No. 17-370

In the Supreme Court of the United States

JAMEKA K. EVANS, PETITIONER
v.
GEORGIA REGIONAL HOSPITAL,
ET AL., RESPONDENTS

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

BRIEF OF *AMICUS CURIAE* DAVID BOYLE IN SUPPORT OF PETITIONER

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MOTION AND REQUEST FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

David Boyle (hereinafter, "Amicus") respectfully moves for leave to file the attached brief as *amicus curiae*. Petitioner has granted blanket permission to *amicae/i* to write briefs. As for Respondents, their counsel, Georgia Solicitor General Sarah Hawkins Warren, has refused to offer either permission or denial of permission for amicus briefs, and even claims that Respondents are not valid respondents.

Indeed, Amicus found it confusing and distracting that Respondents' address(es) were, for long, not on the 17-370 docket page. He didn't even find out Warren's e-mail address until *one day* before October 11, the last-day-to-send-brief-supporting-certiorari date, though he mailed her promptly on October 10. By October 11, he had contacted everyone for whom he had e-mail or telephone contact information.

So, in the instant case, Amicus did not happen to give timely notice to the aforementioned persons of his intent to file a brief, although he usually tries to, *see, e.g.*, his pre-certiorari brief in *Trump v. IRAP*, No. 16-1436, at 1 n.1 (certifying he met 10-day limit of notice under the Court's Rule 37.2). Other pre-certiorari amicus briefs in that latter case failed to meet that 10-day notification deadline, but the Court allowed them to file their briefs anyway, *see, e.g.*, Br. *Amicus Curiae* of Citizens United, et al. in 16-1436 & 16A1190, at 1 n.1 (June 12, 2017) (mentioning that amici had missed the 10-day notice deadline).

This time, "the shoe is on the other foot", in that presently it is Amicus who found it difficult to give timely notice, though other people were able to give

timely notice. So Amicus asks the same grace for himself, as it were, that people in *Trump v. IRAP*, *supra*, were granted: i.e., for him to be allowed to file even though other people gave timely notice, but he himself had unexpected trouble giving timely notice.

Amicus asked counsel for consent to this motion, and also to waive the 10-day notice period: Petitioner sent a two-word reply giving consent; Amicus wrote back and said he assumes Petitioner also waives the 10-day period, unless Petitioner writes back and says otherwise; Petitioner did not write back, so Amicus assumes waiver of the notice period. Respondents, by contrast, merely reiterated their abstention from involvement. In any case, Amicus does not believe there is any real prejudice to either side from notice being less than 10 days in this case.

Amicus' interest in this case arises partially from his writing the Court about other sexual-orientation issues, e.g., in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, No. 16-111. Amicus would here like, *inter alia*, to make useful comparisons between employment issues and other issues, such as marriage-related issues. —The Court should grant Amicus leave to file, and he humbly thanks the Court for its time and consideration.

October 20, 2017 Respectfully submitted,

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AMICUS CURIAE STATEMENT OF INTEREST

The present *amicus curiae*, David Boyle (hereinafter, "Amicus"),[1] has written the Court about other sexual-orientation issues, e.g., in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.[2] While supporting, to an extent, the right of people of any orientation or gender identity to get and keep a job, Amicus would also like to make appropriate and useful comparisons and contrasts between "LGBT"

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[1] No party or its counsel wrote or helped write this brief, or gave money meant to fund its writing or submission, *see* S. Ct. R. 37.

As for the extremely complicated status of Respondents here: while blanket permission to write briefs is filed with the Court by Petitioner; putative Respondents Georgia Regional Hospital et al. claim, in a letter of October 4, 2017 by the Georgia Solicitor General that they were not served properly, so are not genuine respondents, and should not have to give permission to file amicus briefs.

Hence, Amicus was tempted not to send respondents copies of this brief. Moreover, the Court's website does not even have contact information for any respondent, as of October 10. (That is one reason that Amicus wasn't able to contact all respondents and Petitioner by 10 days before sending this brief; in fact, there are still some respondents for whom he has no contact information but a paper-mail address, and that gotten only very recently.) However, Amicus shall nevertheless send paper briefs to putative respondents. He has also contacted all parties by e-mail (or telephone, if no e-mail) if such contact information is even available; again, such information may have come to him only very recently. —So, perhaps the Court should adopt a rule requiring that even putative parties, either respondents or petitioners, submit their contact information to the Court promptly, to help avoid kerfuffles like the present one?

[2] No. 16-111, 370 P.3d 272 (Colo. App. 2015), *cert. granted* (U.S. June 26, 2017).

(lesbian-gay-bisexual-transgender) employment issues, and other LGBT issues, such as marriage-related issues.

SUMMARY OF ARGUMENT

The life of singer Sylvester (1947-1988), a gay and transvestite man with an interesting employment history, offers insights on why employer discrimination against LGBT persons (LGBTs) may be a bad and illegal idea.

Indeed, after *Obergefell v. Hodges*, 576 U.S. ___ (2015), it seems a little strange to let employers discriminate against LGBT workers. If gays or other same-sex-affectionate persons can legally marry (which isn't necessary to live) throughout America, then it would be strange not to let them work freely, which may be necessary for "making a living", thus usually needed to live.

Being a "sinner" does not mean you must lose your job.

The same-sex wedding-cake case before this Court, offers some useful distinctions from the instant case. If *Masterpiece*, *supra* at 1, is highly complex and basically pits First Amendment versus Fourteenth Amendment rights, the instant case is much simpler, since there are usually few rational reasons to discriminate against LGBTs in most jobs.

As an example of a possible BFOQ (bona fide occupational qualification) issue, Amicus posits the hypothetical of whether a fancy French restaurant

might not allow a pregnant transgender man to be the restaurant's front-door host.

Controversial figure Hugh Hefner (1926-2017), who stood up for racial minorities at times, shows us that even morally questionable people can stand up for equality—making his critics even worse people than he was, in a sense, if they needlessly oppose employment equality.

Employment nondiscrimination by orientation or gender identity may help protect members of the majority, not just sexual minorities.

Especially since life can be "nasty, brutish, and short", Thomas Hobbes, Leviathan, ch. 13, para. 9 (1651), the Court should not allow LGBT employment to be needlessly fraught with abuse, if reasonably possible.

ARGUMENT

I. THE LIFE OF SYLVESTER SHOWS THAT LGBTS CAN WORK WELL IN VARIOUS JOBS

Sylvester (born Sylvester James, Jr.) was a famous disco singer, sometimes known as the "Queen of Disco", *see* Wikipedia, *Sylvester (singer)*, https://en.wikipedia.org/wiki/Sylvester_(singer) (as of Sept. 24, 2017, 12:53 GMT). A noted song of his, *You Make Me Feel (Mighty Real)* (*on* Step II (Fantasy Records 1978)), is largely about dancing and having a good time, *see id.*, but also has its title lyric, "You make me feel mighty real", *id.*, which seems to call for authenticity and self-affirmation, *see id.* (The remaining lyrics are available at, e.g., LyricWiki,

Sylvester:You Make Me Feel (Mighty Real) Lyrics, http://lyrics.wikia.com/wiki/Sylvester:You_Make_Me_Feel_(Mighty_Real) (undated); a video is available at, e.g., skytrax1, *Sylvester - You Make Me Feel Mighty Real (Promo Clip)*, YouTube, published June 8, 2008, https://www.youtube.com/watch?v=Ue2UXnxp8Rs.)

This "real" affirmation of one's selfhood—albeit in social connection with a dance partner—is quite relevant here since we are talking about the dignity of workers, in a free America which lets outcasts, individualists, minority members, or anyone else, ideally, shoot for her/his version of the American dream.

Wikipedia Sylvester Art., *supra*.

Sylvester was no angel, considering, e.g., his wild sexual life, maybe starting at the age of eight (!!!): a sad example of child molestation, even if he always claimed it was consensual, *see id.*; *see also, e.g.*,

"Sylvester and his friends . . . .[d]uring the Watts Riots[,] joined in with the widespread rioting and looting, stealing wigs, hairspray, and lipstick." *Id.* (internal citation omitted); "Sylvester often hitchhiked around town while in female dress[, even though] cross-dressing was then illegal in California[: a]lthough avoiding imprisonment for this crime, he was arrested for shoplifting on several occasions." *Id.* (internal citations omitted) Still, his life has educative value. His employment record, for example, is germane to the instant case:

> He found work in a variety of different professions, including cooking in McDonald's—where he was fired for refusing to wear a hairnet—cashier at an airport parking garage, working in a hair salon, at a department store, and as a make-up artist at a mortuary, preparing the corpses for their funerals.

Id. (internal citation omitted) So Sylvester was apparently perfectly able to cook hamburgers—as well as, say, a non-transvestite heterosexual—at McDonald's as anyone else, and was fired only for not wearing a sanitary garment, a hairnet, *see id.*

He was apparently able to do other jobs with some skill as well, *see id.* So, why should he have been fired because of his LGBT status? (But *see infra* Section IV, about the issue of decorum and BFOQ issues: e.g., if Sylvester were wearing a dress at a somber place like the mortuary where he was preparing corpses, that might possibly be seen as offending propriety and thus failing to meet the presumed BFOQ of sobriety for undertakers.)

…On that note, of being able to do a job well despite LGBT status: one well-known comedic reflection on the irrelevance of either LGBT identity, or similar phenomena such as transvestism, to work performance, is Monty Python's *The Lumberjack Song* (1969; single version, Charisma 1975):

> In the song, the Lumberjack recounts his daily tasks and his personal life, such as having buttered scones for tea[.] However, as the song continues, he increasingly reveals cross-dressing tendencies ("I cut down trees, I skip and jump, I like to press wild flowers, I put on women's clothing, and hang around in bars")[.] The last straw comes when he mentions that he wears "high heels, suspenders, and a bra. I wish I'd been a girlie, just like my dear mama"[.] . . . Subsequent versions replace "mama" with "papa", implying that the lumberjack inherited his tendency for transvestism from his father.

Wikipedia, *The Lumberjack Song*, https://en.wikipedia.org/wiki/The_Lumberjack_Song (as of Sept. 26, 2017, 2:08 GMT).

Id. But is the lumberjack any less able to "cut down tree" just because he "dresses funny"? Probably not. (Ask Joe Namath, a famous football player who wore pantyhose…)

One notes that some people may be very unhappy to see a picture of a flamboyant gay black man (or transvestite lumberjack, for that matter) staring out of this brief. But that is sort of the point. One may have to employ people who have backgrounds or characteristics that one does not like, as long as they're qualified to do the job. People may not have the legal right to inflict their identity on someone else (e.g., force someone else to participate in their wedding), but they may have a legal right to live, including having a job, and also live out their identity at the same time.

Sylvester's burger-making skills were "mighty real", *You Make Me Feel (Mighty Real)*, *supra* at 3. More than that, he could obviously sing and dance well. Would we discriminate against Fred Astaire or Cyd Charisse (to mention some old-time hoofers) if they'd been LGBT? Would their LGBT status have

made them worse dancers? And the same for singing. Sylvester need not have been an angel to deserve serious respect for his work, musical, burger-flipping, or otherwise. And that respect includes appropriate legal protection.

II. THE PENUMBRA OR LOGIC OF *OBERGEFELL* MAY LEGITIMATE BANNING DISCRIMINATION AGAINST LGBT WORKERS

And now for something completely different (as Monty Python used to say). —Moving from real-life anecdotes to legal theory: Amicus has been amazed, for years, that *Obergefell*, *supra* at 2, was decided as it was, with its endorsement of same-sex marriage, when there wasn't yet similar federal legal protection for LGBTs in employment situations. It would have seemed more reasonable to flip things around, and offer the employment protections to LGBTs *before* overriding States' traditional authority over marriage. This is because, broadly, LGBTs can probably do most jobs about well as most people can, while marriage may involve unique qualities that the sexes don't always share (e.g., most women are better able to breast-feed children than most men are). Also, work is generally a voluntary, contractual situation between adults, whereas marriage may involve children, who generally cannot dissolve their parents' marriage, get rid of their parents, or get a set of new parents, at least not very easily.

Again, LGBTs are not necessarily bad at work in general. Why would they be? It is difficult to argue, for example, that LBGTs will, say, flip hamburgers

differently or worse than anyone else. Or that when you eat the hamburger, you will tend to turn gay or change your gender. There is no such thing as a "Gay Burger" that Amicus knows of. (Or a "Les Burger", or a "Bi Burger", or a "Trans Burger". Probably not a "Genderless Burger" or "Hermaphrodite Burger", either…) So, paranoia or misjudgment of LGBTs' abilities is not a fair excuse to fire or abuse LGBTs in the workplace.

Amicus, however, is not definitely endorsing every aspect of the reasoning of Petitioner. (Nor is he endorsing *Obergefell*, by the way.) People may argue whether 42 U.S.C. § 2000e-2(a)(1), or similar civil rights provisions, must be read to include LBGT as an included part of sex discrimination protection. But even if it is not mandatory to read such civil rights provisions that way, then maybe an alternate ground can be found to uphold LGBT employment protections. Again, if *Obergefell* reaches so far as to destroy traditional State powers to define marriage, then logically, that landmark case might make a lesser, easier, logical leap, which is to say that if LGBTs are performing as well as other people at a job, then they should have about the same chance as everyone else.

(A cynical person might wonder if Amicus were trying to play some trick on Petitioner, by getting the Court to base LGBT employment non-discrimination on *Obergefell*, not on 42 U.S.C. § 2000e-2(a)(1). That way, if *Obergefell* is somehow overturned, then LGBT employment non-discrimination protections might vanish too. However, Amicus is not trying to do that. Moreover,

even if he were, one suspects that even if *Obergefell* is somehow overturned in the next few years, the overturning will likely be overturned itself in the near future after that, seeing that way that public opinion is going. I.e., *Obergefell* would likely be in force again at some point.)

III. EVERYONE IS A SINNER, SO LGBTS' PUTATIVE SINS ARE NOT AN EXCUSE TO DISFAVOR THEM IN EMPLOYMENT, EXCEPT MAYBE FOR, E.G., RELIGIOUS JOBS WITH RELEVANT PARAMETERS

There are, of course, thousands of years of religious tradition, or even non-religious traditions (e.g., Communist countries have often punished homosexuality severely), that hold LGBT sexuality, or even identity, to be abominable. But many other lifestyles have also been held abominable, *see, e.g.*, the Nazarene in *Mark* 10:11-12 (calling remarriage after divorce adulterous). But how often do we hear about people being fired from their jobs for having remarried someone else after divorce?

Not only do we have separation of church and state in America, we also know, commonsensically, that everybody on Earth is a sinner. (Excepting, for all we know, the nine upstanding Members of this virtuous Court.) To be a Pharisee and say that someone's LGBT status alone, without a really good additional reason, legitimates giving that person second-class status in the work arena, is itself abominable: a work of Sodom, even. *Cf. Ezekiel* 16:49-50, "Now this was the sin of your sister Sodom: She and her daughters were arrogant, overfed and

unconcerned; they did not help the poor and needy. They were haughty and did detestable things before me." *Id.*

Speaking of religion, though, it may be time to point out some educative contrasts between the instant case and *Masterpiece Cakeshop*, *supra* at 1.

IV. A COMPARISON WITH THE "GAY WEDDING-CAKE" ISSUE: IT MAY BE HARDER TO RESTRICT EXPRESSIVE OR RELIGIOUS RIGHTS THAN TO DEMAND EMPLOYMENT EQUALITY

While Amicus has mentioned Sylvester's desire to feel "mighty real", others, too might want to feel "mighty real" about their own religious or free-speech choices, even if those choices are unsupportive of Sylvester's lifestyle, or similar lifestyles. So, is it possible that one could support, to whatever extent, the Petitioners in *Masterpiece*, but also the Petitioner in the instant case, without being self-contradictory or illogical?

After all, the "cake" situation has become a little "funkier" lately; *see* Curtis M. Wong, *The Satanic Temple Has An Ingenious Plan To Troll Anti-Gay Bakeries*, Huffington Post, Sept. 28, 2017, 3:59 p.m. (updated at unstated time that day), https://www.huffingtonpost.com/entry/satanic-temple-wedding-cakes_us_59cd3203e4b0ef069427151f,

> Regardless of how the Supreme Court ultimately rules, however, the queer community has found an unlikely ally: The Satanic Temple. The Salem,

> Massachusetts-based group is encouraging LGBTQ rights supporters to order Satan-themed cakes from bakers who oppose same-sex marriage because of their religious beliefs.
>
> . . . .
>
> [Temple spokesperson Lucien] Greaves told HuffPost that he and his parishioners hope the plan will prompt the Supreme Court to "consider either adding sexual orientation as a protected class, or taking religion away from protected class status."
>
> "We've received a good deal of messages from people who have asked if there is a way to leverage religious freedom in such a way as to allow business owners to refuse service to theocratic evangelical nationalists," he said. "If these self-proclaimed defenders of religious freedom want to leverage their religious privilege to deny service to same-sex couples, perhaps they'll appreciate making a cake for Satan instead."

Id. This all, *see id.*, sounds remarkably like what at least one amicus in *Masterpiece* thought might happen: devil cakes! The world turned upside down. Etc.

Since one is now discussing same-sex wedding cakes and *Masterpiece*, Amicus has made a small chart, *infra*, showing some of the kinds of balance available in that sort of situation. (With relevance to

the instant case, explained *infra*.) The vertical axis on the left of the chart shows religious bakers; a same-sex couple; and a mean, balance, or compromise between what the bakers want and the same-sex couple want:

Rights Chart re Same-Sex Wedding-Cake Issue

	Cake	Fine	Teach	Warn	Jail	Shut	X
Bakers	N	N	N	N	N	N	N
Couple	Y	Y	Y	Y	Y	Y	Y
Mean	N	Y	1/2	Y	N	N	Y

On the horizontal axis at the top of the chart:
"Cake" means being forced to make all consumers (e.g., same-sex couples) a custom wedding cake, regardless of one's conscience, or face huge penalties;
"Fine" means having to pay a fine to the State, and/or damages to consumers, for not making a cake;
"Teach" means having to reeducate your staff that they must make cakes for everyone regardless of conscience;
"Warn" means that the baker must publicly post as much warning as state (or federal) law allows that he does not want to make cakes for certain types of weddings;
"Jail" means that the baker could go to jail for persisting in not making cakes for everyone;
"Shut" means being shut down by the State for persisting in not making cakes for everyone;
and "X" is short for "Explanation", meaning that the baker must give the State not only notice of having refused service to a consumer, but also a detailed explanation of why, so as to help avoid hasty, irrationally bigoted decisions by the baker.

The seven "N"s in the baker's row, "N" standing for "No", show that he or she would probably not want to be punished or restricted in any of those seven ways; the seven "Y"s in the couple's row, "Y" standing for "Yes", show that the couple would likely want the baker to be punished or restricted in all of those seven ways; and then there is the Mean.

The Mean, as the chart shows, has three "N"s, in that the baker would be allowed to avoid making wedding cakes without massive penalty, would not have to go to jail, and would not be shut down for noncompliance. The three "Y"s show that the baker would have to pay a fine and/or damages, in a small or moderate degree (maybe as a quasi-incidental burden—neither merely incidental nor catastrophically huge?—on a fundamental right of religion/speech, so to speak); would have to pre-warn potential customers as much as reasonably possible; and would have to let the State know about all refusals of service, and provide a rational, detailed explanation (as part of the "civilized conversation" that we should all have about people's rights, instead of acting arbitrarily without explanation). The "1/2" symbol, meaning roughly halfway between "Yes" and "No", means that the baker would not have to reeducate his staff (or himself), but that the State could prepare education materials, send them to him, and strongly urge that he reeducate his staff—even though the baker could just ignore the State's precatory advice that he do so. Or there could be a small fine for the baker not reeducating his staff.

So the Mean has 3 ½ "Y"s, and 3 ½ "N"s: an equal number. A perfect balance, of sorts, instead of the

two more "extreme" platforms of either the baker or the couple, having seven "N"s or seven "Y"s respectively. If balance can be achieved—between the "yin" and "yang" of First and Fourteenth Amendments, as it were—, that may be a good thing. And that applies to LGBT employment, too, in a way, although the balance may be limited largely to BFOQ situations, *see infra*.

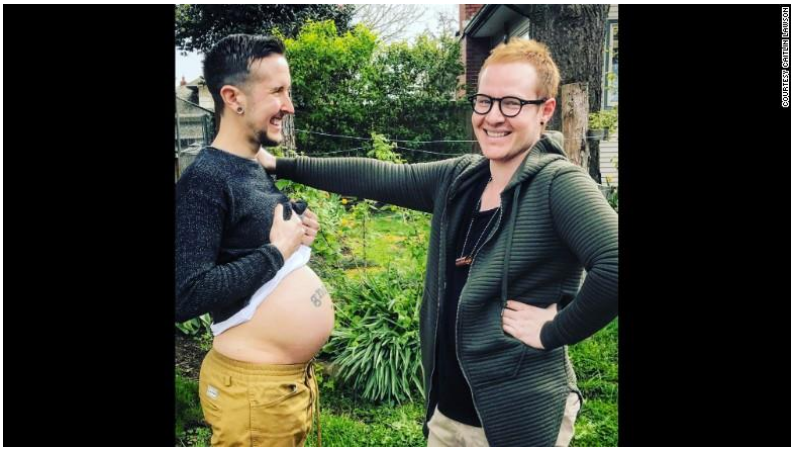
See also David Boyle, *"Gerrymandering the Wedding-Cake Refugee Ban": or, How "Mutual Exclusion" Could Admit Workable Compromises*, Casetext, updated Sept. 14, 2017, https://casetext.com/posts/gerrymandering-the-wedding-cake-refugee-ban-or-how-mutual-exclusion-could-admit-workable-compromises (discussing how partisan gerrymandering and Muslim bans may have no basis, but the Petitioners and Respondents in *Masterpiece* both have some viable claims). …One will now return to the LGBT employment issue, but Amicus did want to show how complex the "cake" issue is by comparison, and thus how simple the LGBT employment issue is by comparison to the "cake" issue.

V. A SAMPLE BFOQ SCENARIO: PREGNANT TRANSMAN HOST AT "LA STAÏDE" FRENCH RESTAURANT, WITH SOME WRINKLES

LGBT lifestyles can bring potentially startling images to the world (as can any other lifestyle). *See, e.g.*, Carma Hassan & Dakin Andone, *'My body is awesome': Trans man expecting first child*, CNN, updated June 8, 2017, 12:53 p.m., http://www.cnn.

com/2017/06/08/health/trans-man-pregnant-trnd/index.html,

> Like most anyone in their [sic] third trimester of pregnancy, Trystan Reese is dealing with cravings and heartburn. But unlike most first-time parents, Reese is a transgender man who is expecting a baby with his partner of seven years, Biff Chaplow. The Portland, Oregon, couple will welcome a son in July.



Id. In history, the sight of a "pregnant man" has not been especially common, even at the circus, where a "bearded lady" was considered the sort of "freak" that circuses are for. How times have changed, *see id.*

On that note: since LGBTs can do so many jobs (hamburger flipping, etc., even Supreme Court advocacy) as well as other people, is there any situation in which there could be an exception to automatic acceptance of LGBTs in every sphere of

employment? Otherwise put, might there be a bona fide occupational qualification, BFOQ, situation would actually occur in real life? —Let us consider the hypothetical situation of La Staïde, a very…*staid* French restaurant, and a venerable and expensive one, too.

Fred and Erma Wrinkle, an old (heterosexual) couple, are planning a nice 50th wedding anniversary celebration, and have saved up some money to go to a fancy French local landmark for a quiet dinner, La Staïde. They enter the majestic oaken door and are greeted by the new host, Butch Marceau—hired under new anti-discrimination laws, maybe—, a transgender pregnant man with notable beard and "masculine" facial looks which contrast greatly with the curve of his swelling pregnancy.

The host trills, "Welcome to *La Staïde*!", laden belly bouncing as he moves slightly towards the guests. The Wrinkles are shocked by the whole unfamiliar and unexpected scene—they thought the host or hostess might look a little more *traditional*, instead of being a bearded pregnant man—, suffer matching heart attacks, and promptly drop dead.

Do we want this to happen? It could, or something like it. Maybe not in 25 years, when pregnant men may be as common as sliced bread; but in the present day, it really could occur, at least in some corners of the Nation. So it is at least conceivable that La Staïde could claim that it is a practical, fair BFOQ for its host or hostess, that the employee not be a transgender man of somewhat unusual appearance, especially one whose pregnancy might seriously confuse old folks like the Wrinkles (RIP). (Amicus is not agreeing, or disagreeing, with La

Staïde here; he is just saying that the claim is conceivable, and maybe not easily or immediately dismissible.)

But there is a lot to discuss here. (Amicus sometimes offers more questions than answers, since the questions might be more stimulating than his (or anyone's?) particular answers would be.) So, then, in no particular order: But would the restaurant possibly be discriminating on the basis of pregnancy, against a vulnerable pregnant person? Then again, would all fancy restaurants allow a massively pregnant person to be a host(ess), just as they might not have a massively obese person in that position?

Indeed, speaking of "expressive freedom": are not hosts/hostesses in general, conventionally attractive people, and, frankly, frequently white people instead of people of color, the latter often being consigned to other jobs in the restaurant, e.g., busboy or the kitchen? On that note, should "lookism" be illegal, especially since a lot of physical appearance is inherited and not changeable even with massive plastic surgery? *See, e.g.*, Tove Danovich, *How Restaurants Get Away With Looks-Based Discrimination*, Jezebel, Aug. 24, 2016, 11:15 a.m., https://jezebel.com/how-restaurants-get-away-with-looks-based-discriminatio-1785308185 (mentioning "lookism" issue, and racial issues, in employment context).

Then again, discriminating against employees by hair length or style, especially demanding men's hair be short and women's be longer, is often perfectly legal. So if one is allowed to do that (and maybe one

should not be allowed so to discriminate?), then why would it be illegal to keep Butch Marceau from being a front-door host at La Staïde? Commonsensically, Marceau's appearance may be far more terrifying, including to a lot of "traditional" or "rural" people, than a long-haired man or short-haired woman would. So why couldn't he be barred from host status, on that rationale?

In fact, Marceau might be happy with having a job in the kitchen or some other "hidden" area, and might not be comfortable with much state or federal policing of La Staïde over LGBT employment issues, since that policing might actually highlight his status and make life worse for him if he wants to keep quiet about his status. Then again, it could be considered a sort of "apartheid" for La Staïde to keep him from being a front-door host, letting the restaurant keep him hidden away from customers as if they are ashamed of him.

…But if La Staïde can argue that Marceau would terrify so many customers that the restaurant would have to shut down, would that let La Staïde avoid employing Marceau without legal penalty? or not?

Finally, what about "class"? Does La Staïde get a pass because it is an expensive French restaurant? E.g., McDonald's could not discriminate on the basis of LGBT identity or appearance, maybe, but fancy places like La Staïde may do so, at least for positions like host? …The "class" issue also relates to the same-sex wedding cake issue: e.g., if a fancy custom wedding cake constitutes a "work of art" that gets First Amendment protection, does that mean that only wealthy businesses get such protection? After

all, a cheap bakery or run-of-the-mill grocery may not sell expensive, custom wedding cakes. So do they not get the same First Amendment right to refuse selling wedding cakes, as some fancy-schmancy "cake artist" does? Indeed, is it a form of elitism and snobbery to allow "artists" or "communicators" of whatever type the privilege of opting out of serving customers, when the average "non-artistic" worker or business might not be wealthy, or artsy, or articulate, enough to get that privilege?

Thus, the BFOQ issue and the wedding-cake issue have some interesting overlap, including issues of "style", "class", "sending a message", "appearance of endorsement of someone else's lifestyle", freedom of expression (by either the employee or the employer, or both), etc.

As we see, there are many issues, or sub-issues, here, and things are not always simple. The basic point remains, though, that there may be some situations in which LGBT-associated particular fact situations, like Marceau's appearance that might startle people, could conceivably bring up BFOQ issues. (There are other obvious examples, such as these *reductio ad absurdum* ones: does there have to be a lesbian Pope to prove the Church isn't discriminating against women and gays? Also, when casting the title role in *Othello*, does a director have to give the same consideration to a two-foot-tall white woman as he would to a six-foot-tall African-American man? Or is the director a "racist, sexist, size-ist bigot" if he doesn't do so?)

However, as noted, most jobs might not have a real BFOQ issue re LGBTs. Thus, a chart for the

LGBT employment issue, with reference to BFOQ, might be rather simple, especially compared to the three-row and seven-column same-sex wedding-cake chart *supra* at 13:

Rights Chart re LGBT Employment/BFOQ Issues

	No BFOQ issue	Legitimate BFOQ issue
LGBT employee or applicant	Employer may not discriminate or exclude LGBT employee or applicant	Employer may possibly exclude, or treat appropriately differently from other and possibly non-LGBT employees, the LGBT employee or applicant

One might be pleased, then, to see the Court grant certiorari for an issue, LGBT employment rights, which is simpler to resolve than the "cake" issue. (Anyone who said some issues are "easy as pie" or "easy as cake", may not have been speaking accurately…)

And speaking of "easy", we now consider one of the most "easy" Americans of all time, and how some of his legacy (though not most of it) resonates with justice in LGBT employment.

VI. HUGH HEFNER: PORNOGRAPHIC POOBAH, YET ADOVCATE OF JUSTICE FOR MINORITIES

The recently-deceased Hugh Hefner ("RIP") was an amazing "cultural entrepreneur", who arguably corrupted the entire world in one lifetime. The idea of presenting women somewhat like meat in his magazines, TV shows, and clubs, and establishing a pornographic empire, was not a good idea. It is also possible that the so-called "sexual revolution" he may have helped spearhead, is one responsible factor for the popularization of various sexual lifestyles, or at least for the openness of discussion which may publicize or abet such lifestyles.

Or such lifestyles may have become popular anyway. In any case, Amicus points out that in the present age for which Hefner may be partially responsible, he actually helped promote social justice at times, *see, e.g.*, Rachel Leah, *Hugh Hefner's real progressive legacy isn't sexual, it's racial*, Salon, Sept. 28, 2017, 2:13 p.m., https://www.salon.com/2017/09/28/hugh-hefners-real-progressive-legacy-isnt-sexual-its-racial/,

> The death of Hugh Hefner means different things to different people. . . .
>
> But in one important realm, Hefner was undeniably progressive. Over many decades and in many ways, he used his platform and wallet to challenge race-based stereotypes and push forward racial justice.

> "I felt from a very early age that there were things in society that were wrong, and that I might play some small part in changing them," Hefner said to CBS Los Angeles in 2011. . . .
>
> . . . .
>
> The publisher donated $25,000 to use as a reward in helping [comedian Dick] Gregory uncover the bodies of slain civil rights activists James Chaney, Andrew Goodman and Mickey Schwerner. . . .
>
> Hugh Hefner's legacy — like almost anyone's — is complicated. . . .
>
> But when it came to racial equality, Hefner was ahead of the pack, listening to and amplifying black voices well before social justice became mainstream. At the very least, Hef deserves credit for that.

Id.

Id. (Hugh Hefner, Harold Washington and Sidney Poitier in foreground)

A key point here is that, then, if someone arbitrarily opposes employment equality for LGBTs (or maybe for practically any group), he or she may actually be *a worse person than Hugh Hefner*, in some ways. Which is not a good thing to be, maybe, if "Hef" is right now roasting at 1 million degrees Fahrenheit in the "Hellfire Club", forced to wear red-hot bunny ears for eternity (may God forfend), for his sins. All the more reason for Americans, and the Court, to consider the fairness of LGBT employment equality.

VII. EMPLOYMENT EQUALITY FOR DIFFERENT ORIENTATIONS OR GENDER IDENTITIES MAY HELP PROTECT MEMBERS OF THE HETEROSEXUAL CISGENDER MAJORITY TOO

Moreover, employment equality for LGBTs might protect the majority of Americans, too. These days, it may be important not only to make sure that LGBTs avoid discrimination against themselves, but that others avoid being discriminated against by LGBTs. For example, what if a group of gays who happened to hate heterosexuals (seeing them as mere "breeders", say), discriminated against them in employment? So, employment non-discrimination by sexual orientation or gender identity may protect everybody, not just LGBTs.

It might even prevent discrimination among LGBTs. For example, what if some LGBTs wanted to discriminate against Eve Tushnet, a well-known Catholic lesbian who wants to be a chaste servant of Christ, *see, e.g.*, Wikipedia, *Eve Tushnet*, https://en.wikipedia.org/wiki/Eve_Tushnet (as of Aug. 31, 2017, 3:58 GMT) rather than sexually active along the lines of her orientation? "Chastity" is not an orientation, maybe, but it is part of sexual identity, so that the spirit of any LGBT employment antidiscrimination laws might help her be treated fairly. And help many others as well.

* * *

Life is often brief and cruel. For example, Amicus recently quoted Tom Petty on his desire not to live like a refugee, in Amicus' merits brief, *see id.* at 5, in *Trump v. IRAP* and *Trump v. Hawaii*, 16-1436 and 16-1540. But now Petty is dead; he didn't want to live like a refugee, but now he is not living at all, *see, e.g.*, CBS News, *Tom Petty, of Tom Petty and the Heartbreakers, dead at 66, manager says*,

CBSNews.com, updated Oct. 3, 2017, 5:08 a.m., https://www.cbsnews.com/news/tom-petty-dead-at-66-rocker-tom-petty-and-heartbreakers/. (RIP) Or, "Out, out, brief candle", as Macbeth said in his eponymous play, act 2, sc. 2. So, even those who despise the LGBT lifestyle might want to show the decency not to want to ruin LGBTs' working lives, since life is so short.

Ideally, of course, the National Legislature would amend 42 U.S.C. § 2000e-2(a)(1) or other provisions, instead of the Court interpreting them in a new and significant way. However, as Petitioner notes, there may be reason for the Court to rule for Petitioner and make a new interpretation anyway. …Let us say that a statute protects pregnant women, in an attempt to be enlightened and equal. But what about a pregnant transgender man? The statute, on its face, and despite its egalitarian intentions, might fail to protect that person, so might have to be interpreted in light of current developments, at the risk of irrationally, or cruelly, misapplying the statute without the Court's new interpretation.

Even Ronald Reagan, of all people, sometimes advocated for LGBT equality in employment. *See, e.g.*, Dan Chmielewski, *Ronald Reagan on Gay Rights*, Liberal OC, June 9, 2008, http://www.theliberaloc.com/2008/06/09/ronald-reagan-on-gay-rights/, on the Briggs Initiative, a 1978 California ballot measure banning gay teachers from public schools,

> Reagan met with initiative opponents[,] and, ultimately, at the risk

> of offending his anti-gay supporters in the coming presidential election, wrote in his newspaper column: "I don't approve of teaching a so-called gay life style in our schools, but there is already adequate legal machinery to deal with such problems if and when they arise."

Id. (citations omitted) So to be a "good conservative", one does not have to be like Roy Moore, *see, e.g.*, Andrew Kaczynski, *Roy Moore opposed the appointment of an 'admitted homosexual' to an ambassadorship in 2006*, CNN, Sept. 28, 2017, updated 10:00 p.m., http://www.cnn.com/2017/09/28/politics/kfile-roy-moore-openly-gay-appointments/index.html.

The time is ripe for change. *See, e.g.*, Nick Greene, *Cam Newton Would Like You to Notice His Rosie the Riveter Pin*, Slate, Oct. 8, 2017, 9:46 p.m., http://www.slate.com/blogs/the_slatest/2017/10/08/cam_newton_wears_rosie_the_riveter_beats_the_lions.html,

> On Wednesday, Carolina Panthers quarterback Cam Newton[, w]hen asked by *Charlotte Observer* reporter Jourdan Rodrigue about an issue regarding a wide receiver, Newton responded with a dismissive and snide remark. "It's funny to hear a female talk about routes.["]
>
> . . . .
>
> . . . [O]n Thursday, Newton . . . said his "word choice was extremely degrading and disrespectful to women."

> . . . .
>
> On Sunday, before the Panthers' contest against the Detroit Lions, Newton made an appeal to women everywhere by wearing a Rosie the Riveter pin on his fedora (as one does). . . .
>
> . . . .
>
> When asked to explain his fashion statement after the game, Newton said, "I did my homework on [Rosie the Riveter] and her impact on World War II. Not only on her, but all the women and females who played a big impact in creating equipment for World War II."

Id. Americans are learning that gender, or many other, stereotypes in employment are outdated.

Finally, while Amicus is not pushing for an LGBT person to be appointed to the Court: if or when that does happen, Amicus hopes that the rest of the Court will not arbitrarily discriminate against that Member of the Court in her, his, or (non-gendered possessive pronoun) employment capacity. (Amicus is not expecting the Court would discriminate, but is just trying to make a point.)

After all, as Holmes' dissent in *Lochner v. New York*, 198 U.S. 45, 76 (1905), noted of the Constitution, "It is made for people of fundamentally differing views[.]" *Id.* So while preserving religious, speech, and expressive freedoms, the Court can also protect employment freedoms and dignities for people of LGBT orientation, non-LGBT orientation, or no orientation at all. Paraphrasing Voltaire:

people should in large part have a legal right to their identity, a right we might even die to protect others having, even if we disagree with their particular lifestyle. If each of us is not free, who is?

CONCLUSION

The Court should grant the petition for certiorari; and Amicus humbly thanks the Court for its time and consideration.

October 11, 2017 Respectfully submitted,

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