

IN THE
Supreme Court of the United States

GERALD LYNN BOSTOCK,

Petitioner,

v.

CLAYTON COUNTY, GEORGIA,

Respondent.

ALTITUDE EXPRESS, INC. AND RAY MAYNARD,

Petitioners,

v.

MELISSA ZARDA AND WILLIAM MOORE, JR.,
CO-INDEPENDENT EXECUTORS OF THE ESTATE OF DONALD
ZARDA,

Respondents.

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

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND
AIMEE STEPHENS,

Respondents.

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

**BRIEF OF *AMICI CURIAE* MODERN MILITARY
ASSOCIATION OF AMERICA AND TRANSGENDER
AMERICAN VETERANS ASSOCIATION IN
SUPPORT OF EMPLOYEES**

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STATEMENT OF INTEREST OF AMICI CURIAE¹

The Modern Military Association of America (“MMAA”) and the Transgender American Veterans Association (“TAVA,” and together with MMAA, the “Service Member Advocates Amici”) are two of the country’s largest non-profit, non-partisan legal services, policy, and watchdog organizations serving lesbian, gay, bisexual, transgender, and queer (“LGBTQ”) military personnel, veterans, military spouses, family members, and allies, as well as individuals living with HIV.

MMAA was formed through the merger of the American Military Partner Association and OutServe-SLDN, Inc., and it currently has over 75,000 members and supporters. MMAA has a unique understanding of the challenges faced by the LGBTQ populations it serves. Since 1993, MMAA and its predecessor entities have assisted over 12,500 clients. During this time, MMAA has filed lawsuits challenging laws and regulations that discriminate against and stigmatize LGBTQ service members, including: the former “Don’t Ask, Don’t Tell” (“DADT”) requirement that lesbian, gay, and bisexual service members conceal their sexual

¹ In accordance with Supreme Court Rule 37.6, counsel for *amici curiae* states that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than amici and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

orientation; regulations prohibiting same-sex military spouses from receiving spousal benefits; the current ban on openly transgender people serving in the United States military; and regulations negatively affecting service members with HIV. MMAA currently has four high-profile lawsuits against the Administration challenging various discriminatory policies. MMAA has also submitted amicus briefs to this Court in cases that directly affected LGBTQ service members, including *United States v. Windsor*,² *Obergefell v. Hodges*,³ and *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*.⁴

Founded in 2003, TAVA is a 501(c)(3) organization that acts proactively with other concerned organizations representing gay, lesbian, bisexual and transgender people to ensure that transgender veterans will receive appropriate care for their medical conditions. Further, TAVA helps in educating the Department of Veterans Affairs and the Department of Defense on issues regarding fair and equal treatment of transgender and transsexual

² Brief of Amicus Curiae OutServe-SLDN Inc. on the Merits in Support of Respondent Edith Windsor, *United States v. Windsor*, 133 S. Ct. 2675 (2013) (No. 12-307), 2013 WL 785634.

³ Brief of Amicus Curiae OutServe-Servicemembers Legal Defense Network and American Military Partner Association in Support of Petitioners, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (Nos. 14-556 et al.), 2015 WL 981531.

⁴ Brief of Outserve-SLDN, Inc. et al. in Support of Respondents, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (No. 16-111), 2017 WL 5152970.

individuals. TAVA also assists the general transgender community when deemed appropriate.

The Service Member Advocates Amici have an acute interest in the cases pending before the Court because they involve a fundamental and recurring issue of profound consequence to their members and the constituencies they serve—namely, whether discrimination against lesbian, gay, bisexual, and transgender (“LGBT”) Americans is prohibited by Title VII of the Civil Rights Act of 1964. As discussed more fully below, the answer to that question is clearly yes. Holding otherwise would have profoundly negative consequences for two equally important classes of individuals that the Service Member Advocates Amici are committed to serving: (1) LGBT family members of people serving in the U.S. Armed Forces; and (2) LGBT veterans transitioning to civilian employment.

SUMMARY OF ARGUMENT

The Service Member Advocates Amici strongly agree with the arguments advanced by petitioner in *Bostock v. Clayton County, Georgia*, No. 17-1618, and respondents in *Altitude Express, Inc. v. Zarda*, No. 17-1623, and *R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, No. 18-107 (collectively, the “Employees”), that discrimination on account of either sexual orientation or gender identity contravenes both the plain language and remedial spirit of Title VII. Specifically, under *any* of the several rationales set forth by the en banc Second Circuit opinion in *Zarda* and the Sixth Circuit opinion in *Harris Funeral*

Homes, discrimination against LGBT Americans constitutes impermissible discrimination “on the basis . . . of sex” according to the plain language of Title VII. In addition, the Service Member Advocates Amici also agree that discrimination based on an individual’s sexual orientation or transgender status easily qualifies as the kind of illegal sex stereotyping squarely foreclosed by this Court’s precedents.

The Service Member Advocates Amici will not repeat these arguments here. Instead, the Service Member Advocates Amici write to highlight for the Court the various ways that the unduly narrow interpretation of Title VII urged by the respondent in *Bostock* and petitioners in *Zarda* and *Harris Funeral Homes* (collectively, the “Employers”) would adversely affect LGBT family members of service members, LGBT veterans transitioning to civil employment, and the overall national security of the United States.

First, the cramped interpretation of Title VII urged by the Employers would undermine the financial stability and dignitary interests of LGBT family members of service members. Title VII ensures the financial stability of *all* military families, including LGBT military families,⁵ which often depend upon supplemental income to meet the needs of service members, their spouses, and their children. This protection is all the more important for LGBT families, which often face increased costs (such as those associated with adoption and surrogacy) and

⁵ This brief uses the terms “LGBT families” and “LGBT military families” to refer to families that have LGBT members old enough to secure employment to contribute to the family.

increased burdens (such as discrimination) due to their LGBT status. Title VII also safeguards the fundamental dignitary interests that employment provides LGBT family members of service members. As numerous studies have shown, employment provides a valuable source of self-worth and promotes mental health—both of which are necessary to counteract the arduous living circumstances that military families face, particularly while service members are deployed. Moreover, because LGBT military families are often required to live in areas of the country that are less accepting of LGBT individuals than other regions of the country, Title VII’s protections are especially critical to protecting the employment opportunities of LGBT family members of service members. As a result, unless Title VII is construed to prohibit employers from discriminating against LGBT people, LGBT family members of service members will suffer profound consequences in the form of economic hardship and deteriorating mental and physical health.

Second, interpreting Title VII in a manner that prohibits discrimination against LGBT individuals is likewise necessary to protect the interests of LGBT veterans. Many veterans transition to civilian employment following their time in the military. Not only do LGBT veterans face the same struggles that all veterans face, such as post-traumatic stress disorder (“PTSD”) and other difficulties adjusting to civilian life, these LGBT veterans also often face the same discrimination as other members of the LGBT community. Absent the full scope of Title VII’s protections as interpreted by the EEOC and the Second and Sixth Circuits, these veterans may

effectively be denied the opportunity to earn a living—despite their service to their country.

Third, ensuring equal employment opportunities for LGBT individuals furthers the national security interests of the United States. Specifically, past experience with DADT teaches that discrimination against LGBT people is detrimental to military morale. Such negative consequences are likely to recur if employers are permitted to discriminate against LGBT family members of service members—inflicting serious mental and other health effects not only on the family members but also the service members *themselves*. The ensuing decline in morale would negatively affect military recruitment and retention, depleting the resources most critical to the military’s mission.

At bottom, permitting employment discrimination against LGBT people under Title VII would harm the LGBT family members of service members, LGBT veterans attempting to transition to civilian employment, and thus the overall national security of the United States. Such results cannot be squared with the remedial goals of Title VII.

ARGUMENT

As the Employees correctly argue, Title VII protects LGBT Americans against employment discrimination. These critical protections likewise apply to LGBT family members of service members and LGBT veterans.⁶ Yet under the Employers’

⁶ This Court has not squarely determined whether Title VII applies to members of the U.S. Armed Forces as concerns

proposed interpretation, both these groups would be denied the employment benefits guaranteed by Title VII. As explained below, that denial would have profoundly damaging effects on LGBT family members of service members and LGBT veterans, and it would put the Nation's security at risk.

I. TITLE VII'S PROTECTIONS ARE INTEGRAL TO PROTECTING THE ECONOMIC AND DIGNITARY INTERESTS OF LGBT FAMILY MEMBERS OF SERVICE MEMBERS.

It is well-established that employment provides individuals and families essential financial and dignitary benefits—fundamental privileges that are promoted by Title VII's anti-discrimination provisions. In particular, a job provides financial stability, especially for families that cannot live comfortably on one military income. Moreover, employment enhances feelings of self-worth and fosters mental health, especially for family members who are required to live on a military base far from friends or family. These benefits are even more important for LGBT family members of service members, who are required to live in communities in the United States that are less accepting than other regions of the country. Under the interpretation of Title VII that the Employers are pursuing, however, LGBT family members of service members could be denied access to employment and suffer serious economic, physical, and mental consequences. And

their military employment. This brief does not address this issue.

while these concerns are relevant for the entire LGBT community, they are most acute for transgender family members, who face even more significant amounts of employment discrimination.

A. Title VII Protection Is Essential to Ensure That LGBT Family Members of Service Members Can Provide Vital Financial Support for Their Families.

Military service demands tremendous sacrifices from service members and their families. Recent surveys show that some of the most significant obstacles that service members and their families face stem from financial obligations. *See Amy Bushatz, Report Shows Finances as a Top Concern for Troops, Families*, Military.com (Mar. 1, 2018), <https://www.military.com/daily-news/2018/03/01/report-shows-finances-top-concern-troops-families.html>. This is no less true for LGBT military families—and perhaps more so. Moreover, because LGBT military families are often stationed in areas of the country that are less accepting of LGBT people than other regions of the country, Title VII’s protections are even more critical to ensuring that these families are not disadvantaged due to their relatives’ choice to serve. But unless Title VII is construed to prohibit discrimination based on sexual orientation and gender identity, LGBT family members of service members may be denied employment opportunities that provide vital financial support for their families—especially those families that include children.

1. *The income of family members of service members, including LGBT family members of service members, is crucial for the entire family's financial health.*

Despite their heroic service to our country, many military families are struggling financially, in the form of both higher debt burdens and the inability to meet basic needs, such as food. According to a 2017 survey by the Military Family Advisory Network (“MFAN”), 92.5% of military families carry some form of debt, and 60% of military families lack enough savings to cover three months of living with no income. Military Family Advisory Network, Military Family Support Survey 2017 Results 14–15 (2018), <https://militaryfamilyadvisorynetwork.org/wp-content/uploads/MFAN-Survey-Report-2018.pdf> [hereinafter MFAN Report]. The same study reported that about 17.5% of veteran families and 13% of service members and their spouses reported experiencing food insecurity. *Id.* When asked how they dealt with food insecurity, one respondent said: “I don’t eat. It’s as simple as that. If my kids need food and there’s no money til payday, I don’t eat.” *Id.* Likewise, the 2018 Military Family Lifestyle Survey conducted by Blue Star Families (“BSF”) shows that finances are a top stressor for military and veteran families. Blue Star Families, 2018 Military Family Lifestyle Survey Results (2019), https://bluestarfam.org/wp-content/uploads/2019/02/2018MFLS-Comprehensive-Infographic_v2.pdf [hereinafter BSF 2018 Survey Results] (finding that 62% of the respondents

reported experiencing stress due to their financial condition).

These financial difficulties are exacerbated by the high costs of relocation and overseas deployment, which are often required as part of military life. For example, according to one study, most military families relocate more than three times during the service members' military service, *Moving: An Inevitable Part of Military Life*, Military Family Advisory Network (June 27, 2018), <https://militaryfamilyadvisorynetwork.org/2018/06/moving-an-inevitable-part-of-military-life/>, and more than 80% of the respondents to the MFAN Report confirmed that moving caused high financial stress. See MFAN Report, *supra*, at 33. As one family member explained, "Each house needs new things, new vehicle registration, different climates require different types of equipment." *Id.* Overseas deployments likewise result in elevated costs for military families. For instance, one military spouse explained that "when we came back from overseas we had to rent a car for two months while we waited for our other car to get shipped. That was a massive expense." Sharon Epperson, Katie Young & Jessica Dickler, *Military Families Say This Is Their Top Concern*, CNBC (May 25, 2019, 10:00 AM), <https://www.cnbc.com/2019/05/24/for-military-families-financial-concerns-outweigh-deployment-issues.html>.

To combat these financial challenges, military families increasingly rely upon incomes from their civilian family members. According to a 2017 survey, 77% of military spouses reported that having two incomes was "vitally important" for their families. Blue Star Families, *Comprehensive Report on*

Military Family Lifestyle Survey 18 (2017), <https://www.secome.org/MFLS-ComprehensiveReport17-FINAL.pdf>. Despite the importance of this supplemental income, it is difficult for family members of service members to find steady employment due to the frequent relocation required by military service. For example, most of the respondents to the BSF survey ranked civilian spouse unemployment or underemployment as their top financial obstacle. BSF 2018 Survey Results, *supra*.

The numbers speak volumes: about a quarter of military spouses are unemployed—almost two and a half times the rate in America’s poorest neighborhoods. Julie Bogen, *The Dismal Career Opportunities for Military Spouses*, *The Atlantic* (Mar. 28, 2019), <https://www.theatlantic.com/family/archive/2019/03/majority-military-spouses-are-underemployed/585586/> (last updated Apr. 17, 2019) [hereinafter Bogen, *Dismal Career Opportunities*]. Such a staggering unemployment rate among military spouses is not surprising. Frequent relocations often result in gaps in employment and repeated change of employers, both of which are red flags for prospective employers. *Id.*

For all these reasons, financial stress is an increasingly pervasive fact of military life—one that would only be worsened under an interpretation of Title VII that permits discrimination.

2. *LGBT military families face unique challenges that aggravate the financial stress already experienced by other military families.*

Employment discrimination can have dire financial consequences for LGBT military families that are already experiencing the hardships of military life set out above. Eighty percent of LGBT households experience high debt levels that cause financial stress. Stacy Rapacon, *The High Cost of Being Gay*, U.S. News (June 18, 2018), <https://money.usnews.com/money/personal-finance/family-finance/articles/2018-06-18/the-high-cost-of-being-gay>. And according to a 2016 study on LGBT financial experience, 41% of LGBT people reported financial struggle, compared to 27% of the general population. Prudential, *The LGBT Financial Experience 2016-2017*, at 9 (2017), <http://corporate.prudential.com/media/managed/PrudentialLGBT2016-2017.pdf>. This disparity is not mere subjective opinion. To the contrary, an income gap linked to sexual orientation persists, as both gay men and lesbian women earn less than their heterosexual counterparts. *Id.* at 8. Bisexual and transgender people face even greater financial challenges. For example, both bisexual men and women experience a much higher poverty rate than their heterosexual and homosexual counterparts. Shabab Ahmed Mirza, *Disaggregating the Data for Bisexual People*, Ctr. for Am. Progress (Sept. 24, 2018, 9:00 AM), <https://www.americanprogress.org/issues/lgbt/reports/2018/09/24/458472/disaggregating-data-bisexual-people/>. Similarly, in a 2015 survey of transgender

people, 29% of respondents indicated that they were living in poverty, compared to 14% of the general population. Julian Edmonds, *Transgender People Are Facing Incredibly High Rates of Poverty*, Nat'l Women's L. Ctr. (Dec. 9, 2016), <https://nwlc.org/blog/income-security-is-elusive-for-many-transgender-people-according-to-u-s-transgender-survey/>. And when impoverished transgender people sought government benefits, one in five of them experienced unequal treatment, verbal harassment, or physical attack. *Id.*

LGBT people also often incur costs in building a family that heterosexual couples typically do not. For example, same-sex couples who want to raise children may choose adoption or surrogacy, each of which is costly. Adoption can cost anywhere between \$10,000 to more than \$50,000 depending on the type of adoption. A.D. Thompson, *How Much Does Adoption Cost Gay Dads*, Gays with Kids (Feb. 13, 2018), <https://www.gayswithkids.com/how-much-does-an-adoption-by-gay-dads-cost-2534597122.html>. Surrogacy costs even more. Same-sex couples increasingly choose to have children through surrogacy, and an informal study estimates that about 10 to 20 percent of donor eggs are used in surrogacy for those couples. Nara Schoenberg, *Gay Men Increasingly Turn to Surrogates to Have Babies*, Chi. Trib. (Nov. 23, 2016, 8:59 AM), <http://www.chicagotribune.com/lifestyles/health/sc-gay-men-having-babies-health-1130-20161123-story.html>. Each surrogacy costs about \$100,000 to \$200,000. *Id.* As a result, for LGBT military families who are already struggling financially, the dream of having children, if realized, will further strain their financial resources.

In short, LGBT military families face financial obstacles even beyond those of their heterosexual or cisgender counterparts, as their military service and LGBT identity produce compounding financial pressures. Title VII's anti-discrimination provisions are thus all the more important for these populations. Absent such protections, it would be even more difficult for LGBT military families to improve their financial position and overcome the significant disadvantages discussed above.

3. *Title VII protection is necessary to ensure that LGBT family members of service members can find employment where they are stationed.*

Service members and their families often cannot choose where they are stationed. But location is critical for LGBT military families, as the experience of being LGBT in America varies dramatically depending on where one lives. See Frank Bruni, Opinion, *The Worst (and Best) Places to Be Gay in America*, N.Y. Times (Aug. 25, 2017), <https://www.nytimes.com/interactive/2017/08/25/opinion/sunday/worst-and-best-places-to-be-gay.html>. Given that 6.1% of military service members self-identify as LGBT—and because military bases span the entire country—it is inevitable that many LGBT military families will be stationed in areas where local attitudes toward individuals identifying as LGBT are less accepting than the national average. See Sarah O. Meadows et al., RAND Corp., 2015 Department of Defense Health Related Behaviors

Survey (HRBS) 216 (2018), https://www.rand.org/content/dam/rand/pubs/research_reports/RR1600/RR1695/RAND_RR1695.pdf (showing that LGBT service members are present in all branches of the military); *Browse Base Guides*, Military.com, <https://www.military.com/base-guide/browse-by-service> (last visited June 30, 2019) (listing bases that span the country). In these areas, absent Title VII protections, there may be fewer employment opportunities for LGBT family members of service members, making it extremely difficult (if not impossible) for them to secure that crucial second income. That many military installations are located in remote areas, far from major cities where employment opportunities are more numerous, only exacerbates the difficulty in finding employment. Without Title VII protection, LGBT family members of service members can be denied the few available jobs in these areas and may have no income or have to travel long distances for work, both of which will burden their families.

The situation at Joint Readiness Training Center (“JRTC”) and Fort Polk—a U.S. Army installation located in Leesville, Louisiana—is instructive. Around 8,000 soldiers are stationed at JRTC Fort Polk, with 13,000 military family members living on- and off-post. *U.S. Army JRTC and Fort Polk*, U.S. Army, <https://home.army.mil/polk/index.php> (last visited June 30, 2019). But Leesville is a small town in decline. As of 2017, it had a total population of 6,335, a 3.3% decrease from the previous year. *Leesville, LA*, Data USA, <https://datausa.io/profile/geo/leesville-la/> (last visited June 30, 2019). Further, approximately 29% of the population in Leesville lives under the poverty line—

more than two times the national average. Simply put, there are few employment opportunities in Leesville for family members of the soldiers at Fort Polk.

In addition to the declining population and increasing poverty rate, Leesville is also isolated, with the nearest towns at least an hour away. Blake Stilwell, *These Are the Worst Places to Be Stationed for Every Branch of the US Military*, Business Insider (Mar. 6, 2018, 1:58 PM), <https://www.businessinsider.com/worst-places-to-be-stationed-for-every-branch-of-the-us-military-2018-3>. Worse still, because Louisiana lacks statutory prohibitions against sexual-orientation and gender-identity discrimination at the state level, LGBT family members of service members who are living in the Leesville area would have to travel that distance in the absence of Title VII protections. Given that these family members usually bear the burden of taking care of children and other family matters, this daily transit to work is simply not feasible. See Bogen, *Dismal Career Opportunities*, *supra*. As a result, LGBT military family members in Leesville may be denied the few available employment opportunities that they need to support their families (absent Title VII protection).⁷

In sum, Title VII's protections are crucial to ensure that LGBT family members of service members across the country receive equal

⁷ Leesville is only one example. From Fort Rucker Army Base in Alabama to Mountain Home Air Force Base in Idaho, LGBT military families stationed at these remote posts will struggle to find employment without Title VII protection.

consideration for the employment opportunities that provide vital financial support for their families.

B. Title VII Is Necessary to Protect the Health and Dignity of LGBT Family Members.

Denying protections for LGBT family members of service members will also have far-reaching effects beyond military families' pocketbooks. Employment confers essential health and dignitary benefits, while unemployment, underemployment, and workplace harassment conversely result in negative health consequences. Because the living circumstances of service members and their families already create particular difficulties in securing employment, stripping LGBT individuals of Title VII protections may effectively deny them the fundamental dignitary and health-related benefits of employment as well.

1. *Employment discrimination, particularly against LGBT individuals, has negative implications for physical, mental, and emotional health.*

Numerous studies have established that employment provides significant health benefits, while unemployment and underemployment are associated with lower levels of health and well-being. As the World Health Organization ("WHO") has recognized, the link between unemployment and poor health outcomes is an "undeniable fact of life." Stephen J. Watkins, *Unemployment and Health*, World Health, Nov.–Dec., at 18 (1992),

https://apps.who.int/iris/bitstream/handle/10665/49390/WH_11-12_1992_p18-19_eng.pdf?sequence=1&isAllowed=y. In particular, the WTO found that “[u]nemployment . . . creates stress by disturbing such important psychological elements as personal identity, time structuring and sense of self-esteem.” *Id.* Additionally, a study on the connection between underemployment and health concluded that underemployment is related to higher levels of chronic disease and depression, as well as lower levels of life and job satisfaction. See Daniel S. Friedland & Richard R. Price, *Underemployment: Consequences for the Health and Well-Being of Workers*, 32 *Am. J. Cmty. Psychology* 33, 40–41 (2003) (discussing the harms of all types of underemployment: status underemployment, income underemployment, and hours underemployment).

These findings apply with equal force to military families. For example, one study concluded that “employment . . . promotes the overall mental and physical well-being of military spouses” and “can contribute to an increased sense of belonging, independence, and self-esteem for the military spouse.” See Blue Star Families, *Military Family Lifestyle Survey* 36 (2015), https://ivmf.syracuse.edu/wp-content/uploads/2016/06/BSF-Report_FINAL.pdf. “Conversely, unemployment and underemployment can be linked to numerous decreases in individual well-being including life satisfaction and depression.” *Id.*

Employment discrimination against LGBT people in particular—whether by negative hiring and firing decisions or through workplace harassment—has been linked to adverse health outcomes. The

Williams Institute has found that “unsupportive social climates, created by anti-LGBT prejudice, stigma, and discrimination, expose LGBT individuals to excess stress, which, in turn, cause adverse health outcomes, resulting in health disparities for sexual minorities and transgender individuals compared with heterosexuals.” Christy Mallory et al., *The Williams Inst., The Impact of Stigma and Discrimination Against LGBT People in Arizona* 41–43 (2018), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Arizona-Impact-Discrimination-March-2018.pdf> (citing studies about stressors LGBT people face nationwide). The Williams Institute also found that discrimination, verbal harassment, and violence against LGBT people are associated with “lower self-esteem, higher rates of suicidal intention, anxiety, anger, post-traumatic stress,” and other symptoms. Brad Sears & Christy Mallory, *The Williams Inst., Documented Evidence of Employment Discrimination & Its Effects on LGBT People* 15 (2011), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Sears-Mallory-Discrimination-July-2011.pdf> (footnotes omitted). Perceived discrimination or fear of discrimination against LGBT people has also been linked to “higher prevalence of psychiatric disorders, psychological distress, depression, loneliness, and low self-esteem.” *Id.* (footnotes omitted).

Moreover, LGBT people must often conceal their identities in the workplace out of fear of discrimination. Studies have found that only about one-third of LGBT people are out to their coworkers. See Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation*

Prohibiting Discrimination and Providing for Equal Employment Benefits, 45 Loy. L.A. L. Rev. 715, 735 (2011) [hereinafter Pizer, *Workplace Discrimination*] (citing Gary J. Gates, The Williams Inst., Sexual Minorities in the 2008 General Social Survey: Coming Out and Demographic Characteristics 5 (2010), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Sexual-Minorities-2008-GSS-Oct-2010.pdf>); Human Rights Campaign, *Bisexual Visibility in the Workplace* (2018) (finding that bisexual individuals are 20% less likely to self-identify in the workplace than their gay or lesbian peers). Most LGBT people who concealed their identity at work stated that they did so because they “feared their employment would be at risk or that they would be harassed in the workplace.” Pizer, *Workplace Discrimination*, *supra*, at 735 (citing Lambda Legal & Deloitte Financial Advisory Services, LLP, 2005 Workplace Fairness Survey 4 (2006)). This fear of discrimination ultimately results in feelings of isolation and unhappiness, which in turn diminish morale and self-esteem. *See id.* at 736–37.

In short, the literature is conclusive: employment discrimination has deleterious effects on LGBT people’s health by denying them the critical benefits of employment.

2. *LGBT family members of service members are particularly vulnerable to the stressors of employment discrimination because of the circumstances of military life.*

Family members of service members are already at a disadvantage in finding work because of the challenges associated with military service. As discussed above, military families are more likely to endure frequent and disruptive moves, which are “associated with working fewer hours and earning less, in raw dollars, than civilian peers.” Sarah O. Meadows et al., *Employment Gaps Between Military Spouses and Matched Civilians*, 42 *Armed Forces & Society* 542, 557 (2016). Beyond these challenges, the military lifestyle also negatively affects family members’ employment due to “service member absence and ensuing child care difficulties, and employer bias against or stigmatization of military spouses.” Laura Werber Castaneda & Margaret C. Harrell, RAND Corp., *Military Spouse Employment: A Grounded Theory Approach to Experiences and Perceptions*, 34 *Armed Forces & Society* 389, 394–400 (2008).

In these circumstances, fulfilling employment is especially important to military family members. While a service member is deployed, family members who are separated seek out employment not only for financial needs but also to keep busy and to find personal fulfillment and independence. *See, e.g., id.* at 403. When asked why they want to work, one family member of a service member stated: “I guess the main reason I want to work is because I don’t

want to stay at the house day in and day out. . . . I would just go stir crazy if I just stayed inside all the time and never did anything.” *See id.* Another family member said: “I want to work because it establishes my own independence, bringing in my own income. It’s not all on my husband, so it establishes my role in the family.” *Id.* In sum, family members of service members are especially reliant on their employment for their own personal satisfaction, and Title VII’s protections are crucial to ensuring that employment.

As this Court recognized decades ago, discrimination “deprives persons of their individual dignity and denies society the benefits of wide participation in political, economic, and cultural life.” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 625 (1984). This principle continues to be as true today as when this Court declared it 35 years ago. Particularly because LGBT family members of service members make sacrifices for the well-being of every citizen when they endure frequent moves and family separation, they deserve to be protected against discrimination and its attendant dignitary and health-related harms under Title VII.

C. Title VII Protection Is Especially Critical for Transgender Family Members of Service Members.

Title VII’s protections are even more important for transgender family members of service members, who are particularly vulnerable to employment discrimination as members of the transgender community. Studies have repeatedly found that transgender job applicants face “an *astonishingly*

high degree of employment discrimination.” See Make the Road New York, *Transgender Need Not Apply: A Report on Gender Identity Job Discrimination* 4 (2010) (emphasis added). One study from 2010, for example, documented the extent of gender-identity discrimination even in liberal areas of the country. In that study, Manhattan retailers received carefully matched pairs of job applications, each of which was equivalent in all respects—age, ethnicity, interview skills, and merits—except transgender status. See *id.* at 5. The results of the study revealed a staggering 42% rate of discrimination against job seekers who were transgender. *Id.* Of the 24 employers tested, 11 extended an offer to the control tester but not to the transgender tester, only one employer extended an offer to the transgender tester but not the control tester, and only one employer extended offers to both testers. See *id.* at 11–12. Despite the study’s location in New York City, a traditionally liberal enclave, discrimination was pervasive—underscoring the need for applying Title VII protection to transgender individuals.

The above study is not an outlier. According to a 2015 survey of almost 28,000 transgender people, the transgender community is unemployed at a rate of 15%—three times that of the general population at the time. See Nat’l Ctr. for Transgender Equal., *The Report of the 2015 U.S. Transgender Survey* 12 (2016), <https://www.transequality.org/sites/default/files/docs/USTS-Full-Report-FINAL.PDF> [hereinafter 2015 Survey]. The survey also found that 16% of respondents reported losing a job because of their gender identity or expression, and 30% of

respondents who had a job in the year leading up to the survey reported being fired, denied a promotion, or experiencing some other form of mistreatment. *See id.* at 12–13. In light of this discrimination, transgender people may be compelled to turn to harmful or less appealing alternatives, such as concealing their gender identity or resigning altogether. Indeed, 77% of respondents who had a job in the year leading up to the survey reported taking those very steps to avoid mistreatment in the workplace. *See id.* at 12.

As these statistics make clear, the transgender community is acutely vulnerable to employment discrimination. If there is such astonishing and prevalent employment discrimination in New York City—an ostensibly tolerant and progressive city—employment discrimination in more rural areas of the country where military families are likely to be stationed is all but guaranteed to be the same or worse.

II. TITLE VII PROTECTIONS ARE CRUCIAL FOR VETERANS TRANSITIONING TO CIVILIAN EMPLOYMENT.

There are an estimated one million LGBT veterans in the United States. Disabled American Veterans, *see LGBT Veterans*, DAV, <https://www.dav.org/veterans/resources/lgbt-veterans/> (last visited June 30, 2019), more than 134,000 of whom are transgender, *see Military & Veterans*, Nat'l Ctr. for Transgender Equal., <https://transequality.org/issues/military-veterans> (last visited June 30, 2019). Title VII is essential to protect these veterans against (1) the difficulties they

face transitioning to civilian life that are created by the compounding effects of veteran status and LGBT status, as well as (2) the particular difficulties associated with discrimination due to “Less than Honorable” discharge characterizations that plague LGBT veterans. Additionally, the ban on transgender individuals serving in the military has created unique problems for transgender veterans, for whom Title VII serves as a crucial backstop.

A. Veterans, Including LGBT Veterans, Often Face Difficulty Transitioning to Civilian Employment.

Many veterans face difficulties finding civilian employment after their service has ended. In a survey of 1,845 post-9/11 veterans, nearly two-thirds of respondents reported facing a difficult transition to civilian life, with nearly half saying they were unprepared for the move to the civilian workforce. Derek Turner, *Vets Facing Difficult Transition to Civilian Jobs*, Military.com (last visited June 30, 2019), <https://www.military.com/veteran-jobs/career-advice/job-hunting/vets-facing-difficult-transition-to-civilian-jobs.html>. According to the same survey, 22% of the veterans surveyed were unemployed, *id.*— a drastically disproportionate rate compared to the current general unemployment rate of approximately 3.6%. Council of Economic Advisors, *Unemployment Rate Falls to Lowest Level in Nearly 50 Years; U.S. Economy Adds 263,000 New Jobs in April*, WhiteHouse.gov (May 3, 2019), <https://www.whitehouse.gov/articles/unemployment-rate-falls-lowest-level-nearly-50-years-u-s-economy-adds-263000-new-jobs-april/>.

These challenges in finding employment are particularly onerous for LGBT veterans, who not only face the same sorts of PTSD and other traumas endured by all veterans,⁸ but also PTSD directly connected to discrimination on the basis of their LGBT status. In 2004, a study cited in the American Psychological Association found that 47.2% of LGBT service members had at least one experience of verbal, physical, or sexual assault, 8% of LGBT service members reported experiencing a sexual assault, and 8% reported experiencing a physical assault while serving in the military. Arthur Goldsmith & Timothy Diette, *Exploring the Link Between Unemployment and Mental Health Outcomes*, Am. Psychol. Ass'n (Apr. 2012), <https://www.apa.org/pi/ses/resources/indicator/2012/04/unemployment>. Further, Servicemembers Legal Defense Network (MMAA's predecessor) documented over 4,600 incidents of anti-gay harassment toward active-duty LGBT service members between the years 1994–2002. Derek J. Burks, *Lesbian, Gay, and Bisexual Victimization in the Military: An Unintended Consequence of "Don't Ask, Don't Tell?"*, Am. Psychol. (Oct. 2011), at 606 http://www.mopaonline.org/uploads/9/4/5/9/9459095/lesbian_gay_and_bisexual_victimization_in_the_military_an_unintended_consequence_of_dont_ask_dont_tell.pdf.

⁸ A 2014 study found the rate of veterans with PTSD to be 15 times higher than civilians. *Veterans & Active Duty*, Nat'l All. on Mental Illness, <https://www.nami.org/Find-Support/Veterans-and-Active-Duty> (last visited June 30, 2019).

Those veterans who experienced these types of emotional or physical trauma while serving were found to be at the greatest risk of having difficulties readjusting to civilian life and successfully entering the workforce. Though these surveys and studies predate the repeal of DADT, their results are still instructive. Notably, all it takes is one emotionally distressing experience to reduce by 26% the chance that a veteran will easily re-enter civilian life. *See* Rich Morin, Pew Social & Demographic Trends, *The Difficult Transition from Military to Civilian Life 1* (2011), <https://pdfs.semanticscholar.org/d1a0/aa645a61d6b332b059275cc2937d40b6bb59.pdf>.

In light of these challenges that veterans already face from their time in the military, Title VII's protections are vital to removing a potentially significant impediment to their ability to return to civilian life.

B. LGBT Veterans Face Unique Discrimination Based on Discharge Status.

Before 1993, service members who were found to have engaged in “homosexual acts” or made a “homosexual admission” were likely to be separated from military service with a “Less than Honorable” discharge characterization. *Handbook of LGBT Elders, An Interdisciplinary Approach to Principles, Practices, and Policies* 230 (Debra A. Harley et. al., eds., 2016). More recently, President Donald Trump’s policy disqualifying transgender individuals from military service may have similar consequences, allowing transgender servicemen and servicewomen

to be discharged with the same less than honorable discharge characterization. *See, e.g.,* Tyler Solorio, *Consequences of a Trans Ban*, Swords to Plowshares (Sept. 26, 2017), <https://www.swords-to-plowshares.org/2017/09/26/consequences-of-a-trans-ban/>. Applying Title VII to LGBT people is necessary to ensure that these LGBT veterans—who were unfairly discharged because of their sexual orientation or gender identity—do not experience ongoing or additional employment discrimination because of that earlier, unfair treatment by the military.

These less than honorable discharges can have significant and lasting consequences on veterans' employment prospects. For example, a characterization less than Honorable may force LGBT veterans to out themselves to potential employers if the employer asks them to explain the circumstances of their discharge. In addition, discharge paperwork may reveal a veteran's sexual orientation by denoting that the veteran was discharged for "homosexual admission" or "homosexual conduct," and a transgender veteran's gender identity by showing their "dead name" (the name given at birth). Because of such compelled disclosure of sexual orientation or gender identity, LGBT veterans face the very real prospect of discrimination by employers who disapprove of LGBT individuals—in the absence of Title VII protections.

Moreover, because veterans who do not receive an honorable discharge may be denied access to some key veteran benefits designed to ease their life following military service, Title VII is necessary to ensure that these veterans have access to

employment opportunities. For example, veterans who do not receive an honorable discharge are not eligible for benefits under the Montgomery G.I. Bill—Active Duty, 38 U.S.C. § 3011, or the Post-9/11 Veterans Educational Assistance Act of 2008, 38 U.S.C. § 3311, which provide veterans with access to training and education. *See* Jennifer Mcdermott, *Discharged and Jobless: Veterans Seek Change in Hiring Rules*, The Associated Press (May 24, 2018), <https://www.military.com/daily-news/2018/05/25/discharged-and-jobless-veterans-look-for-change-in-hiring-rules.html>. Moreover, if the discharge characterization is Other than Honorable or worse, these same veterans may also be ineligible to receive a military pension or to apply for a Veterans Affairs home loan, and they lose their veterans' preference rights in the hiring process for federal jobs. Denise Dayton, *Unemployment After an Other-Than-Honorable Discharge*, Houston Chron., <https://work.chron.com/unemployment-after-otherthanhonorable-discharge-18835.html> (last updated Aug. 19, 2018).

Title VII protection is thus necessary to ensure that these veterans are not penalized for their sexual orientation or gender identity twice: first, by unfair discharge and denial of veterans' benefits; and second, by denying them access to any *other* employment opportunities afterward.

C. The Ban on Transgender Service Members Makes Title VII Protection Even More Essential for Transgender Individuals.

At a time when military policy places enormous burdens on transgender service members who desire to live openly, Title VII protections are all the more crucial to ensure that those who choose to leave the Armed Forces have an opportunity for employment in the private sector. On March 12, 2019, the U.S. Department of Defense released a memorandum effectively prohibiting transgender individuals from enlisting in the military and preventing most transgender people from living as openly transgender in the military. *See* Office of the Deputy Sec’y of Def., Directive-type Memorandum (DTM)-19-004 – Military Service by Transgender Persons and Persons with Gender Dysphoria (Mar. 12, 2019), <https://www.esd.whs.mil/Portals/54/Documents/DD/isuances/dtm/DTM-19-004.pdf?ver=2019-03-13-103259-670>. The memorandum requires “all persons [to] be subject to the standard, requirement, or policy associated with their biological sex.” *Id.*; *see also* Emily Tillett, *Controversial Trump Administration Ban on Transgender Troops Goes Into Effect*, CBS News (Apr. 12, 2019, 3:14 PM), <https://www.cbsnews.com/news/transgender-military-ban-trump-administration-ban-on-transgender-troops-goes-into-effect/>. The import of the current policy is clear: except in limited circumstances, many transgender people who are currently serving, and all who wish to join, may serve only if they conform their gender identity to the same sorts of sex stereotypes long prohibited by Title VII. *See Price*

Waterhouse v. Hopkins, 490 U.S. 228, 230–32 (1989) (recognizing sex stereotyping as actionable under Title VII); *see also, e.g., M.A.B. v. Bd. Of Educ. of Talbot Cty.*, 286 F. Supp. 3d 704, 714 (D. Md. 2018) (“[D]iscrimination on the basis of transgender status constitutes gender stereotyping because ‘by definition, transgender persons do not conform to gender stereotypes.’” (citation omitted)).

Although the effects of the ban remain to be seen, its likely effect will be to force transgender service members to leave service prematurely and face a job market that discriminates against them at astonishing rates. According to one survey, 10% reported being unemployed—twice the rate of the U.S. population at the time. *See Nat’l Ctr. for Transgender Equal., Military Service by Transgender People* (2017), <http://www.transequality.org/sites/default/files/docs/usts/USTS-VeteransDayReport.pdf>. Indeed, the transgender ban, combined with the interpretation of Title VII urged by the Employers, results in a Hobson’s choice for transgender service members: face a discriminatory private-sector job market without the guaranteed protections of Title VII, or serve in the military while being required to conceal their gender identity to the detriment of their mental and physical health. This is untenable.

III. EQUAL EMPLOYMENT OPPORTUNITY FOR LGBT INDIVIDUALS IS A NATIONAL SECURITY INTEREST.

Finally, guaranteeing equal employment opportunity for LGBT people under Title VII will also further the national-security interests of the United

States. Tens, if not hundreds, of thousands of military families include someone who identifies as LGBT. Excluding these LGBT people from Title VII's employment protections harms not only them but also the military and the Nation. In particular, employment discrimination against LGBT family members of service members, as well as LGBT veterans, will undermine the morale of service members, adversely impacting military recruitment and retention. This will, in turn, diminish military readiness and weaken national security—results that are plainly inconsistent with either the letter or spirit of Title VII.

A. Allowing LGBT Discrimination Will Diminish Military Morale.

First, military morale will suffer under a system that permits discrimination against LGBT family members because the negative financial and health effects on those family members demoralize the service members themselves.

As noted above, in many areas across the country where military families are compelled to live due to the military's needs, LGBT family members of service members face greater risk of discrimination without the protections of Title VII. But as studies have shown, the deleterious effects of such discrimination are not confined to the LGBT family members: the mental health of military spouses directly affects the mental health and morale of service members *themselves*—and thus the military as a whole. *See* Helen Verdeli, et al., *The Case for Treating Depression in Military Spouses*, 25(4) J. Fam. Psychol. 488–496 (2011); *see also* Paul Vincent

Courtney, *Prohibiting Sexual Orientation Discrimination in Public Accommodations: A Common Law Approach*, 163 U. Pa. L. Rev. 1497, 1534 (2014–2015) (“[D]iscrimination harms not only the dignity of the immediate victim of the discriminatory act but also the dignity and autonomy of those who, fearing such discrimination, feel forced to comply with heterosexual norms.”).

Moreover, beyond this inextricable link between the mental health of LGBT family members and service members, the threat of LGBT discrimination that would be sanctioned under the Employers’ interpretation of Title VII may also force service members to conceal their own identity to prevent “outing” an LGBT spouse—essentially forcing the service member back into the closet, even where the military otherwise permits them to serve openly. As the military’s experience with DADT makes clear, however, this concealment damages morale. *See, e.g.*, Jeremy T. Goldbach & Carl Andrew Castro, *Lesbian, Gay, Bisexual, and Transgender (LGBT) Service Members: Life After Don’t Ask, Don’t Tell*, *Current Psychiatry Rep.* 18:56, at 2 (online ed. Apr. 16, 2016), <http://cir.usc.edu/wp-content/uploads/2016/04/GoldbachCastro-LGBT-Military.pdf> (“[C]oncealment of [one’s] sexual orientation while in the service was associated with higher rates of depression and PTSD.”).

By contrast, the military found that the repeal of DADT promoted the kind of respect and acceptance that *strengthens* morale. Then Secretary of Defense Chuck Hagel memorialized this sentiment in a June 2013 address:

Our nation has always benefited from the service of gay and lesbian soldiers, sailors, airmen, and coast guardsmen, and Marines. Now they can serve openly, with full honor, integrity and respect. This makes our military and our nation stronger; much stronger. The Department of Defense is very proud of its contributions to our nation's security. We are very proud of everything the gay and lesbian community have contributed and continue to contribute. With their service, we are moving closer to fulfilling the country's founding vision, that all of us are created equal.

U.S. Dep't of Def., Remarks by Secretary Hagel at the Lesbian, Gay, Bisexual, Transgender Pride Month Event in the Pentagon Auditorium (June 25, 2013), <http://archive.defense.gov/transcripts/transcript.aspx?transcriptid=5262>. Simply put, experience has proven that inclusive policies that protect the dignity of all service members *and their families* are indispensable to high morale, while exclusive and discriminatory policies—which would be permitted under the Employers' formulation of Title VII—undermine it.

B. Decreased Morale Will Directly Affect Recruitment and Retention of Service Members.

Second, declining to recognize sexual-orientation and gender-identity discrimination as impermissible forms of sex discrimination under Title VII would

also hinder recruitment and retention of service members—jeopardizing the Nation’s security. This is so because the adverse effects on morale noted above will inevitably reduce the manpower of the military and weaken its capacity as the world’s greatest fighting force.

Recruiting and retaining the best people is essential to maintaining the United States’ all-volunteer military. See Joanne Marshall-Mies, David Westhuis & Richard Fafara, *US Army Morale, Welfare and Recreation (MWR) Programmes: Links to Readiness and Retention*, *Res Militaris* vol. 1, no. 2 Summer, at 3 (2011), http://resmilitaris.net/ressources/10144/30/res_militaris_-

[_us_army_morale_welfare_and_recreation_mwr_programmes.pdf](http://resmilitaris.net/ressources/10144/30/res_militaris_-us_army_morale_welfare_and_recreation_mwr_programmes.pdf) (“The [military] understands that in order to attract and retain top quality soldiers, it must provide a quality of life comparable to that in the civilian community.”). Yet the military today is already facing problems in recruiting and retaining service members. Last year Army officials “were touting a plan to increase the force by 7,500 soldiers in fiscal year 2019. That didn’t happen.” Meghan Myers, *The Army Is Supposed to Be Growing, But This Year, It Didn’t at All*, *Army Times* (Sept. 21, 2018), <https://www.armytimes.com/news/your-army/2018/09/21/the-army-is-supposed-to-be-growing-but-this-year-it-didnt-at-all/>. Instead, the Army fell short of its recruitment goal by 10,000, even while it was offering \$40,000 in bonuses, two-year enlistments, and student loan repayment to get recruits through the door. *Id.*

To exacerbate the problem, the population of Americans fit for military service is dwindling. In

fact, according to 2017 Pentagon data, 71 percent of Americans between the ages of 17 and 24 are ineligible to serve in the military. Thomas Spoehr & Bridget Handy, *The Looming National Security Crisis: Young Americans Unable to Serve in the Military*, The Heritage Found. Backgrounder, at 1 (abstract) (Feb. 13, 2018), <https://www.heritage.org/sites/default/files/2018-02/BG3282.pdf> (citing decreased high school graduation rates, increased rates of obesity, and past criminal history as major factors that disqualify otherwise-qualified service member candidates). Summarizing these challenges, the commander of the Army's Initial Military Training Command put it quite bluntly: "I would argue that the next existential threat we have . . . is the inability to man our military." *Id.* (alteration in original) (citation omitted). In short, America needs a strong military to defend its national interests, and that military depends on qualified volunteers—a universe of individuals that is already contracting.

Declining retention of soldiers not only directly affects the military's mission by denying the military necessary personnel, but it is also costly. For example, the military expends considerable resources training service members. When service members are forced to leave, the fruits of those investments are lost, and the military must expend additional resources to recruit and train replacements for those lost soldiers. Indeed, according to some estimates, the cost of the Pentagon's DADT policy exceeded \$360 million over the course of ten years, including almost \$80 million in recruiting costs to replace service members that left the Armed Forces. *Report: 'Don't Ask, Don't Tell' costs \$363M*, USATODAY.com

(updated Feb. 14, 2006, 7:17 PM), https://usatoday30.usatoday.com/news/Washington/2006-02-14-don't-ask-report_x.htm.

Against this background, declining recruitment and retention of service members with LGBT family members would be particularly problematic. Yet the decreased morale resulting from discrimination against family members of service members will likely do exactly that: damage the military's ability to recruit and retain qualified individuals. See Gary J. Gates, The Williams Inst., Effects of "Don't Ask, Don't Tell" on Retention Among Lesbian, Gay and Bisexual Military Personnel 1 (2007), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-EffectsOfDontAskDontTellOnRetention-Mar-2007.pdf> (finding that an average of 4,000 LGB service members per year over a ten-year period would have been recruited or retained without DADT). While many factors affect the decision to join or reenlist, one key factor is the influence of family members. RAND Corp., Nat'l Def. Research Inst., Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment 400 (1993), https://www.rand.org/content/dam/rand/pubs/monograph_reports/2009/RAND_MR323.pdf. If family members faced employment without Title VII protections, LGBT service members may rationally decide to leave military service rather than subject their spouses or children to the financial and dignitary harms of discrimination in places where necessary anti-discrimination protections do not exist.

A strong military is critical to our Nation's security. Permitting discrimination against LGBT individuals will weaken the strength and readiness of the Armed Forces, while recognizing Title VII's application to sexual orientation and gender identity would fortify it. In particular, discrimination against LGBT family members of service members will damage morale and encourage service members to leave the armed forces to avoid continued harm to a loved one. History shows that declining retention results in both reduced manpower and increased costs for the Nation's military. Adopting the Employees' interpretation of Title VII would avoid this result.

CONCLUSION

For the reasons above, as well as those explained by both the Employees and other amici in their support, the Service Member Advocates Amici respectfully request that the Court affirm the judgments of the Second and Sixth Circuits and reverse the judgment of the Eleventh Circuit.

Respectfully submitted,

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July 3, 2019