

CAPITAL CASE
No. 18-8029

IN THE
Supreme Court of the United States

CHARLES RUSSELL RHINES, *Petitioner,*
—v.—

DARIN YOUNG, WARDEN, SOUTH DAKOTA STATE PENITENTIARY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

**MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE*
AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION,
ACLU OF SOUTH DAKOTA, GLBTQ LEGAL ADVOCATES
& DEFENDERS, HUMAN RIGHTS CAMPAIGN, LAMBDA
LEGAL DEFENSE AND EDUCATION FUND, INC.,
NATIONAL CENTER FOR LESBIAN RIGHTS,
AND NATIONAL LGBT BAR ASSOCIATION,
IN SUPPORT OF PETITIONER**

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**MOTION FOR LEAVE TO FILE BRIEF AS
AMICI CURIAE AMERICAN CIVIL LIBERTIES
UNION, AMERICAN CIVIL LIBERTIES UNION
OF SOUTH DAKOTA, GLBTQ LEGAL
ADVOCATES & DEFENDERS, HUMAN RIGHTS
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This case presents the opportunity to decide whether juror bias based on sexual orientation infringes on the Sixth Amendment right to an impartial jury. Proposed *amici curiae* are civil rights groups dedicated to ensuring that our Constitution’s promises of equality, dignity, and fundamental fairness apply fully to people who are lesbian, gay, bisexual, and transgender, and are well-suited to submit a brief in this case. Accordingly, *amici* timely notified counsel of record for both parties that they intended to submit the attached brief more than ten days prior to filing. Counsel for Petitioner consented to the filing of this brief, and counsel for Respondent declined to grant consent. Therefore, pursuant to Supreme Court Rule 37.2(b), *amici* respectfully move this Court for leave to file the accompanying *amici* brief in support of Petitioner.

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with approximately 2 million members and supporters dedicated to defending the principles embodied in the Constitution and has served as counsel in cases including *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), *Obergefell v. Hodges*, 135 S. Ct. 2584

(2015), and *United States v. Windsor*, 570 U.S. 744 (2013). The ACLU of South Dakota is a regional chapter of the ACLU.

GLTBQ Legal Advocates & Defenders works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation, and has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbian, gay, bisexual, and transgender people and people living with HIV and AIDS.

Human Rights Campaign (“HRC”) is the largest national lesbian, gay, bisexual, and transgender political organization. HRC envisions an America where lesbian, gay, bisexual, and transgender people are ensured of their basic equal rights, and can be open, honest, and safe at home, at work, and in the community. Among those basic rights is freedom from discrimination and equal justice under law.

Lambda Legal Defense and Education Fund, Inc. is the oldest and largest national legal organization whose mission is to achieve full recognition of the civil rights of LGBT people and everyone living with HIV and has served as counsel of record or *amicus curiae* in some of the most important Supreme Court cases regarding the rights of LGBT people and people living with HIV. *See, e.g., Obergefell*, 135 S. Ct. 2584; *Windsor*, 570 U.S. 744; *Lawrence v. Texas*, 539 U.S. 558 (2003); *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Romer v. Evans*, 517 U.S. 620 (1996).

The National Center for Lesbian Rights has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional, civil, and criminal rights, having served as counsel in cases including *Obergefell*, 135 S. Ct. 2584, and *Pavan v. Smith*, 137 S. Ct. 2075 (2017), and *amicus curiae* in cases such as *Masterpiece Cakeshop*, 138 S. Ct. 1719.

The National LGBT Bar Association is a non-profit membership-based professional association with more than 10,000 members and subscribers, including lawyers, judges, legal academics, law students, and affiliated legal organizations.

Proposed *amici* have a vital interest in eradicating bias based on sexual orientation from America's legal system, including our criminal legal system, and therefore respectfully request leave to file the attached brief urging this Court to grant the petition.

Respectfully submitted,

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Dated: March 25, 2019

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INTEREST OF *AMICI CURIAE*¹

Amici are civil rights groups dedicated to ensuring that our Constitution’s promises of equality, dignity, and fundamental fairness apply fully to people who are lesbian, gay, bisexual, and transgender. *Amici* have a vital interest in eradicating bias based on sexual orientation from America’s legal system, including the criminal legal system.²

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with approximately 2 million members and supporters dedicated to defending the principles embodied in the Constitution and our nation’s civil rights laws. The ACLU of South Dakota is a regional chapter of the ACLU. The ACLU and the ACLU of South Dakota have long fought to ensure that lesbian, gay, bisexual, and transgender people are treated equally and fairly under law and have served as counsel in cases including *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), *Obergefell v. Hodges*, 135 S. Ct. 2584

¹ Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amici* made a monetary contribution intended to fund preparation or submission of this brief. Counsel of record for all parties were timely notified of *amici*’s intention to file this brief more than ten days prior to its filing.

² This brief is limited to addressing bias based on sexual orientation. Although not at issue in this case, *amici* recognize that bias based on gender identity is a pernicious problem that people who are transgender continue to face.

(2015), and *United States v. Windsor*, 570 U.S. 744 (2013).

Through litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders (“GLAD”) works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals and transgender individuals and people living with HIV and AIDS. GLAD is committed to a world in which all people are treated equally under the law, particularly within the criminal justice system.

Human Rights Campaign (“HRC”) is the largest national lesbian, gay, bisexual, and transgender political organization. HRC envisions an America where lesbian, gay, bisexual, and transgender people are ensured of their basic equal rights, and can be open, honest, and safe at home, at work, and in the community. Among those basic rights is freedom from discrimination and equal justice under law.

Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) is the oldest and largest national legal organization whose mission is to achieve full recognition of the civil rights of LGBT people and everyone living with HIV through impact litigation, education, and public policy work. Founded in 1973, Lambda Legal works across the country to challenge systemic bias and discrimination LGBT and HIV-affected communities face and, in 2005, established a Fair Courts Project

to expand access to justice in the courts for these communities and to support judicial independence and diversity. Lambda Legal has been counsel in numerous cases establishing constitutional protections for LGBT people including *Obergefell*, 135 S. Ct. 2584 (establishing marriage equality), and *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding unconstitutional state law criminalizing same-sex intimacy). Having researched and written extensively regarding the experiences of LGBT and HIV-affected people in the courts³ and with voir dire,⁴ Lambda Legal has appeared as *amicus curiae* in *Berthiaume v. Smith*, 875 F.3d 1354 (11th Cir. 2017) (specific voir dire on bias based on sexual orientation required where sexual orientation is bound up with the issues at trial), *SmithKline Beecham Corp. v. Abbott Laboratories*, 740 F.3d 471 (9th Cir. 2014) (classifications based on sexual orientation are subject to heightened scrutiny and equal protection prohibits peremptory strikes based on sexual orientation), and *People v. Douglas*, 232 Cal. Rptr. 3d 305 (Ct. App. 2018) (analysis of whether a party may have had a legitimate reason for exercising a peremptory challenge in addition to an invidious reason is inapplicable when considering remedy for invidious discrimination in jury selection). The communities Lambda Legal

³ See, e.g., Lambda Legal, *Protected and Served? A National Survey Exploring Discrimination by Police, Prisons and Schools Against LGBT People and People Living with HIV in the United States* (2014), <http://tinyurl.com/ya42b4oo>.

⁴ See, e.g., Lambda Legal, *Jury Selection and Anti-LGBT Bias: Best Practices Guide to Voir Dire on LGBT Issues* (2015), <http://tinyurl.com/yxdosfna>.

represents depend upon a fair and impartial judicial system to enforce their constitutional and other rights.

The National Center for Lesbian Rights (“NCLR”) is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional, civil, and criminal rights. NCLR has a particular interest in promoting equal treatment of LGBT youth and adults in the courts.

The National LGBT Bar Association is a non-profit membership-based 501(c)(6) professional association with more than 10,000 members and subscribers, including lawyers, judges, legal academics, law students, and affiliated legal organizations supportive of lesbian, gay, bisexual, and transgender rights. The National LGBT Bar Association and its members work to promote equality for all people regardless of sexual orientation or gender identity or expression, and fight discrimination against LGBT people as legal advocates. The organization promotes the equitable treatment of LGBT individuals in the legal system and has numerous programs and policy initiatives aimed at furthering this goal.

SUMMARY OF ARGUMENT

Amici urge this Court to take this opportunity to hold that prejudice against people who are lesbian, gay, or bisexual must play no part in jury decision-making, and especially in the determination of whether a person lives or dies. This Court has properly found that racial animus in juror deliberations interferes with the right to a fair and impartial jury. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). The prevalence and persistence of discrimination against lesbian, gay, and bisexual people strongly support the application of *Peña-Rodriguez* to bias based on sexual orientation.

The history of discrimination against lesbian, gay, and bisexual people in nearly every aspect of life illustrates the need to safeguard against sexual orientation bias in our nation’s judicial system. Well into the last century, lesbian, gay, and bisexual people were subject to explicit discrimination, including being “prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015). Until the mid-twentieth century, same-sex intimacy was often criminalized. *See id.*; *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003) (holding unconstitutional state law criminalizing same-sex intimacy). While many of the laws and policies that authorized such discrimination have been repealed or found unconstitutional, recent years have brought renewed efforts to allow discrimination against lesbian, gay, and bisexual people by public and private actors and

to relegate lesbian, gay, and bisexual people to an inferior status in law.

This pattern of enduring bias is reflected in our nation's legal system. Lesbian, gay, and bisexual people experience discrimination both when they serve as jurors and when they are litigants. Bias based on sexual orientation in jury deliberations reinforces historical prejudice against lesbian, gay, and bisexual people and undermines the integrity of our judicial system. Such bias also violates the Sixth Amendment right to an impartial jury. Accordingly, where juror *voir dire* and other procedural safeguards fail to prevent bias based on sexual orientation from infecting the decisions of the jury, litigants must be allowed to present evidence of bias based on sexual orientation to the court.

This Court should grant certiorari to settle this important question of federal law by clarifying that *Peña-Rodriguez* applies to cases, like this one, involving bias based on sexual orientation.

ARGUMENT

I. THE SIXTH AMENDMENT REQUIRES THAT JURY DECISION-MAKING BE FREE FROM BIAS BASED ON SEXUAL ORIENTATION, PARTICULARLY WHERE SUCH BIAS MOTIVATES A DEATH SENTENCE.

“Our law punishes people for what they do, not who they are. Dispensing punishment on the basis of an immutable characteristic flatly contravenes this guiding principle.” *Buck v. Davis*, 137 S. Ct. 759, 778 (2017). That is particularly true where, as here, the jury’s bias likely made the difference between life and death. *See Turner v. Murray*, 476 U.S. 28, 35 (1986) (observing that the risk of bias “infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence”).

Juror deliberations ordinarily are considered immune from judicial review, but this Court has established an important exception for cases involving bias in the jury room. *Peña-Rodriguez*, 137 S. Ct. 855. In *Peña-Rodriguez*, after the jury voted to convict and was discharged, two jurors came forward to reveal evidence that racial animus may have played a role in the jury’s decision. *Id.* at 861–62. Specifically, the jurors shared that another juror had stated: “I think he did it because he’s Mexican and Mexican men take whatever they want.” *Id.* at 862. The Court found that evidence of anti-Mexican bias “cast serious doubt on the fairness and impartiality of the jury’s deliberations and resulting verdict.” *Id.* at 869. Accordingly, the Court held that the state’s

no-impeachment rule must give way to allow the trial court to consider the evidence of juror bias. *Id.*

The concerns of racial bias infecting the jury that motivated this Court in *Buck* and *Peña-Rodriguez* apply with equal force to evidence the jury's decision to sentence Petitioner Charles Russell Rhines to death was motivated, at least in part, by bias against him because he is a gay man. Mr. Rhines has offered evidence that some of the jurors who voted to impose the death penalty in 1993 relied on the pernicious stereotype that the alternative—a life sentence served in a men's prison—was something he would enjoy as a gay man. These beliefs were rooted in long-held stereotypes that gay men are sexually deviant or sexual predators. *See, e.g., Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 984 (N.D. Cal. 2010). In fact, lesbian, gay, and bisexual people face a higher risk than heterosexual prisoners of being victims of sexual abuse by other prisoners and staff. Nat'l Prison Rape Elimination Comm'n Report 73 (2009), <http://tinyurl.com/y7q96fcs>.

One juror recalled that, during deliberations, there was “a lot of disgust” about the fact that Mr. Rhines was gay. App. 72. Another said that jurors knew Mr. Rhines was gay and “thought that he shouldn't be able to spend his life with men in prison.” App. 70. A third recounted hearing another juror say that, if the jury returned a life sentence for Mr. Rhines, “if he's gay, we'd be sending him where he wants to go.” App. 68. A note from the jury during deliberations highlights the role this pernicious stereotype played in its decision-making process: “We know what the death penalty means,” the jury wrote.

App. 64. “But we have no clue as to the reality of life without parole.” *Id.* The jurors continued with a series of questions aimed at whether Mr. Rhines would be in proximity to other men in prison. Would he “be allowed to mix with the general inmate population”? *Id.* Would he be allowed to “brag about his crime to other inmates, especially new and or young men”? App. 65. Would he “have a cellmate”? App. 66. The note suggests that at least some members of the jury accepted the notion that life in prison without parole would be enjoyable for a gay person—so much so that they felt it was necessary to impose the death penalty instead. In other words, there is disturbing evidence that, if credited, shows the jury sentenced Mr. Rhines to death in significant part because he is gay. Yet Mr. Rhines has never been allowed to present this evidence to a court.

The evidence of juror bias in this case raises concerns about a tainted death sentence similar to the racially biased verdicts condemned by this Court in *Buck* and *Peña-Rodriguez*. While the history of racism in America is unique, that does not make the need to safeguard the fairness and integrity of our nation’s courts against other forms of discrimination, including discrimination based on sexual orientation, any less important. *See Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719, 1727 (2018) (“Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights.”). A decision to sentence a person to death because he is gay violates the Sixth Amendment no less than a decision to sentence him

to death because he is Black, *cf. Buck*, 137 S. Ct. 759, or to convict him because he is of Mexican descent, *cf. Peña-Rodriguez*, 137 S. Ct. 855.

This Court has recognized that sexual orientation is “immutable.” *Obergefell*, 135 S. Ct. at 2596. Moreover, as discussed below, our nation has a long history of discrimination against people who are lesbian, gay, and bisexual, including in the judicial system. As this Court recognized in 2015, it is only recently that the right of lesbian, gay, and bisexual people to equal treatment under the law has been respected. *Id.*

Punishing people based on who they are is fundamentally “inconsistent with our commitment to the equal dignity of all persons.” *Peña-Rodriguez*, 137 S. Ct. at 867; *see also Buck*, 137 S. Ct. at 778. As this Court has long recognized, this principle is all the more important when a person stands trial for his life. *See Gardner v. Florida*, 430 U.S. 349, 357–58 (1977) (plurality opinion) (recognizing that “death is a different kind of punishment from any other which may be imposed in this country” and, thus, “[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion”); *see also Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (“When a defendant’s life is at stake, the Court has been particularly sensitive to insure that every safeguard is observed”). This Court should afford lesbian, gay, and bisexual persons the opportunity to establish whether prejudice against them because of sexual orientation factored into a jury’s decision to convict or impose a sentence of death.

II. DISCRIMINATION AGAINST LESBIAN, GAY, AND BISEXUAL PEOPLE DEMONSTRATES THE NEED FOR JUDICIAL SAFEGUARDS AGAINST JUROR BIAS BASED ON SEXUAL ORIENTATION.

Lesbian, gay, and bisexual people in America have faced a long and painful history of discrimination reaching nearly every aspect of life, including in employment, military service, immigration, medical care, and the criminal legal system. Despite much social and legal progress toward eliminating bias based on sexual orientation, lesbian, gay, and bisexual people continue to experience significant discrimination by both state and private actors. This history and continued experience of discrimination strongly support the application of *Peña-Rodriguez* to bias based on sexual orientation in jury decision-making.

A. There Is a Long History of Discrimination Against Lesbian, Gay, and Bisexual People in America.

“In 1953, President Eisenhower issued an executive order banning the employment” of gay people and “requiring that private contractors currently employing gay individuals search out and terminate” their employment. *Whitewood v. Wolf*, 992 F. Supp. 2d 410, 427 (M.D. Pa. 2014). This ban on employment was not lifted until 1975; even then, the federal government took the position that its agencies were free to discriminate based on sexual orientation until 1998. *See id.* Government discrimination against lesbian, gay, and bisexual

people also hindered their employment in the private sector by denying them occupational licenses based on sexual orientation. *See Dean v. Dist. of Columbia*, 653 A.2d 307, 344 (D.C. 1995).

Discrimination in military service continued into the present decade. From “the early 1920s through the 1970s,” federal regulations treated gay people “as unfit for service because they had a ‘personality disorder’ or a ‘mental illness.’ In 1982 the Department of Defense adopted a policy of mandating dismissal of homosexuals in order, among other things, to ‘ensure the integrity of the system of rank and command’ and ‘prevent breaches of security.’” *Able v. United States*, 968 F. Supp. 850, 855 (E.D.N.Y. 1997) (internal citations omitted), *rev’d*, 155 F.3d 628 (2d Cir. 1998). This discrimination continued into civilian life because the Veterans Administration denied benefits to service members discharged because of their sexual orientation. *See Whitewood*, 992 F. Supp. 2d at 427. The ban on open military service by lesbian, gay, and bisexual people lasted until 2010. *See Pub. L. 111-321, § 2(f)(1)(A)*, 124 Stat. 3516 (2010) (repealing military’s “Don’t Ask, Don’t Tell” policy).

Federal immigration policy also reflected the view that being gay was a mental illness and barred lesbian, gay, and bisexual foreign nationals from entering the United States until 1990. *Bassett v. Snyder*, 59 F. Supp. 3d 837, 849 (E.D. Mich. 2014); *see Boutilier v. I.N.S.*, 387 U.S. 118, 122 (1967) (“Congress used the phrase ‘psychopathic personality’ in the Immigration and Nationality Act of 1952 “to exclude from entry all homosexuals”). Even after this prohibition was removed, the Defense

of Marriage Act (“DOMA”) blocked same-sex couples of different nationalities from reuniting with each other in the United States until DOMA was struck down in 2013. *See United States v. Windsor*, 570 U.S. 744, 765 (2013).

Lesbian, gay, and bisexual people have also been pathologized and subjected to invasive and cruel medical procedures. “In an effort to ‘treat’ homosexuals, hospitals performed prefrontal lobotomies, injected massive doses of male hormones, and administered electric shock and other aversion therapy.” *Campaign for S. Equal. v. Bryant*, 64 F. Supp. 3d 906, 930 (S.D. Miss. 2014) (internal quotation marks omitted).

“Perhaps the most telling proof of animus and discrimination against” lesbian, gay, and bisexual people in the United States “is that, for many years and in many states, homosexual conduct was criminal.” *Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012), *aff’d*, 570 U.S. 744 (2013); *Lawrence*, 539 U.S. at 578–79. The historic consequences for same-sex intimacy could be extreme: “It was common for state laws to call for sterilization or castration of moral degenerates and sexual perverts, usually for homosexual behavior.” *Campaign for S. Equal.*, 64 F. Supp. 3d at 930 (internal quotation marks omitted). Such laws led to harassment and prosecution of gay men simply for congregating in bars or public places. *Whitewood*, 992 F. Supp. 2d at 427. Laws criminalizing same-sex intimacy were permitted until 2003, when this Court recognized that such laws are inherently demeaning and intrude on lesbian, gay, and bisexual people’s personal liberty. *Lawrence*, 539 U.S. at 578.

Despite the fact that laws criminalizing same-sex intimacy were declared unconstitutional by *Lawrence*, the federal government refused to recognize for federal purposes the marriages of same-sex couples even where states authorized the marriages. *See Windsor*, 570 U.S. 744. As of 2007, all but six states had similarly consigned same-sex couples to inferior status by enacting constitutional or statutory provisions banning marriage for same-sex couples and refusing to recognize the lawful marriages they had entered in other states. *Love Unites Us: Winning the Freedom to Marry in America* 11 (Kevin M. Cathcart & Leslie J. Gabel-Brett eds., 2016). Marriage bans had “[t]he avowed purpose and practical effect” of imposing “a disadvantage, a separate status, and so a stigma” on same-sex couples. *Windsor*, 570 U.S. at 770; *see also Obergefell*, 135 S. Ct. at 2590–91. That “grave and continuing harm, serving to disrespect and subordinate” lesbian, gay, and bisexual people continued until 2015. *See Obergefell*, 135 S. Ct. at 2590–91.

Discrimination against lesbian, gay, and bisexual people has also been prevalent in the private sector. “For centuries, the prevailing attitude toward gay persons has been one of strong disapproval, frequent ostracism, social . . . discrimination, and at times ferocious punishment,” *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (internal quotation marks omitted), adversely affecting gay people’s access to jobs, housing, and public accommodations. *See Watkins v. U.S. Army*, 875 F.2d 699, 724 (9th Cir. 1989); *Campaign for S. Equal.*, 64 F. Supp. 3d at 933 (being open about one’s sexual orientation “invited scrutiny and professional consequences”); *Bassett*, 59 F. Supp.

3d at 848 (noting that gay people in Michigan “have a 27 percent chance of experiencing discrimination in obtaining housing”); *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 988 (S.D. Ohio 2013) (“In the mid-twentieth century, bars in major American cities posted signs telling potential gay customers they were not welcome”), *rev’d sub nom. DeBoer v. Snyder*, 772 F.3d 388 (6th Cir. 2014), *rev’d sub nom. Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). The few friendly gathering places were often sites of violence. “[R]aids on gay bars in [the mid-twentieth century] were a fact of life, a danger every patron risked by walking through the door.” *Obergefell*, 962 F. Supp. 2d at 988 (internal quotation marks omitted); *Whitewood*, 992 F. Supp. 2d at 427. And it was not only in bars that gay people were at risk; they also were “victimized in horrific hate crimes” in a wide range of settings. *Whitewood*, 992 F. Supp. 2d at 427. It is no surprise that many gay people chose not to live openly, as “for most of the history of this country, being openly gay resulted in significant discrimination.” *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 485–86 (9th Cir. 2014).

B. Lesbian, Gay, and Bisexual People Continue to Experience Discrimination Because of Their Sexual Orientation.

Despite much social and legal progress toward eliminating bias based on sexual orientation, lesbian, gay, and bisexual people continued to experience significant discrimination by both state and private actors at the time of Mr. Rhines’s sentencing in 1993 and, indeed, today.

The federal government and twenty-eight states do not expressly include protections against discrimination based on sexual orientation in their civil rights laws, leaving lesbian, gay, and bisexual people vulnerable to discrimination in jobs, housing, education, credit, healthcare, jury service, retail stores, and other areas of public life. See H.R. 5, 116th Cong. § 2(10) (2019); Nat'l Conf. of State Legislatures, *State Employment-Related Discrimination Statutes* (2015), <http://tinyurl.com/ybzx59d>. In recent years, many legislators have introduced bills that would constrict, not expand, equality for lesbian, gay, and bisexual people. Julie Moreau, *129 anti-LGBTQ state bills were introduced in 2017, new report says*, NBC News (Jan. 12, 2018, 10:01 AM), <http://tinyurl.com/yygfleth> (describing bills that would restrict the parental rights of LGBTQ people, limit the marital privileges of same-sex couples, and authorize public and private actors to discriminate against LGBTQ people based on religious beliefs); see, e.g., *Barber v. Bryant*, 193 F. Supp. 3d 677, 687 (S.D. Miss. 2016) (describing Mississippi's HB 1523, which "grants special rights" to those who "disapprov[e] of lesbian, gay, [and] transgender" people based on religious beliefs).

Despite trends toward acceptance, bias against lesbian, gay, and bisexual people is still a reality in many workplaces: Forty-two percent of lesbian, gay, and bisexual people report experiencing at least one form of employment discrimination, such as harassment or losing a job. Christy Mallory & Brad Sears, *Employment Discrimination Against LGBT People, in Gender Identity & Sexual Orientation in the Workplace: A Practical Guide* (Christine Michelle Duffy & Denise M. Visconti eds. 2014). This reality

helps to explain why 46% of such employees reported that they remained closeted at work in 2017. See Human Rights Campaign, *A Workplace Divided: Understanding the Climate for LGBTQ Workers Nationwide* (2018), <http://tinyurl.com/y2taga2c>; see generally 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 (2012).

Lesbian, gay, and bisexual people continue to face discriminatory treatment from law enforcement as well. Interactions between lesbian, gay, and bisexual people and the police who profile and target them often involve harassment and violence. Christy Mallory et al., *Discrimination and Harassment by Law Enforcement Officers in the LGBT Community*, The Williams Institute, 6–11 (2015), <http://tinyurl.com/y3bjfsgl>. Young people are particularly vulnerable: A 2014 survey found that 12% of lesbian, gay, and bisexual young people in New Orleans had been asked for sexual contact by law enforcement officers and 22% had been called slurs. BreakOUT!, *We Deserve Better: A Report on Policing in New Orleans by and for Queer and Trans Youth of Color*, 6–7 (2014), <http://tinyurl.com/y49fox2r>.

Additionally, in many communities, lesbian, gay, and bisexual young people continue to be stopped by police more frequently than their heterosexual peers. A 2011 study found that lesbian, gay, and bisexual youth were 53% more likely to be stopped by police, 60% more likely to be arrested

before age 18, 90% more likely to have had a juvenile conviction, and 41% more likely to have had an adult conviction than heterosexual youth—even when controlling for race, socioeconomic status, and criminal behavior. Kathryn E.W. Himmelstein & Hannah Brückner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, 127 *Pediatrics* 49, 51, 53 (2011). Gay men are still targeted by lewd conduct “stings.” See Jordan Blair Woods, *Don’t Tap, Don’t Stare, and Keep Your Hands to Yourself! Critiquing the Legality of Gay Sting Operations*, 12 *J. Gender Race & Just.* 545, 551–53 (2009); see, e.g., *People v. Moroney*, No. 4LG03026 (Cal. Super. Ct. Apr. 29, 2016) (explaining that police “intentionally targeted” gay men even though there was “lewd conduct involv[ing] both heterosexual and homosexual activity”).

Discriminatory law enforcement is often fueled by purposeful as well as implicit bias. In a 2008 study, 62% of police chiefs surveyed believed that being gay constitutes “moral turpitude,” and 56% viewed it as a “perversion.” Christy Mallory et al., *Discrimination Against Law Enforcement Officers on the Basis of Sexual Orientation and Gender Identity: 2000 to 2013*, The Williams Institute, 2 (2013), <http://tinyurl.com/y6nqh5em>; see also Christine M. Anthony et al., *Police Judgments of Culpability and Homophobia*, *Applied Psych. Crim. Just.* 9 (2005) (32% of officers believe gay men are “disgusting”).

“Lesbian and gay people” also “continue to be frequent victims of hate crimes” committed by private citizens. *Varnum v. Brien*, 763 N.W.2d 862, 889 (Iowa 2009). Tragically, 2016 was the deadliest

year on record for hate crimes against lesbian, gay, bisexual, and transgender people, with 1,036 incidents of hate violence reported. Nat'l Coal. of Anti-Violence Progs., *Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2016*, 25 (2017), <http://tinyurl.com/y29fw5c6>.

C. Bias Based on Sexual Orientation Infects Our Nation's Courtrooms and Undermines the Integrity of Our Judicial System.

Bias based on sexual orientation, both in jury selection and in attitudes during jury service, reinforces historical prejudice in the court system, interferes with litigants' rights to a fair trial, and undermines the integrity of the judicial system.

This Court has explained that the injury inflicted by discrimination within the judicial system is most pernicious because the courthouse is “where the law itself unfolds.” *Edmonson v. Leesville Concrete Co., Inc.*, 500 U.S. 614, 628 (1991); see *Batson v. Kentucky*, 476 U.S. 79, 87–88 (1986). Lesbian, gay, and bisexual people “have been systematically excluded from the most important institutions of self-governance,” including jury service. *SmithKline*, 740 F.3d at 484. In jury selection and beyond, bias and discriminatory attitudes toward lesbian, gay, and bisexual people play a “significant role in courtroom dynamics.” *Id.* at 486 (citing Jennifer M. Hill, *The Effects of Sexual Orientation in the Courtroom: A Double Standard*, 39:2 J. of Homosexuality 93 (2000)).

Empirical studies by judicial commissions and bar associations have found that bias based on sexual

orientation significantly and negatively affected court users' experiences in the court system. See Todd Brower, *Twelve Angry—And Sometimes Alienated—Men: The Experiences and Treatment of Lesbians and Gay Men During Jury Service*, 59 Drake L. Rev. 669, 674 (2011) (examining empirical studies in California and New Jersey that evaluated the experiences of lesbian, gay, and bisexual people with the court system). In a California study of lesbian, gay, and bisexual court users, 30% of respondents believed those who knew their sexual orientation did not treat them with respect and 39% believed their sexual orientation was used to diminish their credibility when it became known. Judicial Council of State of Cal., *Sexual Orientation Fairness in the California Courts: Final Report of the Sexual Orientation Fairness Subcommittee of the Judicial Council's Access and Fairness Advisory Committee*, 5 (2001), <http://tinyurl.com/y6n6626w>. Twenty percent of lesbian, gay, and bisexual court employees reported hearing “derogatory terms, ridicule, snickering, or jokes about gay men or lesbians in open court, with the comments being made most frequently by judges, lawyers, or court employees.” *Id.* at 19. More than a third of lesbian, gay, and bisexual court users “felt threatened in the court setting because of their sexual orientation.” *Id.* at 5. Likewise, in a study from Arizona, 29% of lesbian and gay court employees reported hearing “negative remarks” about gay people. Michael B. Shortnancy, Note, *Guilty and Gay, a Recipe for Execution in American Courtrooms: Sexual Orientation as a Tool for Prosecutorial Misconduct in Death Penalty Cases*, 51 Am. U.L. Rev. 309, 327 (2001) [hereinafter *Guilty and Gay*]. Thirteen percent

of judges and attorneys surveyed had witnessed negative treatment by judges in open court toward those perceived to be lesbian or gay. *Id.* These studies “concluded that the majority of gay and lesbian litigants experienced courthouses as hostile and threatening environments, whether in criminal and threatening environments, whether in criminal or civil cases.” Joey L. Mogul et al., *Queer (In)Justice: The Criminalization of LGBT People in the United States* 74 (2011).

A 2012 community survey conducted by Lambda Legal of 965 lesbian, gay, bisexual, transgender, or HIV-affected respondents who had recently been involved with the court system confirms these findings. Lambda Legal, *Protected and Served? A National Survey Exploring Discrimination by Police, Prisons and Schools Against LGBT People and People Living with HIV in the United States* (2014), <http://tinyurl.com/ya42b4oo>. Nineteen percent of those surveyed indicated they had heard negative comments about sexual orientation, gender identity, or gender expression come from judges, attorneys, or court staff. *Id.* Survey respondents also reported having their sexual orientation or gender identity raised in court when it was not relevant, including 11% of respondents who were involuntarily outed as gay or transgender in court. *Id.*

In the specific context of jury *voir dire*, there are many recorded instances of jurors openly admitting to bias against lesbian, gay, and bisexual people.

These statements range from assertions of moral or religious beliefs that homosexuality is wrong (“I think that

they are morally wrong”; “[M]y religious convictions tell me that homosexuality is a sin”) . . . to outright animus (“I just don’t like queers”) to ambivalent feelings (“I hope I would be able to see past that, but I can’t guarantee you that, no”).

Giovanna Shay, *In the Box: Voir Dire on LGBT Issues in Changing Times*, 37 Harv. J. L. & Gender 407,427–28 (2014) (internal citations omitted). A poll by the National Law Journal in 1998—five years after Mr. Rhines’s capital sentencing proceeding—found that 17.1% of prospective jurors admitted to having bias that would make it impossible for them to be impartial in a case where one of the parties was gay or lesbian; 4.8% felt they could not be fair to African Americans, and 5% did not think they could be fair to women. *People v. Garcia*, 92 Cal. Rptr. 2d 339, 346 n.7 (Ct. App. 2000).

“It remains the case that ‘[t]here will be, on virtually every jury, people who would find the lifestyle and sexual preferences of a homosexual or bisexual person offensive.’” *United States v. Bates*, 590 F. App’x 882, 886 (11th Cir. 2014) (quoting *State v. Ford*, 926 P.2d 245, 250 (Mont. 1996)). “While some jurors are not biased based on sexual orientation, some realistically are.” *Berthiaume v. Smith*, 875 F.3d 1354, 1359 (11th Cir. 2017) (internal citations omitted). A jury research firm found that, of jurors who participated in mock trials between 2002 and 2008, 45% believed that being gay “is not an acceptable lifestyle,” 33% thought that sexual orientation should not be a protected characteristic under civil rights laws, between 15 and 20% thought

that employers should be able to refuse to hire workers because of their sexual orientation, and between 15 and 20% said “it would bother them if a gay or lesbian couple moved in next door to them.” Sean Overland, *Strategies for Combating Anti-Gay Sentiment in the Courtroom*, The Jury Expert, Mar. 2009, <http://tinyurl.com/y4fp29ce>.

Hostility toward lesbian, gay, and bisexual people “culminates in the real possibility that homosexual defendants found guilty of heinous crimes may receive the death penalty, as opposed to life sentences, because of their status as homosexuals.” *Guilty and Gay* at 317. In a recent capital case, the Florida Supreme Court reversed the denial of a motion for postconviction relief based on ineffective assistance of counsel and remanded the case for an evidentiary hearing. The defense attorney, who knew his client’s same-sex sexual activity would be raised in court, did not challenge the seating of a juror who made clear his anti-gay bias. *Patrick v. State*, 246 So. 3d. 253 (Fla. 2018). This juror said that he

“would have a bias if [he] knew the perpetrator was homosexual.” When asked if he would still hold the prosecutor to the proper burden of proof, he answered, “Put it this way, if I felt the person was a homosexual, I personally believe that person is morally depraved enough that he—might lie, might steal, might kill.” The juror said “yes” when asked if this bias might affect his deliberations.

Id. at 263. The juror was seated on the jury that ultimately sentenced Mr. Patrick to death—a jury making life and death decisions while infected by impermissible anti-gay bias. *Id.* at 263–64.

While bias against lesbian, gay, and bisexual people remains commonplace, this Court must not allow such bias to influence the decision whether to convict or sentence a person to death. This Court has long made clear that despite the no-impeachment rule, cases could “arise in which it would be impossible to refuse’ juror testimony regarding jury deliberations ‘without violating the plainest principles of justice.” *Peña-Rodriguez*, 137 S. Ct. at 863 (quoting *United States v. Reid*, 53 U.S. 361 (1851)). When *voir dire* and other precautions fail to root out prejudice, subsequent judicial involvement is necessary to ensure that “[o]ur law punishes people for what they do, not who they are.” *Buck*, 137 S. Ct. at 778. Animus and stereotyping by jurors based on sexual orientation reinforces and perpetuates invidious discrimination in a manner that violates an accused person’s Sixth Amendment right to a fair trial and impartial jury.

Mr. Rhines has unearthed disturbing evidence that jurors who participated in his capital sentencing proceeding in 1993 held anti-gay biases that likely contributed to their decision to sentence him to death. Under these circumstances, the Sixth Amendment demands that the trial court be permitted to consider this evidence.

CONCLUSION

Amici urge this Court to grant the petition for a writ of certiorari and afford Mr. Rhines the opportunity to establish whether bias based on his sexual orientation was a motivation for the jury to sentence him to death.

Respectfully submitted,

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