual orientation. Period.”

The brief was filed earlier this week, on National Coming Out Day. In addition to Attorney General Chin, it was led by New York Attorney General Eric Schneiderman and joined by the attorneys general of California, Connecticut, Delaware, Iowa, Illinois, Massachusetts, Maryland, Minnesota, New Mexico, Oregon, Pennsylvania, Rhode Island, Virginia, Vermont, Washington, and the District of Columbia.

“Employment discrimination against gay, lesbian, and bisexual workers not only deprives them of important economic opportunities—it also stigmatizes their most intimate relationships and thus ‘diminish[es] their person-hood,’” the attorneys general write. “Title VII plays a crucial complementary role by covering individuals not subject to

the State's laws—for instance, federal employees or residents who work in another State—and by making available both the federal courts and a federal enforcer, the Equal Employment Opportunity Commission (EEOC), to police invidious discrimination based on sexual orientation."

The case, Evans v. Georgia Regional Hospital, involves Jameka Evans, a security guard at a Savannah hospital who was harassed at work and forced out of her job because she is a lesbian. Evans' petition seeks a nationwide ruling that discrimination on the basis of sexual orientation violates Title VII.

A copy of the brief is attached.

# # #

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No. 17-370

In the

Supreme Court of the United States

JAMEKA K. EVANS,

Petitioner,

v.

GEORGIA REGIONAL HOSPITAL, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

Brief for the States of New York, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maryland, Massachusetts, Minnesota, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia as *Amici Curiae* in Support of Petitioner

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QUESTION PRESENTED

Whether the prohibition in Title VII of the Civil Rights Act of 1964 against employment discrimination "because of . . . sex" encompasses discrimination based on an individual's sexual orientation.

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INTEREST OF THE AMICI STATES

The States of New York, California, Connecticut, Delaware, Hawai'i, Illinois, Iowa, Maryland, Massachusetts, Minnesota, New Mexico, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, and Washington, and the District of Columbia, file this brief as amici curiae in support of Jameka Evans's petition for a writ of certiorari. The amici States have a strong interest in the correct resolution of the question presented here: whether the provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq., barring employment discrimination "because of . . . sex" encompasses discrimination on the basis of an individual's sexual orientation. Employment discrimination against gay, lesbian, and bisexual workers not only deprives them of important economic opportunities—it also stigmatizes their most intimate relationships and thus "diminish[es] their personhood." *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015). The amici States have important interests in combating such discrimination.

Millions of adults residing in the amici States identify as lesbian, gay, bisexual, or transgender (LGBT).[1] The amici States' interests in the welfare of these residents include an interest in protecting them

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*Amici curiae served timely notice upon all parties of their intent to file this brief.

[1] *See* Movement Advancement Project, *LGBT Populations* (Oct. 2, 2017) (internet); Williams Inst., *LGBT Data & Demographics* (2017) (internet); *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) (internet). (For authorities available on the internet, URLs are listed in the table of contents.)

against discrimination. As this Court has recognized, "invidious discrimination in the distribution of publicly available goods, services, and other advantages cause[s] unique evils," *Roberts v. United States Jaycees*, 468 U.S. 609, 628 (1984), and States therefore have compelling interests in "removing the barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups" and in ensuring them equal access to economic and professional opportunities, *id.* at 626.

Many of the amici States have adopted measures to protect gay, lesbian, and bisexual people from invidious discrimination at work.[2] Unfortunately, such discrimination continues to occur within the amici States and throughout the country.[3] Such discrimination penalizes individuals based on a characteristic that has nothing to do with their ability to do their jobs, thereby harming victims,[4] employers,[5] and the economies of the amici States.[6] The amici

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[2] *See*, *e.g.*, N.Y. Exec. Law § 296(1)-(1-a); Cal. Gov't Code § 12940; Minn. Stat. § 363A.08(2); Vt. Stat. Ann., tit. 21, § 495.

[3] *See* Pet. 19-20; *see also*, *e.g.*, Michal Addady, *LGBT-Related Workplace Complaints Went Up by 28% Last Year*, Fortune, Apr. 13, 2016 (internet); Human Rights Campaign, *The Cost of the Closet and the Rewards of Inclusion: Why the Workplace Environment for LGBT People Matters to Employers* 2-3 (2014) (internet).

[4] *See* Pet. 20; *see also*, *e.g.*, Brad Sears & Christy Mallory, *Documented Evidence of Employment Discrimination and Its Effects on LGBT People* 1,4 (Williams Inst. 2011) (internet).

[5] *See*, *e.g.*, Human Rights Campaign, *The Cost of the Closet*, *supra*, at 22-23.

[6] Crosby Burns et al., *Gay and Transgender Discrimination in the Public Sector: Why It's a Problem for State and Local*

States therefore share strong interests in ending those harms and the discrimination that causes them.

Title VII's protections are critical to preventing such injuries. In many States, including Georgia (where this case arose), there are no state laws protecting gay, lesbian, and bisexual people from discrimination in the workplace. And even in States that have such laws, including New York, Title VII plays a crucial complementary role by covering individuals not subject to the State's laws—for instance, federal employees or residents who work in another State—and by making available both the federal courts and a federal enforcer, the Equal Employment Opportunity Commission (EEOC), to police invidious discrimination based on sexual orientation.

The court below misinterpreted Title VII to exclude sexual-orientation discrimination, adhering to a nearly forty-year-old decision issued at a time when same-sex intimate contact was punishable as a criminal offense and this Court had yet to decide *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), which made clear that penalizing an employee for failing to fulfill gender stereotypes is a form of prohibited sex discrimination. These and other crucial legal developments since the late 1970s have recently led one other circuit and several district courts around the country to conclude that sexual-orientation discrimination is itself an impermissible form of gender stereotyping

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and violates Title VII. By ignoring these developments and refusing to reconsider its prior precedent en banc, the Eleventh Circuit has ensured the persistence of a circuit split that only this Court can resolve. Because the amici States' gay, lesbian, and bisexual populations will be exposed to significant harms while the split persists, the States have a substantial interest in this Court's prompt resolution of the important question presented here.

REASONS FOR GRANTING THE WRIT

In light of several major developments in the law relating to sexual orientation, *see*, *e.g.*, *United States v. Windsor*, 133 S. Ct. 2675, 2682 (2013); *Obergefell*, 135 S. Ct. at 2608, the federal courts of appeals have recently begun to reexamine the question whether discrimination on the basis of sexual orientation is prohibited by Title VII as a form of sex discrimination. Three courts of appeals have recently revisited that question: the Seventh Circuit held that it is, *see Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351-52 (7th Cir. 2017) (en banc); the Eleventh Circuit in the instant case held that it is not; and the issue is pending before the Second Circuit en banc in *Zarda v. Altitude Express*, No. 15-3775 (2d Cir. May 25, 2017), ECF No. 271 (granting en banc review); *see also Christiansen v. Omnicom Group, Inc.*, 852 F.3d 195, 202 (2d Cir. 2017) (Katzmann, C.J., concurring, joined by Brodie, J.) (recommending such en banc review); *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641, at *5 (EEOC July 16, 2015) (EEOC administrative determination that Title VII's ban on sex discrimination encompasses sexual-orientation discrimination).

This Court should resolve this question now. The States and their residents are already suffering harm from the absence of federal-law protections for lesbian, gay, and bisexual individuals in the circuits (including the Eleventh Circuit) that do not recognize sexual-orientation discrimination as a basis for Title VII liability. Further percolation is not likely to shed additional light on the question, given the square and fully articulated conflict between the Seventh and Eleventh Circuits. And delay will exacerbate the harms that the States and their residents will continue to face in the absence of intervention by this Court.

A. Delaying Resolution of the Circuit Split Will Seriously Harm Gay, Lesbian, and Bisexual Workers by Denying Them the Important Protections of Title VII.

By interpreting Title VII narrowly to exclude sexual-orientation discrimination, the decision below denied gay, lesbian, and bisexual people an important protection against a form of prejudice that "serves to disrespect and subordinate" them. *Obergefell*, 135 S. Ct. at 2605. The Eleventh Circuit's reading of Title VII allows these individuals to be excluded from employment based on their most intimate relationships, *see id.*, and thus will cause significant harm. The absence of the federal protections in Title VII will cause the greatest harm in States like Georgia that do not have their own laws against sexual-orientation discrimination. But narrowing Title VII's scope in this way would also eliminate a critical complement to state and local measures in the States that have chosen to protect gay, lesbian, and bisexual workers from discrimination.

First, Title VII coverage triggers the jurisdiction of a federal enforcer, the EEOC, that has historically been an effective partner with the States to prevent, investigate, and remedy invidious discrimination. In 2015, for example, the EEOC and the New York State Office of the Attorney General reached a multimillion-dollar joint settlement agreement with Consolidated Edison Company of New York resolving allegations of sexual harassment at the company, among other acts of discrimination.[7] While sexual-orientation discrimination was not a part of this joint effort (in part because the settlement was reached only two months after the EEOC first interpreted Title VII to prohibit such discrimination), this case demonstrates the value to the States of having a federal enforcer as a partner to investigate and remedy employment discrimination.[8]

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[7] *See Con Edison Settles Sexual Harassment Lawsuit for $3.8 Million*, ABC Eyewitness News (New York, N.Y.) (Sept. 9, 2015) (internet).

[8] Indeed, the EEOC and state and local fair-employment-practices agencies frequently formalize their cooperation through worksharing agreements entered into pursuant to 42 U.S.C. § 2000e-8(b). *See generally EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 112 (1988) (describing worksharing agreements and their prevalence). Differences in the scope of federal and state discrimination laws reduce the benefits of EEOC participation in investigations under such agreements, however. For instance, the model worksharing agreement on the EEOC's website assigns to state and local agencies initial processing of "[a]ll charges that allege more than one basis of discrimination where at least one basis is not covered by the laws administered by the EEOC but is covered" by state or local antidiscrimination law. *See* EEOC, *FY 2012 EEOC/FEPA Model Worksharing Agreement*, pt. III.A.2. (internet); *see also* California Dep't of Fair Empl. and Hous. & EEOC, *Worksharing Agreement Between California Department of Fair Employment and Housing and the U.S. EEOC San Francisco District Office for Fiscal Year 2016*, pt. III.A.2 (signed Nov. 2015) (including same language) (internet).

Yet the effectiveness of the EEOC's enforcement efforts is now compromised by the current circuit split over the scope of Title VII. For instance, the EEOC successfully defeated a motion to dismiss a Title VII enforcement action in Pennsylvania alleging sexual-orientation discrimination after the district court concluded that Title VII prohibited such discrimination. *See EEOC v. Scott Med. Health Ctr.*, 217 F. Supp. 3d 834, 839-42 (W.D. Pa. 2016). But that outcome would be barred if the EEOC brought a similar enforcement action within the Eleventh Circuit or the other circuits that have read Title VII narrowly—thereby depriving employees and civil-rights enforcers in the affected States of important benefits that the EEOC has to offer.

Moreover, the federal government's internal division over the scope of Title VII (*see* Pet. 14) further frustrates the full deployment of federal antidiscrimination resources to address sexual-orientation discrimination. As noted in the petition (at 13-14), the EEOC is not authorized to bring civil enforcement actions against state and local government employers. *See* 42 U.S.C. § 2000e-5(f)(1). Instead, such actions must be filed by the U.S. Attorney General, acting through the Department of Justice. *Id.* But the Department of Justice has recently taken the position, in conflict with the EEOC, that Title VII's ban on sex discrimination does *not* include sexual-orientation discrimination (*see* Pet. 14). That internal disagreement thus deprives state and local government employees nationwide of an important federal protection against sexual-orientation discrimination.

Second, Title VII provides additional coverage and remedies that state and local laws do not. For example, some employers—including federal entities

and certain multistate bodies—are exempt from state and local antidiscrimination laws. For employees of these entities, courts have held that federal law provides the sole remedy against employment discrimination. *See Rivera v. Heyman*, 157 F.3d 101, 105 (2d Cir. 1998) (federal employers); *Dezaio v. Port Auth. of N.Y. & N.J.*, 205 F.3d 62, 65-66 (2d Cir. 2000) (Port Authority of New York and New Jersey). Employees of such entities will lack important protections in circuits where Title VII is held not to prohibit sexual-orientation discrimination.[9]

Moreover, in the context of private enforcement actions, Title VII may provide broader remedies than are available under state or local laws. For instance, state civil-rights laws sometimes do not allow a prevailing plaintiff to recover punitive damages or attorney's fees, but Title VII does. *See* 42 U.S.C. § 1981a(b)(1) (punitive damages); *id.* § 2000e-5(k) (attorney's fees). Title VII thus offers additional incentives for employers to eliminate invidious discrimination, above and beyond what state and local laws may provide.

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[9] To be sure, federal employees in those circuits may enjoy some protection because the EEOC administratively adjudicates discrimination complaints filed against federal employers. *See* 42 U.S.C. § 2000e-16(b); 29 C.F.R. § 1614.401; *see also Baldwin*, 2015 WL 4397641, at *1, *10 (reinstating Title VII administrative complaint alleging sexual-orientation discrimination filed by federal employee working in Miami). However, Title VII provides additional remedies in the form of a private cause of action for federal employees unable to obtain full relief administratively. *See* 42 U.S.C. § 2000e-16(c); 29 C.F.R. §§ 1614.407, 1614.503(g). Aggrieved federal employees will not have the ability to do so in circuits where claims of sexual-orientation discrimination are not cognizable under Title VII.

Third, a particular State's protections for its residents may have no effect if those residents work in another State. For many, commuting to another State for work is commonplace, especially in areas with large populations situated near state lines. For example, interstate commutes regularly occur in the New York metropolitan area, which spans the States of New York, New Jersey, and Connecticut; the Washington metropolitan area, which spans the District of Columbia and the States of Maryland and Virginia; and the Cincinnati metropolitan area, which spans the States of Ohio, Kentucky, and Indiana. Interstate commuting is also common outside of metropolitan areas; for example, a significant number of Californians commute across the border to Arizona, a State that lacks any affirmative prohibition against discrimination based on sexual orientation.[10] Moreover, work trips and temporary assignments to out-of-state offices and worksites are increasingly common in our ever-more-integrated economy, in which large employers typically have operations in several States.

Accordingly, there are circumstances when a State's lesbian, gay, and bisexual residents travel to another jurisdiction without laws prohibiting sexual-orientation discrimination, and federal laws such as Title VII provide the only protection. Given the current divide among the federal circuits, such workers may lose all protection from invidious discrimination merely by taking a work-related trip. For instance, under the present split, such workers cannot travel from Chicago or Milwaukee in the

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[10] U.S. Census, *2009-2013 5-Year American Community Survey Commuting Flows* tbl.1 (last revised May 10, 2017) (internet); *see* Ariz. Rev. Stat. Ann. § 41-1463.

Seventh Circuit to Selma or Savannah in the Eleventh Circuit without risking exposure to sexual-orientation discrimination for which there is no legal remedy.

A lack of uniform national protection under Title VII thus poses concrete problems for many gay, lesbian, and bisexual workers—and, in turn, for the amici States. No matter where victims of invidious employment discrimination work, they will suffer the effects of such discrimination where they live—including decreased earnings and increased financial insecurity attended by a heightened risk of requiring public assistance. This potential for discrimination in one State to cause injury in another means the amici States will not be able to guarantee their citizens or themselves full protection against the harmful effects of sexual-orientation discrimination so long as the circuits remain divided over the scope of Title VII.

B. Delaying Resolution of the Circuit Split Will Harm Gay, Lesbian, and Bisexual Workers by Making It Harder for Them to Prove Gender Stereotyping That Is Indisputably Prohibited by Title VII.

A separate problem with the decision below is that it will lead to under-enforcement of indisputably cognizable gender-stereotyping claims under Title VII brought by gay, lesbian, and bisexual employees. This Court made clear nearly thirty years ago that Title VII prohibits disparate treatment based on an employee's failure to adhere to traditional gender stereotypes. *See Price Waterhouse*, 490 U.S. at 251 (plurality op.); *id.* at 259 (White, J., concurring in the judgment); *id.* at 261 (O'Connor, J., concurring in the judgment). And every circuit to consider the question, including the Eleventh Circuit, has held that gay, lesbian, and bisexual

employees may bring gender-nonconformity claims under Title VII if they were discriminated against for failing to conform to gender stereotypes.

Such employees face a unique burden in proving such claims: they must demonstrate that their employer's discrimination was based solely on gender nonconformity, and not on sexual orientation. The distinction between these forms of discrimination is (at best) difficult to draw in theory, and it is still more difficult, if not impossible, to apply in practice. As the Seventh Circuit observed in *Hively*—a case that, like the present one, was brought by a lesbian plaintiff—a woman who is not heterosexual "represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional)." 853 F.3d at 346.

Because sexual-orientation discrimination thus ordinarily overlaps with, and is often indistinguishable from, other types of gender stereotyping, courts around the country have struggled to draw a line between cognizable Title VII claims by gay, lesbian, or bisexual employees for discrimination on the basis of nonconformity with sex stereotypes and (putatively) noncognizable Title VII claims of sexual-orientation discrimination. The problem, as courts have repeatedly recognized, is that both types of claims often stem from acts of abuse or harassment that target employees for failing to conform to traditional gender stereotypes. Indeed, a "perception of homosexuality itself may result from an impression of nonconformance with sexual stereotypes." *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1065 n.5 (7th Cir. 2003), *overruled by Hively*, 853 F.3d 339. And

"[h]ostility to effeminate men and to homosexual men, or to masculine women and to lesbians, will often be indistinguishable as a practical matter," and attempting to differentiate these forms of hostility is "beyond the practical capacity of the litigation process." *Hamm*, 332 F.3d at 1067 (Posner, J., concurring). For example, a "homophobic epithet like 'fag'" may be "as much of a disparagement of a man's perceived effeminate qualities as it is of his perceived sexual orientation," making it impossible to "rigidly compartmentalize the types of bias that these types of epithets represent." *Id.* at 1065 n.5 (majority op.) (quotation marks omitted).

In the circuits that do not recognize sexual-orientation discrimination under Title VII, the impossibility of disentangling gender stereotyping from sexual-orientation discrimination unfairly disadvantages employees who suffer discrimination because of gender stereotyping and are or are perceived to be gay, lesbian, or bisexual. Carving sexual-orientation discrimination out of Title VII in effect allows employers in these circuits to assert a "defense" of sexual-orientation discrimination—and thereby limit or escape liability for conduct that, if applied to a heterosexual individual, would indisputably violate the statute. Indeed, many litigants have had seemingly viable claims dismissed on such grounds. *See* Pet. 17-18; *see also*, *e.g.*, *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1082 n.1, 1085-86 (7th Cir. 2000) (gay man held, pre-*Hively*, not to have viable gender-nonconformity claim under Title VII despite being called a "bitch" and publicly compared to the drag performer RuPaul); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 222 (2d Cir. 2005) (rejecting gender nonconformity claim by lesbian plaintiff with

stereotypically masculine appearance whose coworkers repeatedly called her "Donald"); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 759, 763-65 (6th Cir. 2006) (rejecting claim by plaintiff whose coworkers shoved sanitary napkins in his face, among other incidents, because such actions were "more properly viewed as harassment based on [the employee's] perceived homosexuality, rather than based on gender non-conformity").

The Title VII regime reaffirmed by the decision below thus hinders enforcement against discrimination that no one disputes is part of Title VII's broad scope. And it does so in a particularly damaging way: by restricting the practical ability of an already-vulnerable class of employees—those who are (or are thought to be) gay, lesbian, and bisexual—to bring claims for gender stereotyping. The result is to deny those employees the full protection from such stereotyping that this Court long ago recognized Title VII provides. This Court should grant certiorari to resolve this problem and ensure that Title VII's full protections extend to all workers.

CONCLUSION

This Court should grant the petition.

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