
**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

CHARLES RUSSELL RHINES,

Plaintiff - Appellant,

v.

DARIN YOUNG, Warden, South Dakota State Penitentiary,

Defendant - Appellee.

On Appeal from the United States District Court
for the District of South Dakota, No. 5:00-cv-05020-KES
The Honorable Karen E. Schreier, Presiding

**BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION,
AMERICAN CIVIL LIBERTIES UNION OF SOUTH DAKOTA,
GLBTQ LEGAL ADVOCATES & DEFENDERS,
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.,
NATIONAL CENTER FOR LESBIAN RIGHTS,
AND NATIONAL LGBT BAR ASSOCIATION
IN SUPPORT OF PLAINTIFF-APPELLANT'S
APPLICATION FOR CERTIFICATE OF APPEALABILITY**

COURTNEY BOWIE*
AMERICAN CIVIL LIBERTIES UNION
OF SOUTH DAKOTA
P.O. Box 1170
Sioux Falls, South Dakota 57101
(605) 332-2508
*Admitted in MS, AL, and MA

RIA TABACCO MAR
LESLIE COOPER
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2500

BRIAN STULL
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
201 W. Main Street, Suite 402
Durham, North Carolina 27701
(919) 682-9469

ETHAN RICE
RICHARD SAENZ
LAMBDA LEGAL
120 Wall Street, 19th Floor
New York, New York 10005
(212) 809-8585

Attorneys for Amici Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(a)(4)(a) of the Federal Rules of Appellate Procedure, the undersigned counsel of record certifies that none of the *amici curiae* is a nongovernmental entity with a parent corporation or a publicly held corporation that owns 10% or more of its stock. This representation is made in order that the judges of this Court may evaluate possible disqualification or recusal.

Dated: August 2, 2018

s/ Courtney Bowie
COURTNEY BOWIE*
American Civil Liberties Union of
South Dakota
P.O. Box 1170
Sioux Falls, SD 57101
Phone: (605) 332-2508
Fax: (605) 332-5648
cbowie@aclu.org

Attorney for Amici Curiae

*Admitted in MS, AL, and MA

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENTi

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES iii

INTRODUCTION1

INTERESTS OF *AMICI CURIAE*.....4

SUMMARY OF ARGUMENT5

ARGUMENT7

 I. Lesbian, gay, and bisexual people have a long history of discrimination
 in America.....7

 II. Lesbian, gay, and bisexual people continue to experience exclusion
 from public life because of their sexual orientation.11

 III. Bias based on sexual orientation interferes with the Sixth Amendment
 right to a fair trial and undermines the integrity of our judicial system.15

CONCLUSION21

CERTIFICATE OF COMPLIANCE.....23

CERTIFICATE OF SERVICE FOR ELECTRONIC FILINGS24

TABLE OF AUTHORITIES

Cases

<i>Able v. United States</i> , 968 F. Supp. 850 (E.D.N.Y. 1997).....	7
<i>Baldwin v. Foux</i> , EEOC No. 0120133080, 2015 WL 4397641 (EEOC July 16, 2015)	12
<i>Barber v. Bryant</i> , 860 F.3d 345 (5th Cir. 2017)	13
<i>Bassett v. Snyder</i> , 59 F. Supp. 3d 837 (E.D. Mich. 2014).....	8, 10, 11
<i>Batson v. Kentucky</i> , 476 U.S. 79 (1986).....	16
<i>Berthiaume v. Smith</i> , 875 F.3d 1354 (11th Cir. 2017).....	19
<i>Buck v. Davis</i> , 137 S. Ct. 759 (2017).....	2, 4, 21
<i>Campaign for Southern Equality v. Bryant</i> , 64 F. Supp. 3d 906 (S.D. Miss. 2014).....	8, 9, 10
<i>DeBoer v. Snyder</i> , 772 F.3d 388 (6th Cir. 2014).....	11
<i>Edmonson v. Leesville Concrete Co., Inc.</i> , 500 U.S. 614 (1991)	16
<i>Geiger v. Kitzhaber</i> , 994 F. Supp. 2d 1128 (D. Or. 2014)	11
<i>Hively v. Ivy Tech Community College</i> , 853 F.3d 339 (7th Cir. 2017)	12
<i>Kerrigan v. Commissioner of Public Health</i> , 957 A.2d 407 (Conn. 2008).....	10
<i>Lawrence v. Texas</i> , 539 U.S. 558 (2003).....	6, 9
<i>Obergefell v. Hodges</i> , 135 S. Ct. 2584 (2015).....	3, 5, 6, 10
<i>Obergefell v. Wymyslo</i> , 962 F. Supp. 2d 968 (S.D. Ohio 2013).....	10
<i>Patrick v. State</i> , No. SC17-246, 2018 WL 2976307 (Fla. June 14, 2018)	20

<i>Peña-Rodriguez v. Colorado</i> , 137 S. Ct. 855 (2017).....	2, 3, 4, 20
<i>People v. Garcia</i> , 77 Cal. App. 4th 1269 (2000)	18
<i>People v. Moroney</i> , No. 4LG03026 (Cal. Super. Ct. Apr. 29, 2016)	14
<i>SmithKline Beecham Corp. v. Abbott Laboratories</i> , 740 F.3d 471 (9th Cir. 2014).....	4, 11, 16
<i>State v. Ford</i> , 926 P.2d 245 (Mont. 1996)	19
<i>United States v. Bates</i> , 590 F. App'x 882 (11th Cir. 2014).....	19
<i>United States v. Reid</i> , 13 L. Ed. 1023 (1852)	20
<i>United States v. Windsor</i> , 570 U.S. 744 (2013).....	8, 9, 10
<i>Varnum v. Brien</i> , 763 N.W.2d 862 (Iowa 2009).....	15
<i>Watkins v. U.S. Army</i> , 875 F.2d 699 (9th Cir. 1989)	10
<i>Whitewood v. Wolf</i> , 992 F. Supp. 2d 410 (M.D. Pa. 2014)	7, 8, 11
<i>Windsor v. United States</i> , 699 F.3d 169 (2d Cir. 2012).....	3, 9
<i>Zarda v. Altitude Express, Inc.</i> , 883 F.3d. 100 (2d Cir. 2018)	12
<u>Statutes and Legislative Materials</u>	
H.R. 2282, 115th Cong. § 2(10) (2017).....	12
Pub. L. 111-321, § 2(f)(1)(A), 124 Stat. 3516 (2010)	8
<u>Other Authorities</u>	
Anthony, Christine M. et al., <i>Police Judgments of Culpability and Homophobia</i> , Applied Psych. Crim. Just. 9 (2005)	15
BreakOUT!, <i>We Deserve Better: A Report on Policing in New Orleans by and for Queer and Trans Youth of Color</i> (Oct. 23, 2014)	14

Brief for the United States as Amicus Curiae, <i>Zarda v. Altitude Express</i> , No. 15-3773 (2d Cir. July 26, 2017)	11
Brief for the United States as Amicus Curiae Supporting Petitioners, <i>Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n</i> , No. 16-111 (U.S. Sept. 7, 2017).....	12
BreakOUT!, <i>We Deserve Better: A Report on Policing in New Orleans by and for Queer and Trans Youth of Color</i> (Oct. 23, 2014)	14
Brower, Todd, <i>Twelve Angry – And Sometimes Alienated – Men: The Experiences and Treatment of Lesbians and Gay Men During Jury Service</i> , 59 Drake L. Rev. 669 (2011).....	16
Frye, Phyllis Randolph & Katrina C. Rose, <i>Responsible Representation of Your First Transgendered Client</i> , 66 Tex. Bar. J. 558 (2001).....	4
Hill, Jennifer M., <i>The Effects of Sexual Orientation in the Courtroom: A Double Standard</i> , 39:2 J. of Homosexuality 93 (2000).	16
Himmelstein, Kathryn E.W. & Hannah Brückner, <i>Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study</i> , 127 Pediatrics 49 (2011).....	6, 14
Human Rights Campaign, <i>A Workplace Divided: Understanding the Climate for LGBTQ Workers Nationwide</i> (2018).....	13
Judicial Council of State of Cal., <i>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</i> (2001)	17
Lambda Legal, <i>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</i> (2014)	17, 18
<i>Love Unites Us: Winning the Freedom to Marry in America</i> (Kevin M. Cathcart & Leslie J. Gabel-Brett eds., 2016).....	9

Mallory, Christy et al., <i>Discrimination and Harassment by Law Enforcement Officers in the LGBT Community</i> , The Williams Institute (Mar. 2015)	13
Mallory, Christy et al., <i>Discrimination Against Law Enforcement Officers on the Basis of Sexual Orientation and Gender Identity: 2000 to 2013</i> , The Williams Institute (Nov. 2013)	15
Mogul, Joey L. et al., <i>Queer (In)Justice: The Criminalization of LGBT People in the United States</i> (2011)	17
Moreau, Julie, <i>129 anti-LGBTQ state bills were introduced in 2017, new report says</i> , NBC News (Jan. 12, 2018, 10:01 AM)	12
Nat’l Coal. of Anti-Violence Progs., <i>Lesbian, Gay, Bisexual, Transgender, Queer, and HIV-Affected Hate Violence in 2016</i> (2017)	15
Overland, Sean, <i>Strategies for Combating Anti-Gay Sentiment in the Courtroom, The Jury Expert</i> (March 2009)	19
Pizer, Jennifer C. et al., <i>Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits</i> , 45 Loy. L.A. L. Rev. 715 (2012).....	13
Shay, Giovanna, <i>In the Box: Voir Dire on LGBT Issues in Changing Times</i> , 37 Harv. J. L. & Gender 407 (2014)	18
Shortnancy, Michael B., Note, <i>Guilty and Gay, a Recipe for Execution in American Courtrooms: Sexual Orientation as a Tool for Prosecutorial Misconduct in Death Penalty Cases</i> , 51 Am. U. L. Rev. 309 (2001).....	19
<i>State Employment-Related Discrimination Statutes</i> , Nat’l Conf. of State Legislatures (July 2015)	12
Woods, Jordan Blair, <i>Don’t Tap, Don’t Stare, and Keep Your Hands to Yourself! Critiquing the Legality of Gay Sting Operations</i> , 12 J. Gender Race & Just. 545 (2009).....	14

INTRODUCTION

Bias based on sexual orientation should play no role in our judicial system. Yet Plaintiff-Appellant Charles Russell Rhines has offered evidence that some of the jurors who voted to impose the death penalty on him in 1993 may have done so based 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. One juror recalled that, during deliberations, there was “a lot of disgust” about the fact that Mr. Rhines was gay. Ex-3.¹ 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.” Ex-1. A third recounted hearing that, if the jury did not sentence Mr. Rhines to death, “if he’s gay, we’d be sending him where he wants to go.” Ex-2.

A note from the jury during deliberations to the sentencing judge highlights the role this pernicious stereotype played in the jury’s decision-making process: “We know what the death penalty means,” the jury wrote. Ex-12. “But we have no clue as to the reality of life without parole.” *Id.* In the note, the jurors went on to ask 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,

¹ “Ex-” refers to exhibits filed with Plaintiff-Appellant’s application for a certificate of appealability in this Court.

especially new and or young men”? *Id.* Would he “have a cellmate”? *Id.* The jury note suggests that at least some members of the jury accepted the notion that life in prison without parole would be fun for a gay person – so much so that they felt it was necessary to impose the death penalty instead. In other words, significant evidence suggests that the jury may have sentenced Mr. Rhines to death based not on the facts of his case, but because he is gay.

Bias in sentencing is “a disturbing departure from a basic premise of our criminal justice system: 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, bias against Mr. Rhines because of his sexual orientation may have made the difference between life and death. *See id.* at 779.

Juror deliberations ordinarily are considered immune from judicial review, but the Supreme Court has established an important exception for cases involving bias in the jury room. *Peña-Rodriguez v. Colorado*, 137 S. Ct. 855 (2017). In *Peña-Rodriguez*, after the jury voted to convict the accused person and was discharged, two jurors came forward to reveal evidence that racial animus may have played a role in the jury’s decision to convict. *Id.* at 861-62. Specifically, the jurors shared that another juror had stated he believed that the accused person was

guilty of unlawful sexual contact and harassment ““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” and held that it must be set aside. *Id.* at 869.

The concerns that motivated the Court in *Buck* and *Peña-Rodriguez* apply with equal force to evidence that bias against Mr. Rhines because he is a gay man played a motivating factor in the jury’s decision to sentence him to death. The Supreme Court has recognized that a person’s sexual orientation is “immutable.” *Obergefell v. Hodges*, 135 S. Ct. 2584, 2596 (2015). Moreover, our nation has a long history of discrimination against people who are lesbian, gay, and bisexual, including bias in the judicial system. As the Supreme Court has 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.*

While the history of racism in America is unique and demands unique safeguards, 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 Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012) (noting that the history of discrimination based on sexual orientation “differs from that against racial minorities and women,” but that

the difference does not warrant denying constitutional protection to gay people), *aff'd on other grounds*, 570 U.S. 744 (2013); *e.g.*, *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471 (9th Cir. 2014) (extending *Batson* rule to prohibit peremptory strikes based on juror's sexual orientation).

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. This Court should grant Mr. Rhines's application for a certificate of appealability to afford him the opportunity to establish whether prejudice against him because he is gay factored into the jury's decision to sentence him to death.

INTERESTS OF *AMICI CURIAE*²

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.³ *Amici* have a vital interest in

² Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

³ This case involves bias based on Mr. Rhines's sexual orientation, an all too common problem that lesbian, gay, and bisexual people face in our judicial system. Although not at issue here, bias based on gender identity is a pernicious problem that transgender people continue to face in America's courts. *See Phyllis Randolph Frye & Katrina C. Rose, Responsible Representation of Your First Transgendered*

eradicating anti-gay bias from America’s legal system, including the criminal legal system. Detailed statements of interest are contained in the accompanying motion.

SUMMARY OF ARGUMENT

Amici urge this Court to take into account the history of discrimination based on sexual orientation in considering Mr. Rhines’s application for a certificate of appealability. Well into the twentieth century, gay people were “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). While many of the laws and policies that authorized – and, indeed, required – such discrimination have been repealed or found unconstitutional, recent years have brought renewed efforts to ban same-sex couples from adopting, allow discrimination against lesbian, gay, and bisexual people by public and private actors, and relegate lesbian, gay, and bisexual people to an inferior status in law. Today, federal law still does not expressly prohibit discrimination based on sexual orientation in employment, housing, or public accommodations, and neither do the laws of 28 states.

This pattern of enduring bias is reflected in the criminal legal system. Until the mid-20th century, same-sex intimacy was widely condemned as immoral and

Client, 66 Tex. Bar. J. 558, 561 (2001) (noting that “potential jurors have openly admitted to anti-transgender prejudice”).

was often criminalized. *See id.*; *Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003) (holding unconstitutional state law criminalizing same-sex intimacy). Despite a long-standing recognition in the field of psychiatry that being gay is “a normal expression of human sexuality,” *Obergefell*, 135 S. Ct. at 2596, a recent study of police chiefs revealed that a majority believe that being gay is a form of “moral turpitude” and a “perversion.” Lesbian, gay, and bisexual young people frequently are profiled as sex workers by police and are significantly more likely to be stopped or arrested than their heterosexual peers – even when controlling for factors including 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).

Bias based on sexual orientation in jury selection and in jury deliberations reinforces historical prejudice against lesbian, gay, and bisexual people, interferes with an accused person’s Sixth Amendment right to a fair trial, and undermines the integrity of our judicial system. Lesbian, gay, and bisexual people experience discrimination both when they serve as jurors and when they are litigants themselves. Where, as here, juror voir dire and other procedural safeguards fail to prevent bias based on sexual orientation from infecting the decisions of the jury, Mr. Rhines should be allowed to present evidence of anti-gay bias to the court.

ARGUMENT

I. Lesbian, gay, and bisexual people have a long history of discrimination in America.

Lesbian, gay, and bisexual people in America have faced a long and painful history of discrimination reaching nearly every aspect of public life, including in employment, military service, immigration, medical care, and policing.

“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.*

Discrimination in military service lasted even longer. 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 people who were not citizens from entering the United States until 1990. *Bassett v. Snyder*, 59 F. Supp. 3d 837, 849 (E.D. Mich. 2014) (noting that “the Immigration and Nationality Act of 1952 labeled gay and lesbian people as mentally ill”). Even after this prohibition was removed, the so-called 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 because of their sexual orientation. “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 v. Texas*, 539 U.S. 558, 578-79 (2003). 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). Laws criminalizing same-sex intimacy were permitted until 2003, when at last the Supreme Court recognized that such laws are inherently demeaning and intrude on gay people’s personal liberty. *Lawrence*, 539 U.S. at 579.

Despite the fact that laws criminalizing same-sex intimacy were declared unconstitutional by *Lawrence* (or perhaps because of that progress), under DOMA the federal government refused to recognize for federal purposes the marriages of same-sex couples. *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 “the avowed purpose and practical

effect” of imposing “a disadvantage, a separate status, and so a stigma” on same-sex couples. *See Windsor*, 570 U.S. at 770; *see also Obergefell v. Hodges*, 135 S. Ct. 2584, 2590-91 (2015). 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.

State-sponsored discrimination against lesbian, gay, and bisexual people is not the only form of exclusion based on sexual orientation. “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. Commissioner of Public Health*, 957 A.2d 407 (Conn. 2008), adversely affecting gay people’s access to jobs, housing, and public accommodations and sometimes resulting in violent hate crimes against them. *See Watkins v. U.S. Army*, 875 F.2d 699, 724 (9th Cir. 1989); *Bassett*, 59 F. Supp. 3d at 848. “In the mid-twentieth century, bars in major American cities posted signs telling potential gay customers they were not welcome,” and the few friendly gathering places were often sites of violence. *Obergefell v. Wymyslo*, 962 F. Supp. 2d 968, 988 (S.D. Ohio 2013), *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).

Being open about one’s sexual orientation has “invited scrutiny and professional consequences” historically and today. *Campaign for S. Equal.*, 64 F.

Supp. 3d at 933; *Whitewood*, 992 F. Supp. 2d at 427 (“Within our lifetime, gay people have been . . . portrayed by the press as perverts and child molesters; and victimized in horrific hate crimes.”). Lesbian, gay, and bisexual people have been fired from jobs, denied housing opportunities, and expelled from educational institutions when their sexual orientation becomes known. *See id.*; *Bassett*, 59 F. Supp. 3d at 848 (noting that gay people in Michigan “have a 27 percent chance of experiencing discrimination in obtaining housing”). 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); *see also Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1146 (D. Or. 2014) (“Generations of Americans . . . were raised in a world in which homosexuality was believe to be a moral perversion, a mental disorder, or a mortal sin. . . . [T]hat same worldview led to an environment of cruelty, violence, and self-loathing.”).

II. Lesbian, gay, and bisexual people continue to experience exclusion from public life because of their sexual orientation.

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.

The current Attorney General of the United States has argued that employers should be free to fire lesbian, gay, and bisexual people under federal law, Br. for

the United States as Amicus Curiae, *Zarda v. Altitude Express*, No. 15-3773 (2d Cir. July 26, 2017), and that businesses open to the public should have a license to discriminate against same-sex couples, Br. for the United States as Amicus Curiae Supporting Petitioners, *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, No. 16-111 (U.S. Sept. 7, 2017).

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. 2282, 115th Cong. § 2(10) (2017); *State Employment-Related Discrimination Statutes*, Nat'l Conf. of State Legislatures (July 2015), <https://perma.cc/B4MR-K7LJ>.⁴ Rather than prohibiting sexual orientation discrimination, 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), <https://perma.cc/47HV-WJJT>.

⁴ Where laws do not expressly prohibit discrimination based on sexual orientation, courts and federal agencies have increasingly recognized that sexual orientation discrimination is a subset of discrimination based on sex and, consequently, prohibited by laws barring sex discrimination. See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc); *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2017) (en banc); *Baldwin v. Foxx*, EEOC No. 0120133080, 2015 WL 4397641 (EEOC July 16, 2015).

Mississippi expressly authorizes state-funded child welfare agencies to reject prospective foster parents who are gay and allows government officials and businesses in the state to deny services to people based on their sexual orientation if providing service would conflict with certain sincerely held religious beliefs.

Barber v. Bryant, 860 F.3d 345, 351 (5th Cir. 2017).

Despite trends toward acceptance, bias against lesbian, gay, and bisexual people is still a reality in many workplaces: Forty-six percent 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), <https://perma.cc/9BT4-EAWB>; *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. 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 (Mar. 2015), <https://perma.cc/PT2K-LBXS>. Young people are particularly vulnerable: A 2014 survey found that 12% of lesbian, gay, and bisexual young people 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 (Oct. 23, 2014), <https://perma.cc/483Q-JCYC>.

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) (police “intentionally targeted” gay men even though there was “lewd conduct involv[ing] both heterosexual and homosexual activity”).

Disproportionate 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 (Nov. 2013), <https://perma.cc/4R58-W8MH>; 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), <https://perma.cc/ENV8-SU24>.

III. Bias based on sexual orientation interferes with the Sixth Amendment right to a fair trial and undermines the integrity of our judicial system.

The history of exclusion and current societal prejudice based on sexual orientation inform and shape the experiences of lesbian, gay, and bisexual people in our nation’s courtrooms. Bias based on sexual orientation in jury selection and service is notably harmful, as it reinforces historical prejudice in the court system,

interferes with litigants' rights to a fair trial, and undermines the integrity of the judicial system.

The Supreme 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 (1986). There is no doubt that lesbian, gay, and bisexual people “have been systematically excluded from the most important institutions of self-governance.” *SmithKline*, 740 F.3d at 484. 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 lessen 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), <https://perma.cc/X2FV-DFG6>. 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. These studies “concluded that the majority of gay and lesbian litigants experienced courthouses as hostile 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), <https://perma.cc/477T-WVVE>. 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 eleven percent 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*, 77 Cal. App. 4th 1269, 1279 n.7 (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 (March 2009), <https://perma.cc/QP8X-SVMX>.

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.” 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, 317

(2001). 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. In that case, an 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*, No. SC17-246, 2018 WL 2976307 (Fla. June 14, 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 *6. This juror was a member of the petit jury that sentenced Mr. Patrick to death – a jury making life and death decisions while infected by impermissible anti-gay bias. *Id.* at *6-7.

The Supreme Court has long made clear that despite the importance of 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 v. Colorado*, 137 S. Ct. 855, 863 (2017) (quoting *United States v. Reid*, 13 L. Ed. 1023 (1852)). 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.

Juror voir dire is a critical safeguard to prevent bias based on sexual orientation, but it is not infallible. 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 v. Davis*, 137 S. Ct. 759, 778 (2017). Mr. Rhines has unearthed disturbing evidence that jurors who participated in his capital sentencing proceeding in 1993 held anti-gay biases that may have contributed to their decision to sentence him to death. Under these circumstances, the Sixth Amendment demands that the no-impeachment rule give way to permit the trial court to consider this evidence.

CONCLUSION

This Court should issue a certificate of appealability to 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.

Dated: August 2, 2018

Respectfully submitted,

s/ Courtney Bowie
COURTNEY BOWIE*
American Civil Liberties Union of
South Dakota
P.O. Box 1170
Sioux Falls, SD 57101
Phone: (605) 332-2508
Fax: (605) 332-5648
cbowie@aclu.org
*Admitted in MS, AL, and MA

RIA TABACCO MAR
LESLIE COOPER
American Civil Liberties Union
Foundation
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
rmar@aclu.org
lcooper@aclu.org

BRIAN STULL
American Civil Liberties Union
Foundation
201 W. Main Street, Suite 402
Durham, NC 27701
(919) 682-9469
bstull@aclu.org

ETHAN RICE
RICHARD SAENZ
Lambda Legal
120 Wall Street, 19th Floor
New York, NY 10005
(212) 809-8585
erice@lambdalegal.org
rsaenz@lambdalegal.org

Attorneys for Amici Curiae

CERTIFICATE OF COMPLIANCE

1. *Amici* certify that this brief contains 4,932 words, excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure. *Amici* have contemporaneously filed a motion for leave to file a brief not exceeding that length.
2. This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) of the Federal Rules of Appellate Procedure because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type style.
3. This brief has been scanned for viruses and found to be virus-free.

Dated: August 2, 2018

s/ Courtney Bowie
COURTNEY BOWIE*
American Civil Liberties Union of
South Dakota
P.O. Box 1170
Sioux Falls, SD 57101
Phone: (605) 332-2508
Fax: (605) 332-5648
cbowie@aclu.org

Attorney for Amici Curiae

*Admitted in MS, AL, and MA

CERTIFICATE OF SERVICE FOR ELECTRONIC FILINGS

I hereby certify that on August 2, 2018, I electronically filed the foregoing brief with the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Courtney Bowie
COURTNEY BOWIE*
American Civil Liberties Union of
South Dakota
P.O. Box 1170
Sioux Falls, SD 57101
Phone: (605) 332-2508
Fax: (605) 332-5648
cbowie@aclu.org

*Admitted in MS, AL, and MA