Office of Congressional Workplace Rights

OCWR BROWN BAG LUNCH SERIES
SUPREME COURT PREVIEW: EMPLOYMENT CASES
SEPTEMBER 18, 2019

I. Introduction

The Congressional Accountability Act of 1995 (CAA), 2 U.S.C. §§ 1301 *et seq.*, applies the rights and protections of 13 labor and employment statutes to the legislative branch of the federal government. Covered employees alleging violations of these laws may file civil actions in federal court, and some might have the option of pursuing their claims through an administrative hearing at the Office of Congressional Workplace Rights (OCWR), in which Hearing Officers and the Board of Directors typically follow federal case law. Accordingly, developments in the jurisprudence concerning employee protection laws bear close watching.

In its upcoming October term the Supreme Court of the United States (SCOTUS) will be deciding several important cases that could change or clarify the rights and obligations of covered employees and employing offices under the CAA. Some of these cases deal with substantive rights and protections, which would affect litigants in both judicial and administrative proceedings, and which could also require employing offices to reevaluate their employment policies and practices. Another case the SCOTUS will consider this term concerns a matter of civil procedure that could apply in CAA cases brought in federal court, and might also influence administrative proceedings.

II. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 applies to legislative branch employees through section 201 of the CAA, and prohibits discrimination on the basis of race, color, religion, sex, or national origin. 2 U.S.C. § 1311; 42 U.S.C. § 2000e-2. Three cases in the upcoming term will afford the SCOTUS an opportunity to resolve a split in the Circuit Courts of Appeal as to whether discrimination because of "sex" in Title VII applies to discrimination based on employees' sexual orientation or gender identity.

The two sexual orientation cases, *Bostock* and *Zarda*, have been consolidated for filing and oral argument. The case involving gender identity, *R.G. & G.R. Harris Funeral Homes*, will be argued on the same day.

Bostock v. Clayton County, Georgia
SCOTUS docket no. 17-1618
Oral argument: Tuesday, October 8, 2019
Decision below: *Bostock v. Clayton Cty. Bd. of Comm'rs*, 723 F. App'x 964 (11th Cir. 2018) (per curiam), *reh'g en banc denied*, 894 F.3d 1335 (2018)

Question presented: Whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination "because of . . . sex" within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.

History:

- Gerald Bostock, a Child Welfare Services Coordinator for Clayton County, Georgia, alleged that despite ten years of good job performance and accolades, he was fired not long after joining a gay recreational softball league. He alleged that joining the league had prompted individuals with significant influence on the county's decision making to criticize him and make disparaging remarks about his sexual orientation and identity and his participation in the league, and that the county initiated an audit and falsely accused him of mismanaging funds as a pretext to fire him for being gay.
- The district court adopted the recommendation of a magistrate judge that the complaint be dismissed because Eleventh Circuit precedent does not recognize sexual orientation as a basis for a Title VII sex discrimination claim, and also because the fact of being gay, standing alone, is not enough to plead a gender stereotyping claim.
- In a short per curiam opinion that did not discuss the merits of the legal arguments, a three-judge panel of the Eleventh Circuit Court of Appeals affirmed the district court's dismissal of the case because its own precedent – specifically, its holding in *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017), *cert. denied*, 138 S.Ct. 557 (2017) – foreclosed Bostock's claim. "[U]nder our prior panel precedent rule, we cannot overrule a prior panel's holding, regardless of whether we think it was wrong, unless an intervening Supreme Court or Eleventh Circuit en banc decision is issued."
- Bostock petitioned for rehearing en banc. The en banc court declined to review the panel's decision, although Judge Rosenbaum authored a strongly-worded dissent from the denial for rehearing en banc, in which she espoused the view that the prohibition on gender stereotyping recognized by the Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), should apply to bias based on sexual orientation, because being attracted to the "wrong" gender would seem to be the "ultimate" nonconformity with gender stereotypes.

SCOTUS appeal:

Petitioner Bostock in his brief argues that:

- Title VII's "because of… sex" language encompasses sexual orientation for three reasons: (1) sexual orientation is itself a sex-based classification, because one cannot consider an individual's sexual orientation without considering his sex, and therefore discrimination based on sexual orientation is disparate treatment that would not occur "but for" the employee's sex; (2) sexual orientation discrimination is associational

discrimination, like discrimination based on interracial relationships, and Title VII's prohibition on this type of discrimination should apply with equal force regardless of whether it is based on race or sex; and (3) sexual orientation discrimination is unlawful discrimination on the basis of failure to conform to a sex-based stereotype under *Price Waterhouse*.

- The statutory history supports an expansive interpretation of what "because of sex" means under Title VII. In particular, the brief focuses on the broader understanding of "sex" reflected in the passage of the Pregnancy Discrimination Act of 1978 and the Civil Rights Act of 1991, the latter of which incorporated the expansive definition of "because of sex" reflected in several Supreme Court cases. Bostock argues that sexual orientation discrimination is a "reasonably comparable evil" that is prohibited, just as same-sex sexual harassment was held to violate Title VII in the Supreme Court case of *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), regardless of whether that specific form of discrimination was contemplated by Congress when the statute was first enacted.
- Contrary to arguments that Title VII does not prohibit sexual orientation discrimination because it is sex-neutral discrimination – i.e., gay men and lesbians are treated the same – the case of *Loving v. Virginia*, 388 U.S. 1 (1967), held that "mere equal application" of a discriminatory practice is not enough to make it lawful, because the discrimination must have a legitimate basis. Prohibitions on interracial marriage affected whites and non-whites equally, but were still unlawful, and sexual orientation discrimination in the workplace likewise lacks a legitimate basis and is therefore also unlawful.
- The fact that Congress has failed repeatedly to amend Title VII to clearly include sexual orientation does not necessarily indicate that Congress did not intend for the prohibition on sex discrimination to cover discrimination based on sexual orientation; as the Supreme Court has held, "Congressional inaction lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'" *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (quoting *United States v. Wise*, 370 U.S. 405, 411 (1962)).
- Interpreting Title VII to prohibit sexual orientation discrimination is necessary to harmonize and give effect to all parts of Title VII, including the "motivating factor" causation standard that makes it unlawful to base employment decisions even partly on sex in addition to other factors. In other words, if an employee is fired for being gay, they are being fired because they are attracted to individuals of the same sex, which necessarily requires taking the employee's *own* sex into account; if their own sex is one of the factors considered, then even if the other factor (i.e., their partner's sex) isn't an unlawful consideration in and of itself, the employee's own sex is still a motivating factor and therefore Title VII has been violated.
- It is unworkable to attempt to distinguish between discrimination based on "sex stereotypes" and discrimination based on sexual orientation, because there is a great deal of overlap – for instance, an effeminate gay man may be harassed for being gay, or for having traits that do not conform to the "real man" stereotype, or both – and the courts have been unable to agree on a consistent approach for analyzing allegations to categorize them as one or the other.
- The Supreme Court's decisions in constitutional cases involving the rights of LGBT individuals, including *Romer v. Evans*, 517 U.S. 620 (1996), *Lawrence v. Texas*, 539 U.S.

558 (2003), and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), should also be taken into account, as "It would be anachronistic, to say the least, to read Title VII to permit a form of discrimination that the Court has held to violate the Constitution."

Respondent Clayton County in its brief argues that:

- Sexual orientation is not included as a protected class under Title VII because "sex" and "sexual orientation" are two different concepts, and because "sex" was not considered to include sexual orientation at the time the statute was enacted. It is a fundamental canon of statutory construction to give words their ordinary, contemporary (i.e., at the time of enactment), common meaning. It is for Congress to rewrite statutes in light of new social problems and preferences, not for the courts to imbue old terms with new meanings. In 1964 the commonly understood public meaning of "sex" was being male or female, and the Supreme Court's Title VII cases since that time have all interpreted "sex" to mean being male or female. Even *Oncale*, which established that same-sex harassment is prohibited by Title VII, did not change the meaning of "sex" as being male or female, because the target of the harassment was chosen for his sex – i.e., for being male.
- Sexual orientation is not a sex-specific stereotype like those addressed in *Price Waterhouse v. Hopkins*, because homosexuality is a trait that is present in both men and women, and an employer who objects to that trait does so for both men and women. The holding in *Price Waterhouse* does not support applying a sex stereotyping theory to sexual orientation, because that case "involved a scenario where a female employee was treated less favorably than male employees… because she did not satisfy requirements that applied *exclusively* to women."
- Employment decisions based on sexual orientation do not treat employees of one sex more favorably than similarly situated employees of the other sex. The relevant comparison is not that men who are attracted to other men are treated less favorably than women who are attracted to men, but rather whether gay men and lesbians are treated differently; because the relevant consideration is whether men and women are treated differently, all variables other than the characteristic of sex must be kept the same, including sexual orientation.
- The *Loving v. Virginia* associational discrimination theory is inapplicable because "sex" and "sexual orientation" are different; unlike with interracial marriage, "sexual orientation discrimination does not involve invidious discrimination based on sex or favor one sex over the other sex" comparable to the white supremacist attitudes that drove the anti-miscegenation laws. Also, "claims of sex discrimination cannot be analyzed identically as race discrimination claims," as evidenced by the fact that employers may have different grooming, dress, and restroom policies for men and women, but not for members of different races. Moreover, an employer who objects to homosexuality does not object to employees associating with members of the same sex in platonic ways, only in romantic ways, so it isn't the association with others of the same sex that forms the basis for discrimination, but rather the fact that the employee is homosexual.
- Congress has repeatedly and consistently rejected proposed bills to amend Title VII to prohibit discrimination on the basis of sexual orientation, and did not include sexual orientation when enacting the Civil Rights Act of 1991, despite the unanimous views of the courts and the EEOC until very recently that Title VII did not already cover sexual

orientation; further, Congress has included sexual orientation discrimination in other civil rights statutes when it intended to include sexual orientation as a protected class. Nor is it reasonable to infer that something as significant as a prohibition on sexual orientation discrimination could have been intended to be covered by a prohibition on discrimination because of "sex," because "Congress does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1626-27 (2018) (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (punctuation and citations omitted).
- Bostock's argument based on the "motivating factor" causation standard is misplaced; that standard does not affect the definition of "sex," but rather addresses to what extent an employment decision must be based on sex in order to violate Title VII.
- Finally, Bostock's argument about the distinction between sex stereotyping and sexual orientation discrimination claims being unworkable is based on a few courts' misreading of *Price Waterhouse*, which did not recognize "stand-alone claims of sex stereotyping" but rather stands for the proposition that "sex stereotyping may constitute *evidence* of sex discrimination."

Almost 70 amicus curiae or "friend of the court" briefs – most of them representing the views of multiple entities or individuals – have been filed in the consolidated *Zarda* and *Bostock* cases, and many of those were also filed with respect to the *R.G. & G.R. Harris Funeral Homes* case.

- A wide variety of civil rights organizations, religious groups, unions, Members of Congress (39 Senators and 114 Representatives), 21 States and the District of Columbia, local governments, bar associations, educators, historians, physicians and mental health professionals, and others filed briefs in support of the employees. The amicus briefs make some or all of the same arguments as Zarda and Bostock: LGBT discrimination is impermissible sex stereotyping, regardless of whether it is applied to both genders; there is inevitable overlap between sex stereotyping based on traits and discrimination based on LGBT status, such that attempting to distinguish between them leads to absurd results; LGBT discrimination is a form of associational discrimination, which is prohibited; and there is no way to disentangle a person's sexual orientation or gender identity from the person's sex, so the plain text of Title VII prohibits discrimination against LGBT workers, and Congressional intent cannot override the unambiguous language of the statute. Many of the amicus briefs also make policy arguments, including that diverse and inclusive workforces are good for business, and that discrimination against LGBT individuals causes significant measurable harm both to individuals and to society.
- Various non-profit organizations, faith-based groups, businesses, religious colleges and universities, Members of Congress (8 Senators and 40 Representatives), the U.S. Solicitor General, 15 States, and others filed briefs in support of the employers. In addition to the arguments made by the employers – primarily that "sex" is distinct from sexual orientation or gender identity, that the legislative history and historical context do not support Title VII prohibiting sexual orientation and gender identity discrimination, and that the employees' sex stereotyping and associational discrimination arguments are misplaced – some of the amici also raise a number of policy concerns. Included in those concerns: that businesses have relied on decades of consistent interpretations of Title VII and would be unfairly prejudiced if those interpretations were suddenly deemed to be

wrong; that many religious groups hold sincere religious beliefs about same-sex relationships and gender identity issues, and religious employers' religious freedom would be hindered if they were not allowed to take those issues into account with respect to employment decisions; and that extending the protection of Title VII to LGBT individuals would require employers to eliminate single-sex bathrooms, locker rooms, shower facilities, etc., resulting in increased risks and actual harm to individuals and society. Several groups are primarily concerned with judicial deference and restraint, and the respective roles of Congress and the courts, and they argue that the nature of this issue requires legislative action, not a judicial determination, in order to be resolved.

- Notably, a brief was filed on behalf of 206 businesses – many of them among the most prominent companies in the country – in favor of the <u>employees</u> in all three Title VII cases.[1] Their primary arguments are that (1) the U.S. economy benefits from a diverse workforce, and the nation's business interests would therefore be undermined by excluding LGBT individuals from the protections of Title VII, and (2) uniform federal protections are necessary to provide businesses and employees with consistency and certainty. As they explain in the Summary of Argument: "Laws forbidding sexual orientation or gender identity discrimination are not unreasonably costly or burdensome for business. To the contrary, recognizing that Title VII prohibits these forms of sex discrimination would strengthen and expand benefits to businesses, such as the ability to recruit and retain top talent; to generate innovative ideas by drawing on a greater breadth of perspectives, characteristics, and experiences; to attract and better serve a diverse customer base; and to increase productivity among employees who experience their workplace as a place where they are valued and respected."
- Also filing in support of the employees was a group of organizations and individuals from a wide spectrum of religious denominations.[2] Among other views, they express that their various faiths recognize the inherent dignity of LGBT individuals, and they "unite in believing it is both morally wrong and not constitutionally required to permit blanket discrimination against [LGBT] people based on the personal religious beliefs of employers or their customers. *Amici* believe that, to the contrary, antidiscrimination statutes like Title VII should be applied on the basis of religiously neutral principles of equal protection under the law." They oppose what they view as a false dichotomy between LGBT rights and people of faith, explaining that "Personal religious views are entitled to the utmost respect, but do not provide a license to disregard neutral civil rights laws of general applicability." Prohibiting workplace discrimination against LGBT

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[1] Among the major companies represented are retailers (e.g., Amazon, Best Buy, IKEA, Macy's, Williams Sonoma), tech and social media companies (e.g., Apple, eBay, Facebook, Google, IBM, LinkedIn, Microsoft, PayPal), financial institutions (e.g., Bank of America, BNY Mellon, Citigroup, Deutsche Bank, Goldman Sachs, HSBC, JPMorgan Chase, Mastercard, Morgan Stanley, PWC, Prudential, T. Rowe Price, Wells Fargo), airlines and hotel chains (e.g., American Airlines, Hilton, Marriott, MGM Resorts, Southwest Airlines), food and beverage companies and restaurants (e.g., Ben & Jerry's, Coca-Cola, Domino's, Starbucks), media and entertainment companies (e.g., CBS, Comcast NBCUniversal, Univision, Viacom, Walt Disney Company, WarnerMedia), manufacturers (e.g., General Motors, Northrup Grumman), pharmaceutical companies (e.g., Bayer, GlaxoSmithKline, Pfizer, Takeda), two Major League Baseball teams (San Francisco Giants, Tampa Bay Rays), and many others.

[2] Among the entities represented are the Episcopal Church, the United Synagogue of Conservative Judaism, the Union for Reform Judaism, the General Synod of the United Church of Christ, the Unitarian Universalist Association, several Presbyterian groups, a Quaker faith community, the Methodist Foundation for Social Action, Muslims for Progressive Values, the Interfaith Alliance Foundation, over 700 individual clergy and faith leaders, and other groups.

individuals would not impinge on religious freedom; rather, as they see it, the amici who support the employers in these cases "confuse true freedom of religious exercise with an extravagantly expanded freedom that none of us possess to be free from any offense or contradiction to our sensibilities (religious or otherwise) while functioning in the public sphere of a pluralistic society."

- Another diverse cross-section of religious groups[3] filed a brief in support of the employers, based primarily on the concern that the religious freedom and mission of many religious organizations – including places of worship, religious schools and colleges, and faith-based social service providers/charities – would be threatened if they were forced to employ LGBT individuals in direct conflict with their sincerely held religious beliefs about sexuality and gender. These amici "maintain that the law should protect the right of religious organizations to hold their beliefs regarding sexuality and gender and to have those beliefs reflected in their employment practices." Because religious organizations "are guided by their beliefs in all they do" and because "Their practices, including acts of charity, education, and healthcare, are an expression of those beliefs[,]" it is vital that they be protected in their right to live their central religious principles, including the family structure that is part of their religious tradition. "The right of a religious organization to control the make-up of its workforce is fundamental to achieving its religious mission, promoting its religious beliefs, and being a true faith community." These amici fear that the ministerial exception and Title VII's existing religious exemption do not provide sufficient protection, as those provisions have been construed narrowly by some courts, so they would be forced to choose between violating the law and violating their religious beliefs if they could not take sexual orientation and gender identity into account in their employment practices. "Only Congress possesses the institutional authority and flexibility to balance these competing interests. Whether to make such a fundamental change in the 1964 Civil Rights Act, and if so, how to mitigate the serious religious conflicts that would inevitably follow, are policy decisions that belong to Congress."

On September 11 the SCOTUS granted a motion by the U.S. Solicitor General to participate in the oral argument as amicus curiae on the side of Altitude Express and Clayton County. The employers consented to the motion and agreed to cede ten minutes of argument time to the United States. The Solicitor General in his motion asserted that the United States has a substantial interest in the resolution of the question of whether Title VII prohibits discrimination on the basis of sexual orientation, both because the United States enforces Title VII against employers (the Attorney General in cases involving public employers, and the EEOC in cases involving private employers) and because the United States is itself an employer that is bound to follow Title VII.

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[3] These include the National Association of Evangelicals; the Church of God in Christ, Inc.; the American Islamic Congress; the Church of Jesus Christ of Latter-day Saints; the General Conference of Seventh-day Adventists; Agudath Israel of America; the Lutheran Church-Missouri Synod; the Christian Legal Society; the Jewish Coalition for Religious Liberty; the Orthodox Church in America; and the Christian and Missionary Alliance. Another brief filed on behalf of the U.S. Conference of Catholic Bishops, the Anglican Church in North America, the Association of Christian Schools International, the Ethics and Religious Liberty Commission of the Southern Baptist Convention, and others made similar arguments.

Altitude Express, Inc. v. Zarda
SCOTUS docket no. 17-1623
Oral argument: Tuesday, October 8, 2019
Decision below: *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018) (en banc)

Question presented: Whether the prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), against employment discrimination "because of . . . sex" encompasses discrimination based on an individual's sexual orientation.

History:

- Donald Zarda, a gay skydiving instructor, sued his former employer and its owner, alleging that he was fired because of his sexual orientation in violation of Title VII and New York state law. According to Zarda, he often told female clients about his sexual orientation, especially if they were accompanied by a significant other, so as to allay any discomfort about them being strapped tightly to him during the skydiving experience. However, one client's boyfriend complained to Zarda's employer about this disclosure, and Zarda was fired shortly afterward. The employer claimed he was fired because he failed to provide an enjoyable experience for the client, but Zarda maintained that he was fired for being gay. (While the district court proceedings were ongoing, Zarda died in a BASE jumping accident, and two executors of his estate – his sister Melissa Zarda and his partner William Moore – replaced him as the plaintiffs in the case.)
- The district court found triable issues of fact regarding the state law claims,[4] but granted summary judgment in favor of the employer with respect to the Title VII claims, because under Second Circuit precedent Title VII did not prohibit employment discrimination based on sexual orientation. Zarda had also made a gender stereotyping argument, but the district court found that he had failed to establish the requisite proximity between his termination and his failure to conform to gender stereotypes in ways other than not dating women (e.g., wearing pink to work and painting his toenails).
- A three-judge panel of the Second Circuit Court of Appeals affirmed, holding that under its precedent, specifically *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), Title VII does not prohibit discrimination based on sexual orientation. The court noted that the Second Circuit has considered gender stereotyping claims, but Zarda had not challenged the district court's finding regarding gender stereotyping on appeal.
- Zarda's executors successfully petitioned for rehearing en banc, and in a 10-3 decision, the full court reversed and remanded on the Title VII claim, overruling *Simonton* and other precedents that had previously held Title VII not to encompass sexual orientation discrimination.

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[4] New York law explicitly prohibits employment discrimination based on sexual orientation. The district court determined that there was a genuine dispute of material fact regarding the reason for Zarda's termination. A jury, following an instruction that New York law requires "but-for" causation, found in favor of Altitude Express and its owner on the state law claims. The Second Circuit panel noted that this verdict did not moot Zarda's Title VII claim because the "motivating factor" standard of causation under Title VII is less stringent than the "but-for" causation standard considered by the jury for the state law claims.

Decision upon rehearing en banc:

- Majority opinion by Chief Judge Robert Katzmann
  - At the outset, the majority discussed the evolving legal landscape with respect to this issue: first, the EEOC's 2015 decision to reverse its longstanding position and hold that sexual orientation is inherently a sex-based consideration, such that allegations of sexual orientation discrimination are necessarily allegations of discrimination based on sex; and second, the Seventh Circuit's 2017 en banc decision in *Hively v. Ivy Tech Cmty. Coll. Of Ind.*, 853 F.3d 339 (7th Cir. 2017), which marked the first time a Circuit Court of Appeals held that Title VII prohibited sexual orientation discrimination.
  - The court then noted that the Supreme Court precedents establish that "Title VII prohibits not just discrimination based on sex itself, but also discrimination based on traits that are a function of sex[.]" The majority summarized the question before it as "whether an employee's sex is necessarily a motivating factor in discrimination based on sexual orientation. If it is, then sexual orientation discrimination is properly understood as 'a subset of actions taken on the basis of sex.'" 883 F.3d at 112 (quoting *Hively*, 853 F.3d at 343).
  - The court pointed out that "To… identify the sexual orientation of a particular person, we need to know the sex of the person and that of the people to whom he or she is attracted. … Because one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex." 883 F.3d at 113. It is not enough for a defendant to say that it fired an employee for being gay, without reference to whether the employee is a gay man or a lesbian woman; "Title VII instructs courts to examine employers' motives, not merely their choice of words. *See* 42 U.S.C. § 2000e-2(m). As a result, firing an employee because he is 'gay' is a form of sex discrimination." 883 F.3d at 114.
  - Although sexual orientation discrimination was not considered to be within the scope of Title VII's protections in 1964, the same could be said of sexual harassment or hostile work environments, which are now indisputably held to be prohibited even though they don't appear in the statutory text. The court explained, "because Congress could not anticipate the full spectrum of employment discrimination that would be directed at the protected categories, it falls to courts to give effect to the broad language that Congress used." 883 F.3d at 115. As the Supreme Court held with regard to same-sex harassment in *Oncale*, statutory prohibitions "often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* (quoting *Oncale*, 523 U.S. at 79-80).
  - The majority also used the "comparative test," in which all variables are held constant except for the employee's sex, to "determine[] whether the trait that is the basis for discrimination is a function of sex by asking whether an employee's treatment would have been different 'but for that person's sex.'" 883 F.3d at 116 (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)). The Department of Justice in its amicus brief argued that the question is whether the employer treats men who are attracted to the same sex differently from

women who are attracted to the same sex, but the majority disagreed, holding that the appropriate inquiry is whether a man who is attracted to men is treated differently from a woman who is attracted to men; if yes, then the single variable that has changed – the employee's sex – is the basis for the discrimination. The court used the cases of *Manhart* and *Price Waterhouse* to illustrate why the DOJ's argument was based on "the wrong framing." *Id*. at 117.

- The majority also held that sexual orientation constitutes impermissible gender stereotyping, because "sexual orientation discrimination is almost invariably rooted in stereotypes about men and women." 883 F.3d at 119. Citing the *Hively* majority as well as several cases from various district courts, the court noted that perceptions of homosexuality are based on stereotypes about the proper roles of men and women. The majority also pointed out the "unworkability" of trying to distinguish between sex stereotyping and sexual orientation discrimination, because of how difficult the line can be to draw between them.
- In a footnote, the court notd that even if an employer discriminates against both homosexual men and homosexual women, "Title VII does not ask whether a particular sex is discriminated against; it asks whether a particular "*individual*" is discriminated against "because of such *individual's*… sex." *Id*. at 123 n.23 (citing 42 U.S.C. 2000e-2(a)(1)). "Taking individuals as the unit of analysis, the question is not whether discrimination is borne only by men or only by women or even by both men and women; instead, the question is whether an individual is discriminated against because of his or her sex. And this means that a man and a woman are both entitled to protection from the same type of discrimination, provided that in each instance the discrimination is 'because of such individual's… sex.'" *Id*.
- The court also held that sexual orientation discrimination is a form of associational discrimination: "Consistent with the nature of sexual orientation, in most contexts where an employer discriminates based on sexual orientation, the employer's decision is predicated on opposition to romantic association between particular sexes. For example, when an employer fires a gay man based on the belief that men should not be attracted to other men, the employer discriminates based on the employee's own sex." 883 F.3d at 124. Analogizing to cases in which Circuit Courts of Appeal have found that discrimination against employees because they are in interracial marriages violates Title VII, on the theory that the employee's own race inevitably must be taken into account in defining the marriage as interracial, the court held that "the prohibition on associational discrimination applies with equal force to all classes protected by Title VII, including sex." *Id*. at 125.
- Finally, the majority rejected the argument that the Civil Rights Act of 1991 implicitly ratified judicial decisions that had held Title VII to exclude prohibitions on sexual orientation discrimination. "When we look at the 1991 amendment, we see no indication in the legislative history that Congress was aware of the circuit precedents… and, turning to the substance of the amendment, we have no reason to believe that the new provisions it enacted were in any way premised on or made assumptions about whether sexual orientation was protected by Title VII." 883 F.3d at 129. Moreover, the majority rejected arguments based on Congress' failure to pass legislation extending Title VII's scope to encompass sexual

orientation discrimination, noting that "[The] theory of ratification by silence is in direct tension with the Supreme Court's admonition that 'subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress…" and because there are many reasons why Congress might not pass legislation, and various inferences that may be drawn from that inaction. *Id*. at 130 (quoting *Pension Benefit Guar. Corp.*, 496 U.S. at 650).

- Concurrence by Judge Dennis Jacobs – Of the various bases cited by the majority in favor of Zarda's Title VII claim, Judge Jacobs was persuaded by the associational discrimination claim, and wrote separately to concur in that part of the opinion and in the overall result. Considering cases that hold associational discrimination to violate Title VII and cases that hold Title VII to treat each of the enumerated protected categories the same, he wrote that he saw no reason why associational discrimination based on sex would not encompass association between persons of the same sex. He was, however, "unconvinced" by the other bases for the majority's opinion.
- Concurrence by Judge José Cabranes – In a very short opinion, Judge Cabranes concurred only in the judgment, writing that "This is a straightforward case of statutory construction" because Title VII prohibits discrimination based on sex, Zarda's sexual orientation is a function of his sex, and therefore discrimination against Zarda based on his sexual orientation was discrimination because of his sex and a violation of Title VII. "That should be the end of the analysis."
- Concurrence by Judge Robert Sack – Like Judge Jacobs, Judge Sack was most convinced by the associational discrimination argument. He concurred in the judgment and in selected parts of the majority's opinion, but cautioned that "I think it is in the best interests of us all to tread carefully; to say no more than we must; to decide no more than is necessary to resolve this appeal. This is not for fear of offending, but for fear of the possible consequences of being mistaken in one unnecessary aspect or another of our decision… My declination to join other parts of the majority opinion does not signal my disagreement with them. Rather, inasmuch as, in my view, this appeal can be decided on the simpler and less fraught theory of associational discrimination, I think it best to stop there without then considering other possible bases for our judgment."
- Concurrence by Judge Raymond Lohier, Jr. – Judge Lohier agreed with the majority opinion "that there is no reasonable way to disentangle sex from sexual orientation in interpreting the plain meaning of the words 'because of… sex.' The first term clearly subsumes the second[.]" In Judge Lohier's view, the rest of the majority opinion's analysis reflects evidentiary techniques, frameworks, or ways to determine whether sex is a motivating factor in a given case. He therefore joined the parts of the opinion that "reflect the textualist's approach" and joined the remaining parts of the opinion "only insofar as they can be said to apply to Zarda's particular case." Finally, Judge Lohier addressed the dissents by pointing out that the analysis must start with the text, not the legislative history, and "The text here pulls in one direction, namely, that sex includes sexual orientation."
- Dissent by Judge Gerard Lynch
  - In the lead dissent, Judge Lynch delved into the historical context and legislative history of the Civil Rights Act of 1964, discussing how the legislation originally was concerned with race discrimination and how a strongly anti-integration Representative added "sex" to the legislation in an effort to derail the bill. He explained that the adoption of the amendment prohibiting sex discrimination was

"consistent with a long history of women's rights advocacy that had increasingly been gaining mainstream recognition and acceptance." Thus, "The problem sought to be remedied by adding 'sex' to the prohibited bases of employment discrimination was the pervasive discrimination against women in the employment market, and the chosen remedy was to prohibit discrimination that adversely affected members of one sex or the other."

- However, "Discrimination against gay women and men, by contrast, was not on the table for public debate." Judge Lynch also explored the historical context of how homosexual individuals were stigmatized and treated as mentally ill, and how same-sex relationships were often criminalized, in what he called "those dark, pre-Stonewall days." As far as any discussion of including protection for homosexuals in employment in the bill, "The idea was nowhere on the horizon."
- Judge Lynch emphasizesd that he is concerned with the *public* meaning of the word "sex" at the time of enactment, not with what legislators might have thought privately about it: "I am concerned with what principles Congress committed the country to by enacting the words it chose. I contend that these principles can be illuminated by an understanding of the central public meaning of the language used in the statute at the time of its enactment." And "If the specifically *legislative* history of the 'sex amendment' is relatively sparse in light of its adoption as a floor amendment… the broader *political and social* history of the prohibition of sex discrimination in employment is plain for all to read."
- In response to the arguments that Title VII has been interpreted more broadly to include prohibitions on sexual harassment and hostile work environment, Judge Lynch pointed out that those interpretations involve construing whether certain practices do in fact discriminate against members of one sex, which is not the same as extending the protection to an entirely different category of people. Title VII does not go so far as to prohibit all "discrimination based on personal characteristics or classifications unrelated to job performance," but rather delineates only certain specific characteristics or classifications. Fundamentally, "discrimination based on sexual orientation is not the same thing as discrimination based on sex."
- Judge Lynch also provided examples of situations in which Title VII does not necessarily prohibit distinctions between the sexes, even though they might be prohibited if the relevant criterion were race (bathrooms, dress codes, etc.), to show that Title VII does not necessarily apply equally to all of its protected classes. He also distinguished between traits that are "a function of sex" or "associated with sex" such as life expectancy or childbearing capacity – which form the basis for several Supreme Court cases relied upon by the majority – and same-sex attraction, which applies to both men and women.
- As for the decision not to address sexual orientation in the Civil Rights Act of 1991, "the continual attempts to add sexual orientation to Title VII, as well as the EEOC's determination regarding the meaning of sex, should be considered, in addition to the three appellate court decisions, as evidence that Congress was unquestionably aware, in 1991, of a general consensus about the meaning of 'because of … sex,' and of the fact that gay rights advocates were seeking to change the law by adding a new category of prohibited discrimination to the statute. … Although the Supreme Court has rightly cautioned against relying on

legislative inaction as evidence of congressional intent… surely the proposal and rejection of over fifty amendments to add sexual orientation to Title VII means something."
  - With respect to the sex stereotyping argument, Judge Lynch cited the dissent of Judge Sykes in *Hively*, which he summarized as "the homophobic employer is not deploying a stereotype about men or about women to the disadvantage of either sex. Such an employer is expressing disapproval of the behaviors or identity of a class of people that includes both men and women. … The belief on which it rests is not a belief about what men or women ought to be or do; it is a belief about what *all* people ought to be or do – to be heterosexual, and to have sexual attraction to or relations with only members of the opposite sex. That does not make workplace discrimination based on this belief better or worse than other kinds of discrimination, but it does make it something different from sex discrimination, and therefore something that is not prohibited by Title VII."
  - Judge Lynch distinguished between race-based associational discrimination and sexual orientation discrimination because the former is based on animus against the race with whom the employee associates, whereas discrimination against a gay man does not arise from animus against men (i.e., the employee's male partner), nor does discrimination against lesbians arise from animus against women (i.e., the employee's female partner). Although associational discrimination could extend beyond race – for instance, discriminating against a white Christian employee for associating with Latinos or Jews – such discrimination would still be based on the employer's animus against the ethnicity or religion of the employee's associate, which would not be the case in sexual orientation discrimination. "An employer who practices such discrimination is hostile to gay men, not to men in general; the animus runs not, as in the race and religion cases discussed above, against a 'protected group' to which the employee's associates belong, but against an (alas) *unprotected* group to which they belong: other gay men."
  - Finally, Judge Lynch distinguished between the Constitutional cases expanding the rights of the LGBT community (*Lawrence v. Texas* through *Obergefell v. Hodges*) from cases involving statutory interpretation, primarily because "the role of the courts in interpreting the Constitution is distinctively different from their role in interpreting acts of Congress."
- Dissent by Judge Debra Livingston – Judge Livingston joined in parts I, II, and III of Judge Lynch's dissent – i.e., all but the part about the distinction between Constitutional law and statutory interpretation – because although she believes individuals should not be discriminated against in the workplace because of their sexual orientation, she "cannot conclude, however, as the majority does, that sexual orientation discrimination is a 'subset' of sex discrimination" and therefore prohibited by Title VII. "The majority's efforts founder on the simple question of how a reasonable reader, competent in the language and its use, would have understood Title VII's text when it was written – on the question of its public meaning at the time of enactment."
- Dissent by Judge Reena Raggi – Judge Raggi did not include any independent discussion but joined in parts I, II, and III of Judge Lynch's dissenting opinion and in Judge Livingston's dissenting opinion.

SCOTUS appeal:

Respondents Zarda and Moore in their brief argue that:

- Two key principles established by Title VII are that (1) sex should not limit a person's ability to compete for employment opportunities, either standing alone or in combination with another fact about the person, and (2) the analysis in a discrimination case must focus on the individual plaintiff's employment outcomes and not on those who share the same protected characteristic – in other words, if an individual is treated unfairly because he is a man, that is discrimination regardless of whether other men are treated fairly.
- Discriminating against a person for being attracted to persons of their own sex, rather than of a different sex, is discrimination because of sex, because "'Sexual orientation' is a shorthand way to describe the relationship between an individual's sex and the sex of the people to whom that individual is attracted."
- Just as it is was deemed unlawful in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971), for a company to refuse to hire a woman with preschool-age children even though it would hire men with preschool-age children (an example of "sex-plus" discrimination), it is unlawful to refuse to hire men who are attracted to men while hiring women who are attracted to men. "Were [Zarda] not a man, he would not have been fired for his attraction to men. Conversely, persons who shared his attraction to men but not his sex (i.e., 'heterosexual women') were not denied job opportunities. Saying he was fired for being 'gay' does not change the analysis" just as the analysis would not change if a woman were fired for being a "mother."
- Normative beliefs about how a person of a particular sex should behave are sex stereotypes, and discrimination on the basis of sex stereotypes is prohibited under Title VII. "The notion that men should be attracted only to women and women should be attracted only to men is a normative sex-based stereotype" and therefore constitutes discrimination "because of sex." Moreover, this particular sex stereotype is especially unjustifiable as a basis for employment discrimination because "it is so utterly unrelated to performance on the job." And Title VII's prohibition on sex discrimination does not contain any exception for "moral beliefs" – for instance, a moral belief that a woman's place is in the home cannot justify an employer's refusal to hire women.
- Attempts to distinguish between sex stereotyping and sexual-orientation discrimination are "futile, because they are inextricably interrelated. As the Seventh Circuit has explained, '[h]ostility to effeminate men and to homosexual men, or to masculine women and to lesbians, will often be indistinguishable as a practical matter.'" (quoting *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1067 (7th Cir. 2003)). In fact, if Title VII is held not to prohibit sexual orientation discrimination, then even people who are not members of the LGBT community could lose their recourse to challenge discrimination: "If this Court were to hold than an employer's targeting of an employee's sexual orientation provides a defense to an otherwise meritorious sex stereotyping or sexual harassment claim, employers could discriminate against heterosexual employees and then argue they did so because they thought (even if they were ultimately mistaken) that the employee was gay. In such a world, an employer like Price Waterhouse could defeat liability by claiming that it assumed Hopkins' 'macho' and 'masculine' behavior indicated she was a lesbian."

- Sexual orientation discrimination is a form of associational discrimination, which refers to discrimination against individuals because of the types of people they date, marry, or otherwise associate with. Just as a white employee cannot be discriminated against for being attracted to non-white people, neither can male employees be discriminated against for being attracted to other men. The rationale behind prohibiting discrimination based on interracial marriages flows from Title VII's prohibition on discrimination because of race: "A person who is discriminated against by his employer for being part of an interracial relationship is discriminated against 'because of' his race: Had his race been the same as his partner's, he would not have faced discrimination." Likewise, a person who is discriminated against by his employer for being part of a same-sex relationship is discriminated against "because of" his sex: Had his sex been different from his partner's, he would not have faced discrimination. The text of Title VII does not distinguish between race and sex, or any of the other protected characteristics, so the standards for discrimination based on interracial associations and same-sex associations must be the same.
- Attempts to distinguish these types of associational discrimination by arguing that discrimination based on interracial associations is rooted in racism, but discrimination based on same-sex associations is not rooted in sexism, are unavailing, because Title VII does not prohibit discrimination based on racism or sexism, but rather based on race or sex. Not all distinctions between men and women in the workplace arise out of sexism, yet the courts recognize that discrimination is still actionable under Title VII even when it is motivated by benign intentions. It is also unavailing to argue that sexual orientation is a "status" and therefore distinguishable from interracial relationships, which involve acts of dating or marriage, because "sexual orientation is a relational concept" and in this context status cannot be disentangled from acts.
- Because Title VII focuses on the treatment of an individual, the notion that sexual orientation discrimination treats both gay men and lesbian women equally does not relieve employers from liability under Title VII; rather, gay men and lesbian women are both being discriminated against because of their sex. If a man is fired for being attracted to men whereas a woman who is attracted to men is not fired for that attraction, the man has been fired because of his sex; if a woman is fired for being attracted to women whereas a man who is attracted to women is not fired for that attraction, the woman has been fired because of her sex. Firing a white person for being married to a black person does not cease to be discrimination because of race if the employer also fires a black person for being married to a white person; rather, both have been fired because of race in violation of Title VII. Similarly, under *Price Waterhouse*, firing a woman for being too "macho" would not be justified by also firing a man for being too effeminate; both are being fired because of sex, and Title VII is violated both times. The same principle applies to sexual orientation discrimination: Discriminating against gay men and lesbian women equally still violates Title VII.
- The Court's role is to interpret and apply the language of Title VII, "and not the reconstructed beliefs of its drafters." "Nothing about what Congress contemplated in 1964 or what it has done since should change this Court's conclusion that discriminating against somebody for being a man attracted to men discriminates against that person because of his sex." The Court has repeatedly applied the Title VII prohibition on sex discrimination beyond the forms originally targeted by Congress, such as in the same-sex harassment case of *Oncale*, in which a majority led by Justice Scalia refused to limit the

protection of the statute to only the "principal evil" contemplated by Congress. Likewise, although it is "quite plausible that in 1964, most members of Congress believed that women in the workplace should conform to typical notions of appropriate female behavior regarding makeup, attire, and deportment[,]"this did not deter the Court from its holding in *Price Waterhouse*. "To the contrary: '[S]tatutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.'" (quoting *Oncale*, 523 U.S. at 79). "This Court has further cautioned against construing Title VII 'so that it covers only what we think is necessary to achieve what we think Congress really intended.'" (quoting *Lewis v. City of Chicago*, 560 U.S. 205, 215-16 (2010)). "And the mere fact 'that Congress may not have foreseen all of the consequences of a statutory enactment is not a sufficient reason for refusing to give effect to its plain meaning.'" (quoting *Union Bank v. Wolas*, 502 U.S. 151, 158 (1991)).

- There is almost no legislative history regarding the last-minute, scarcely-debated addition of sex as a protected trait under Title VII, so using legislative history to determine the scope of the sex discrimination prohibition is "especially unjustified given the distinctive circumstances[.]" Speculation and assumptions are not valid bases for statutory interpretation.
- The Court has repeatedly "refused to interpret statutes based on subsequent congressional inaction." The fact that Congress has not amended the statute to include sexual orientation therefore is not probative. Nor should the inclusion of "sexual orientation" as a separate trait from "sex" in other statutes preclude the Court from interpreting Title VII to cover sexual orientation, both because those statutes were enacted decades later and doesn't shed any light on what Title VII meant when it was enacted, and because "Congress is free to take a 'belt-and-suspenders' approach in its legislation. Congress might, out of an abundance of caution, enumerate a criterion that could also be fairly encompassed within other enumerated criteria." Finally, the Civil Rights Act of 1991 did not ratify the exclusion of sexual orientation from Title VII, both because the vast majority of appellate courts at that time had not addressed the question and because there is no evidence in the legislative history that Congress was aware of cases in which the courts had addressed it.

Petitioner Altitude Express in its brief argues that:

- The original public meaning of "because of… sex" at the time Title VII was enacted clearly meant because of an individual's status as a man or a woman, and did not encompass sexual orientation. Sex discrimination and sexual orientation discrimination have always been understood as distinct concepts, and "Congress does not bring about seismic legal changes in cryptic fashion" – if it wanted to outlaw sexual orientation discrimination, it would have been much clearer on this point. Various principles of statutory interpretation require the conclusion that Title VII's prohibition on discrimination because of sex applies only to employers treating members of one sex better than members of the other sex. And the purpose of banning discrimination based on sex is to ensure that men and women are treated the same, whereas the purpose of banning sexual orientation discrimination would be to ensure that gay and heterosexual employees are treated the same, regardless of their sex, so the text-based purpose of Title VII is not served by expanding the definition of "sex" to include sexual orientation.

- However, although Title VII prohibits employers from treating members of one sex better than members of the other, it does not outlaw all distinctions between the sexes in the workplace. Following Zarda's argument to its logical conclusion, many policies that distinguish between men and women – including separate restrooms and locker rooms, fitness tests, and dress codes – would be unlawful. Title VII's prohibition on discrimination because of sex cannot be read so expansively to cover anything that could be considered a "function of sex" or a "trait defined by reference to sex." Just as citizenship and alienage are functions of one's national origin but are not included in Title VII's prohibition on discrimination because of national origin, sexual orientation may be a function of one's sex but is not encompassed by Title VII.
- Many federal statutes include both "sex" and "sexual orientation," and treat sex- or gender-based motives differently from sexual-orientation-based motives, which demonstrates that Congress considers sex and sexual orientation to be distinct. Reading sexual orientation into Title VII would render the term in the other statutes as surplusage, and would also violate the canon of statutory interpretation that Congress does not silently attach different meanings to the same term in related statutes. (The statutes cited by Altitude include laws pertaining to hate crimes, financial aid in higher education, and support for criminal investigations and prosecutions by state, local, and tribal law enforcement.)
- Members of Congress have introduced more than 50 bills to add "sexual orientation" alongside "sex" in Title VII; "The sheer breadth and consistency of these efforts leave no doubt that Americans, including countless members of Congress, have always understood that sex discrimination does not encompass actions based on sexual orientation." Moreover, Congress was likely aware of the numerous judicial interpretations prior to 1991 holding that Title VII did not cover sexual orientation discrimination, but chose not to address the issue in the Civil Rights Act of 1991. Unlike in the *PBGC v. LTV* case, in which Congress' rejection of a single bill was not considered probative, when it comes to sexual orientation discrimination the failure to pass legislation despite so many efforts shows that Congress has consistently chosen not to forbid sexual orientation discrimination.
- Zarda's analogies to "sex-plus" case law are unavailing because even in those cases – for example, policies that treated men with preschool age children differently from women with preschool age children, or provided different benefits to pregnant female employees than to the pregnant wives of male employees – still favored employees of one sex over employees of the other sex. Sexual orientation discrimination, by contrast, affects both gay men and lesbian women equally, because the "plus" factor is attraction to members of the same sex. Zarda's argument requires changing not one but two variables in the similarly-situated comparator: the comparator for a gay man becomes a heterosexual woman, and thus Zarda "loads the dice in his favor" by changing both the sex *and* the sexual orientation of the similarly-situated employee.
- The "mixed motive" standard of causation does not further Zarda's cause, because it merely provides that an employment action is unlawful if it was based partly on sex discrimination and partly on lawful factors. "Mixed motive" does not mean that because sexual orientation is defined in reference to an individual's sex, an employment decision based on sexual orientation is made partly because of the individual's sex.
- There is no independent cause of action under Title VII for sex stereotyping; rather, the employer in *Price Waterhouse* relied on a sex-specific stereotype about women in order

to treat a female employee worse than similarly-situated male employees. This was still discrimination based on sex – disfavoring a woman because she was a woman – and the sex stereotyping component was *evidence* supporting sex discrimination, not a new theory of discrimination in and of itself. Thus Zarda's argument that sexual orientation discrimination is impermissible because it relies on sex stereotyping is misplaced.

- The associational discrimination claims fail because race discrimination cannot be analogized to sex discrimination. In contrast to *Loving v. Virginia*, which recognized that bans on interracial marriages were based on invidious racial discrimination, none of the Supreme Court's Constitutional cases involving gay rights has found distinctions between heterosexual and homosexual relationships to be based on sex discrimination. The SCOTUS has also held that even race-based classifications that do not favor one race over the other – i.e., "separate but equal" distinctions – are forms of racial discrimination, whereas sex-based distinctions are only unlawful if they favor one sex over the other. Moreover, a prohibition on sexual orientation discrimination would cover not only individuals who are in same-sex relationships, but also individuals who aren't in relationships at all, which "stretches associational theory well beyond its breaking point" because it "depends not on actual associations, but on assumed or desired ones."
- Reading sexual orientation into the coverage of the statute would create ambiguities and troubling results, including, among other concerns: How should "sexual orientation" be defined – based on attraction, or relationships, etc. – and how many different varieties of attraction and relationships would fall within its scope? Would plaintiffs be able to bring disparate impact claims? Altitude argues that if Zarda's interpretation is accepted, then employers would have to get rid of all policies distinguishing between the sexes, such as separate bathrooms and changing facilities, as well as dress codes and grooming standards, resulting in them being helpless to stop male attorneys from wearing dresses to court, female swim instructors from wearing only swim trunks, etc. Another consequence would be that employers would have to end affirmative action programs benefiting women.
- If Title VII were interpreted as prohibiting discrimination based on sexual orientation, religious freedom would be imperiled, because many faith-based organizations would be subject to liability for hiring practices based on their beliefs about same-sex relationships. Unlike the invidious views of white supremacists that underlay the bans on interracial marriages in *Loving*, the Supreme Court has recognized that opposition to gay marriage may be based on a "'decent and honorable' religious belief… held by 'reasonable and sincere people.'" (quoting *Obergefell*, 135 S. Ct. at 2594, 2602). To equate white supremacy with opposition to gay marriage "brands as bigots countless religious adherents – from faith traditions as diverse as Islam, Judaism, and Christianity. The ramifications of that are chilling and wide-ranging." Potential results could include the revocation of tax exemptions from faith-based organizations, the requirement that such organizations hire employees whose sexual practices violate their teachings, and liability for hostile work environments whenever any employee discusses religious reservations about gay marriage in the workplace.
- The harms that would result from undermining the clarity of Title VII by expanding the definition of "sex" illustrate why Congress is in a much better position than the courts to answer the question of whether and how federal law should address sexual orientation discrimination, because it can calibrate the scope and application of the law with precision.

R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC
SCOTUS docket no. 18-107
Oral argument: Tuesday, October 8, 2019
Decision below: *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.,* 884 F.3d 560 (6th Cir. 2018)

Questions presented: (1) Whether the word "sex" in Title VII's prohibition on discrimination "because of . . . sex," 42 U.S.C. 2000e-2(a)(1), meant "gender identity" and included "transgender status" when Congress enacted Title VII in 1964. (2) Whether *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), prohibits employers from applying sex-specific policies according to their employees' sex rather than their gender identity.

History:

- Aimee Stephens was born biologically male and lived and presented as a man while working as a funeral director at R.G. & G.R. Harris Funeral Homes, Inc. (the "Funeral Home"). Stephens informed the owner of the Funeral Home, Thomas Rost, that he would be transitioning from male to female and would begin presenting and dressing as woman while at work upon returning from an upcoming vacation. Shortly thereafter, Rost fired Stephens because "'he was no longer going to represent himself as a man. He wanted to dress as a woman.'" Rost, a Christian, believed that retaining Stephens as an employee and authorizing or paying for him to wear the uniform for female funeral directors would constitute endorsement of Stephens' views regarding the mutability of sex.
- Stephens filed a charge of discrimination with the EEOC. The EEOC found reasonable cause that the Funeral Home had violated Title VII by discriminating against Stephens on the basis of sex and gender identity in violation of Title VII. During its investigation, the EEOC had also discovered that the Funeral Home provided a clothing stipend for its male employees that it did not provide for its female employees. The EEOC found that this was discrimination against its female employees. The EEOC later filed suit based on both findings.

District Court:

- The Funeral Home moved to dismiss the EEOC's action for failure to state a claim, which the district court denied. The court did, however, narrow the scope of the EEOC's unlawful-termination claim, holding that transgender status is not a protected trait under Title VII and that the EEOC therefore could not sue for discrimination on this basis.
- Both parties then filed cross-motions for summary judgment. The district court granted the Funeral Home's motion for summary judgment, holding that although there was direct evidence of employment discrimination on the basis of sex, the Religious Freedom Restoration Act (RFRA) precluded enforcement of Title VII, as doing so would substantially burden the religious exercise of the Funeral Home and its owner. The EEOC had failed to demonstrate that enforcing Title VII was the least restrictive way to achieve its compelling interest, and had failed to consider an alternative accommodation of having the Funeral Home impose a gender-neutral dress code.
- As to the discriminatory clothing allowance claim, the district court held that it did not have jurisdiction to hear this claim because it was not reasonable to expect that this claim

would grow out of the employee's original charge. The EEOC appealed to the Sixth Circuit Court of Appeals. Stephens moved to intervene in the appellate proceedings after the change in administration gave her concern that her interests would no longer be adequately represented.

Circuit Court:

- The Sixth Circuit Court of Appeals reversed the district court's grant of summary judgment to the Funeral Home on both claims, granted summary judgment to the EEOC on the unlawful termination claim, and remanded to the district court. The court held that discrimination on the basis of transgender and transitioning status violates Title VII. The court reasoned that "it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex[,]" noting that the employee would not have been fired if the employee had been a woman who sought to comply with the women's dress code. Further, "discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping" because "a transgender person is someone who 'fails to act and/or identify with his or her gender' – i.e., someone who is inherently 'gender non-conforming.'"
- The court also held that the Funeral Home's RFRA defense did not preclude enforcement of Title VII. While the court accepted that the owner's funeral home operation was religious exercise (Rost stated that he was compelled by his faith to serve grieving people), the court found that Rost was not substantially burdened under the RFRA. Although the Funeral Home argued that allowing the funeral director to wear a uniform for women would be distracting for customers, the court held that as a matter of law, "a religious claimant cannot rely on customers' presumed biases to establish a substantial burden under RFRA."
- As to the Funeral Home's second alleged burden – that permitting Stephens to wear the women's uniform would force Rost to choose between violating his religious beliefs and leaving the funeral industry – the court held that, as a matter of law, tolerating one's understanding of their sex and gender identity is not tantamount to supporting it.
- While the issue was not necessary to reach, the court also rejected the Funeral Home's RFRA defense on the alternative grounds that the EEOC had adequately demonstrated that enforcing Title VII in this case is the least restrictive means of furthering a compelling government interest.
- As to the clothing-benefit discrimination claim, the court held that this claim could be reasonably expected to grow out of the initial charge of discrimination – it concerned the same type of discrimination raised in Stephens' initial charge, and further, the "reasonably expected" element should be construed broadly.

SCOTUS appeal:

Petitioner, the Funeral Home, argues that:

- Title VII's sex discrimination provisions were originally intended to prohibit employers from treating one sex less favorably than the other because of sex. Accordingly, because Stephens did not allege that the Funeral Home owner favored one sex over the other or

treated Stephens differently than similarly situated female employees, the claim based on transgender status is not covered by Title VII.

- The lower court erred in ruling that Stephens had a sex-based stereotyping claim, because *Price Waterhouse* did not expand Title VII sex discrimination to include such a claim. There is no actionable claim of sex discrimination under Title VII without a showing an unfavorable treatment of one sex compared to the other.
- Interpreting Title VII to exclude transgender status as a separate classification is consistent with the statute's "plain, public meaning."

Respondent EEOC advanced a different position than it did before the Sixth Circuit, now arguing in favor of reversing the appeals court decision that had been decided in its favor. While the EEOC's appeal was pending, then-Attorney General Jeff Sessions had issued a memorandum stating that "Title VII's prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity per se. Further, Title VII does not protect against employment practices that take account of the sex of employees but do not impose different burdens on similarly situated members of each sex." The memorandum explained that "the Department of Justice will take that position in all pending and future matters."

Accordingly, consistent with this memorandum, the EEOC argued before the SCOTUS that:

- Title VII does not protect against discrimination because of transgender status; the ordinary public meaning of "sex" was biological sex at the time of Title's VII's passage and Congress has acted consistent with that meaning since that time.
- Transgender-status discrimination does not necessarily entail discrimination based on sex, including sex stereotyping discrimination, because discrimination based on sex requires proof that an employer treated members of one sex less favorably than similarly situated members of the other sex. Although sex stereotyping can be relevant evidence in making that proof, a plaintiff still has to show that their employer treated similarly situated members of the opposite sex more favorably. According to the EEOC, the employee was terminated here for refusing to comply with the Funeral Home's sex-specific dress code, and Stephens did not challenge the dress code. Because neither Stephens nor the court of appeals identified evidence that the Funeral Home treated Stephens less favorably than similarly situated females, the EEOC argued Stephens' claim of sex discrimination must fail.
- The Court would be encroaching on Congress' responsibilities by addressing whether Title VII should be amended to prohibit transgender discrimination; "the question in this case is not whether employers ought to be prohibited from discriminating against individuals who are transgender. It is whether Title VII as written currently bars such discrimination."

Respondent Aimee Stephens argues that:

- Discrimination "because of sex" means that but for the employee's sex, the employee would not have been subjected to the discriminatory action. Here, sex was a but-for cause of Stephens' firing because the Funeral Home would not have terminated Stephens for living openly as a woman if Stephens were biologically female. Second, the Funeral

Home owner had admitted that he fired Stephens because in his view Stephens was a man. Third, just as an employee being terminated for changing his religion would be considered as being terminated because of religion, Stephens being terminated for "'attempting to change' her sex is sex discrimination."

- Termination for one's transgender status also falls within the definition of sex stereotyping discrimination. A transgender person fails to conform to stereotypes about how men and women should identify, appear, and behave.
- Ruling in favor of the Funeral Home and the EEOC would mean writing "an exclusion into Title VII to deny transgender people the protection from sex discrimination that the statute provides to all employees."
- This case is not about the general lawfulness of applying sex-specific policies, such as dress codes, to transgender employees. Stephens echoed the court of appeals determination that Stephens was not fired solely for violation of the dress code, but because of Stephens' transgender status and failure to comply with sex stereotypes about "how men and women should identify, appear, and behave."

Over 70 amicus curiae briefs were filed in this case, many of them also filed with respect to the *Bostock* and *Zarda* sexual orientation cases described above. Many echoed the same arguments that were raised in the principal briefs, but some raised additional, more policy-based arguments, which are summarized below.

- Judicial Watch, Inc. – The number of "persistent, failed attempts to amend" Title VII to include sexual orientation and gender-related categories is compelling evidence that "what all these bills proposed is not part of existing law."
- Christian Employers Alliance – It was error for the Sixth Circuit to determine that the Funeral Home owner would not offend his religious beliefs by "'tolerating [petitioner employee's] understating of her sex and gender identity[.]'"
- Liberty Counsel – Title VII sex discrimination provision targets discrimination that is based on the "immutable" characteristics that divide men and women into one of two separately-identifiable groups. Additionally, Title VII's "sex" discrimination provision targets discrimination based on stereotypes about how men, as a class, and women, as a class, should look and act. Interpreting the provision to include gender discrimination is error because "gender identity" discrimination does not target men or women as a class based on their status in one of the two unique and separately-identifiable classes, but a subset of both men and women.
- Dr. Paul R. McHugh, M.D., Professor of Psychiatry – The Respondent and court of appeals conflated sex and gender identity. "Gender identity is not sex and a person's belief about their gender identity has no bearing on their sex." He also argues that there is insufficient evidence that social transition and mandatory gender affirmation are effective treatments for gender dysphoria.
- American Psychological Association, American Psychiatric Association, et al. – Sexual orientation and gender identity are each intrinsically related to sex.
- American Medical Association – Transgender individuals should be protected from employment discrimination in order to safeguard their physical and mental health and well-being.
- Transgender Legal Defense and Education Fund – The Funeral Home's definition of "sex" is inconsistent with the fact that sex is defined by more than just chromosomes and

reproductive organs. The attributes that make up a person's sex include: genetic or chromosomal sex (i.e., the presence of an XX or XY genotype); gonadal sex (i.e., the presence of ovarian or testicular tissue); internal morphologic sex (i.e., the presence of seminal vesicles, a prostate, a vagina, a uterus, or fallopian tubes); external morphologic sex (i.e., genitalia); hormonal sex (i.e., levels of testosterone, estrogens, and progesterone); phenotypic sex (i.e., secondary sexual features such as facial hair or breasts); assigned sex and gender of rearing; and psychosexual identity, sexual identity, or gender identity (i.e., brain gender).

III. Age Discrimination in Employment Act (ADEA)

The Age Discrimination in Employment Act of 1967 applies through section 201 of the CAA and protects employees aged 40 and over from discrimination on the basis of age. 2 U.S.C. § 1311; 29 U.S.C. § 633a. The SCOTUS will take up a case this term that will clarify which standard of causation – "but-for" or "motivating factor" – must be applied by the courts in deciding federal-sector ADEA cases.

Babb v. Wilkie
SCOTUS docket no. 18-882
Oral argument: Not yet scheduled; briefs on the merits due in November 2019
Decision below: *Babb v. Sec'y, Dep't of Veterans Affairs*, 743 F. App'x 280 (11th Cir. 2018)

Question Presented: Whether the federal-sector provision of the Age Discrimination in Employment Act of 1967, which provides that personnel actions affecting agency employees aged 40 years or older shall be made free from any "discrimination based on age," 29 U.S.C. §633a(a), requires a plaintiff to prove that age was a but-for cause of the challenged personnel action.[5]

History:

- Petitioner Noris Babb is a clinical pharmacist working at the Bay Pines VA Medical Center in Florida. She began working at the facility in 2004, and in 2006 accepted a position as a geriatrics pharmacist. She was a GS-12. Between 2006 and 2013, Babb was assigned to an "interdisciplinary team" of caregivers in the MC's Geriatric Clinic. Her work scope and responsibilities were governed by a service agreement between Pharmacy Services and the Geriatric Clinic. In 2013, Babb filed an EEO complaint with the agency that led to this current suit. Her EEO complaint alleged four adverse employment actions based on gender discrimination, age discrimination, hostile work environment, and retaliation for protected activities: (1) removal of her advanced scope designation; (2) denial of training requests in the anticoagulation clinic; (3) non-selection for higher graded (GS-13) positions; and (4) denial of Monday holiday pay based on scheduling. Babb also provided information and testimony in support of EEO complaints filed by two female colleagues over the age of 40 in 2011 and 2014.
- Prior to Babb's claims reaching the district court, the 11th Circuit decided *Trask v. Secretary, Department of Veterans Affairs*, 822 F.3d 1179 (11th Cir. 2016), which involved two employees with age and gender discrimination claims from the same facility. The panel in *Trask* applied the private sector *McDonnell Douglas* causation standard, and did not address any linguistic differences between private sector and federal sector provisions of the ADEA and Title VII anti-retaliation statute.
- The district court in Babb's case granted summary judgment for the Department. While the court found that Babb described adverse employment actions directing impacting the terms of her employment and that Babb had engaged in protected activity and faced

[5] This is not the question presented in the cert petition, but rather the question to be answered according to the case's docket page on the SCOTUS website.

adverse actions shortly thereafter, the court found that under the burden-shifting framework of *McDonnell Douglas* the VA offered a legitimate and non-retaliatory reason for every employment action it took with respect to Babb. Specifically, as to her claims related to retaliation, the court found that Babb did not point to any evidence of pretext for the adverse employment actions after the Department articulated a legitimate, non-discriminatory reason for its actions.

- Before the 11th Circuit, Babb argued that the lower court applied the wrong causation standard in evaluating her claims of age discrimination and retaliation. Specifically, she pointed to the textual differences in the statutory language between federal sector employees and private sector employees, and argued that the lower court incorrectly applied the private sector "but for" causation standard to her federal sector claims.
- The Eleventh Circuit Court of Appeals remanded the gender discrimination claim, but affirmed the district court's grant of summary judgment on the claims of age discrimination, retaliation, and hostile work environment. Interestingly, in addressing Babb's arguments regarding the statutory textual difference between the private sector and federal sector provisions, the court stated, "if we were writing on a clean slate, we might well agree." However, the court felt bound by the "prior-panel-precedent" rule.[6] Citing *Trask*¸ the circuit court found that the district court did not err in applying the *McDonnell Douglas* test to Babb's ADEA age-discrimination claim, particularly that the district court correctly concluded that Babb failed to demonstrate that the Medical Center's proffered reasons for the adverse employment decisions that she alleges were pre-textual and that the "real" reason for those decisions was because Babb was too old.
- A petition for rehearing and rehearing en banc was denied on October 9, 2018.

SCOTUS appeal:

The Petition for Writ of Certiorari focuses on the difference in the language of the ADEA as applied to private sector and federal sector employees:

29 U.S.C. § 623a(a) (private sector employees):

> It shall be unlawful for an employer
>
> (1) To fail or refuse to hire or discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, <u>because of such individual's age</u>;
> (2) To limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, <u>because of such individual's age</u>;
> (3) To reduce the wage rate of any employee in order to comply with this chapter.

[6] *See Breslow v. Wells Fargo Bank*, 755 F.3d 1265, 1267 (11th Cir. 2014) (it is the firmly established rule of the 11th Circuit that each succeeding panel is bound by the holding of the first panel to address an issue of law, unless and until that holding is overruled en banc or by the Supreme Court).

29 U.S.C. 633a(a) (Federal sector employees):

> All personnel actions affecting employees or applicants for employment who are at least 40 years of age… in executive agencies as defined in section 105 of Title 5… shall be made free from any discrimination based on age.

In granting certiorari, the Supreme Court limited its review to the ADEA provisions noted above.

The Supreme Court has previously interpreted the meaning of these statutory provisions as applied to private sector employees:

- In *Gross v. FBL Financial Services, Inc.*, 557 U.S. 167 (2009), the Supreme Court held that the provision of the ADEA applicable to private sector employees precludes the application of the motivating factor standard.
- In *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338 (2013), the Supreme Court held that Title VII's private-sector retaliation provision requires a but-for rather than a motivating factor causation standard.

However, only the D.C. Circuit has addressed the difference in the statutory language, determining that the much broader "free from" language applicable to federal sector employees should be interpreted differently from the "because of" language applicable to private sector employees. Thus, the D.C. Circuit concluded that a federal employee's burden of proof was to show a "motivating factor" in Title VII and ADEA discrimination cases. *Ford v. Mabus*, 629 F.3d 198 (D.C. Cir. 2010). Administrative agencies that oversee discrimination and retaliation claims (the EEOC and MSPB) follow the D.C. Circuit.

Both Petitioner and Respondent agree that coherence and clarity is needed with respect to the statutory framework applicable to federal sector discrimination and retaliations claims.

Petitioner Babb in her petition argues that:

- Supreme Court precedent "suggests that the differing statutory language applicable to federal-sector and private-sector claims mandates differing approaches." The Eleventh Circuit in this case "felt bound by a prior decision that did not address the textual differences between the private- and federal-sector provisions in holding that the *McDonnell Douglas* test and a 'because of' or 'but-for' standard governed the determination of federal-sector employees' retaliation claims."
- The Eleventh Circuit's decision conflicts with the Supreme Court's decisions related to the principles of statutory construction. "In addition to the plain meaning of the words 'free from any,' the laws of statutory construction also support the decisions by the D.C. Circuit, MSPB, and EEOC. '[W]here Congress includes particular language in one section of the statute, but omits it in another…, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" (quoting *Keene Corp. v. United States*, 508 U.S. 200, 208 (1993) (internal citations and quotations omitted).
- At the time Congress passed Title VII and later expanded the ADEA to the federal sector, the phrase "because of" or "because" was included in the private-sector

provisions. Thus Congress knew how to impose a "but-for" causation standard, but did not use the words "because of" or "because," instead choosing to use the words "free from any," indicating that it did not intend to impose a but-for standard for federal employees.

Respondent Secretary, Department of Veterans Affairs, in its response argues that:

- The court of appeals correctly determined that the federal-sector provisions of Title VII and the ADEA "both require proof that an agency's consideration of an impermissible factor was a 'but for' cause of the challenged personnel action."
- Although the federal-sector provisions do not include the language "because of," the but-for causation standard still applies to the federal sector because the federal-sector provisions prohibit discrimination "based on" certain protected traits. For example, the ADEA federal-sector provision provides: "All personnel actions… shall be made free from any discrimination <u>based on</u> age." 29 U.S.C. § 633a(a) (emphasis added). The Supreme Court has repeatedly concluded that the phrase "based on" indicates a "but-for" causal relationship. Thus, the prohibition against "discrimination based on age" covers personnel actions for which age was a but-for cause of the alleged discrimination.
- "Section 633a(a)'s textual adoption of that but-for causation requirement reflects 'the default rule[]' at common law, where a tort plaintiff must normally prove that her asserted 'harm would not have occurred' in the absence of – that is, but for – the defendant's conduct.'… Because the ADEA was enacted against that settled background principle, Congress 'is presumed to have incorporated' that 'default rule[]' in the ADEA, 'absent an indication to the contrary in the statute itself.'… Section 633a(a) contains no contrary textual indication." (quoting *Nassar*, 570 U.S. at 346-47).
- The Supreme Court has interpreted Title VII's private-sector discrimination provision to require a but-for causation standard of liability. "If a plaintiff showed that a protected trait was a 'motivating' factor in a private-sector employment decision, the burden shifted to the employer to prove that 'it would have made the same decision even if it had not taken [that factor] into account.'" (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989)). *Price Waterhouse* thus "applied a 'but-for caus[ation]' standard: the employer had the burden of disproving causation by 'show[ing] that a discriminatory motive was not the but-for cause of the adverse employment action.'" (quoting *Nassar*, 570 U.S. at 348).
- Although *Gross* interpreted the ADEA's private-sector provision, the Court's rationale applies equally to the ADEA's federal-sector provision. Moreover, *Nassar* extended *Gross's* reasoning to the Title VII private-sector retaliation provision by emphasizing that the 1991 Civil Rights Act showed that the motivating factor standard was not an organic part of Title VII, and that just as that standard could not be read into the ADEA, it could also not be read into Title VII's private-sector retaliation provisions, because Congress limited the application of the motivating factor standard to Title VII's private-sector discrimination provision.

Petitioner Babb presented additional arguments and rebuttals in her reply brief:

- The government is "deeply mistaken as to the proper interpretation of the provisions at issue." "As the D.C. Circuit explained… a 'but-for' causation standard is inconsistent

with the plain language of § 633a(a) and fails to give effect to the clear textual differences between the private- and federal-sector provisions.” (citing *Ford*, 629 F.3d at 205-06).

- It is the language “shall be made free from,” which is not present in the private-sector provisions, that is controlling, as that language focuses on the process of making personnel decisions regardless of the outcome of any particular decision. Thus, “the statutory text is incompatible with the Government’s view that discriminatory animus can infect the decision-making process so long as it is not ultimately the but-for cause of the challenged action.”
- “Congress’s decision to provide a broad procedural protection to federal employees is evident from the statute’s structure… Congress chose not to include the federal government in the ADEA and Title VII definitions of ‘employer,’” and instead provided separate statutory provisions applicable only to the federal sector. Private-sector provisions more narrowly ban discrimination, whereas federal-sector provisions ban “any” discrimination.
- The Supreme Court’s equal protection cases have recognized that discrimination “based on” a protected characteristic occurs whenever the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group.

IV. Civil Procedure: Defense Preclusion

Covered employees alleging violations of the CAA may bring civil actions in federal district court, and those actions are subject to the Federal Rules of Civil Procedure as well as the rules of the district court in which the actions are filed. Supreme Court cases addressing issues of civil procedure are therefore potentially relevant to federal litigation involving legislative branch entities. Moreover, when eligible covered employees choose to request administrative hearings at the OCWR rather than pursue litigation in the federal courts, the Hearing Officers generally follow principles of federal civil procedure in conducting hearings, and the Board of Directors is guided by those principles in reviewing Hearing Officer decisions.

Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.
SCOTUS docket no. 18-1086
Oral argument: not yet scheduled
Decision below: *Marcel Fashions Grp., Inc. v. Lucky Brand Dungarees, Inc.*, 898 F.3d 232 (2d Cir. 2018)

Question Presented: Whether, when a plaintiff asserts new claims, federal preclusion principles can bar a defendant from raising defenses that were not actually litigated and resolved in any prior case between the parties.

History:

- Lucky Brand Dungarees ("Lucky Brand") and Marcel Fashions Group, Inc. ("Marcel") were involved in long-standing multi-suit litigation against one another concerning the use of certain trademarks. One of the earlier suits between the parties resulted in a settlement agreement, under which Lucky Brand agreed to cease future use of the phrase "Get Lucky" as a trademark and Marcel agreed to release, in exchange for $650,000, "any and all claims arising out of or in any way relating to Lucky Brand's right to use, license and/or register the trademark LUCKY BRAND and/or any other trademarks … [owned,] registered and/or used by Lucky Brand … as of the date of this Agreement[.]"
- In a later suit in 2005 between the parties where Marcel raised certain counterclaims alleging trademark infringement, Lucky Brand moved to dismiss Marcel's claims, arguing that they were barred by the terms of the release. The district court denied the motion in relevant part without prejudice. Lucky raised the release defense in its answer as an affirmative defense, but never again asserted the defense in that action, including in any of the summary judgment proceedings, pre-trial motions practice, or the lengthy jury trial. The jury found in favor of Marcel on its trademark infringement counterclaim, and the district court entered an injunction barring Lucky Brand's use of the "Get Lucky" mark.

District Court:

- In the instant action before the district court, Marcel sued Lucky Brand for its continued use of the "Lucky Brand" mark. Lucky did not assert the release defense in its answer or in its motion for summary judgment. Instead, Lucky Brand moved for summary judgment on the basis that Marcel's claims were precluded by *res judicata* in light of the

final disposition in the 2005 action. The district court agreed, but on appeal the Second Circuit reversed, concluding that "Marcel's claims were not barred by res judicata because Marcel alleged infringements that occurred subsequent to the judgment in the 2005 Action, claims which 'could not possibly have been sued upon in the previous case.'"

- On remand, Marcel filed a second amended complaint, and Lucky Brand moved to dismiss, now raising as its only argument that the release barred Marcel's claims. The district court granted the motion, rejecting Marcel's argument that *res judicata* precluded Lucky Brand from invoking the release defense. The court acknowledged that *res judicata* encompasses both issue and claim preclusion and determined that issue preclusion did not apply because the applicability of the release was not action litigated and resolved in the 2005 action, and that claim preclusion did not apply because Lucky Brand was seeking to preclude a defense and not a claim.

Circuit Court:

- The Second Circuit reversed the district court, holding that *res judicata* did preclude Lucky Brand from asserting the release defense. Claim preclusion may be applied to bar the litigation of a party's defense.
- As it is normally applied, claim preclusion bars a plaintiff from re-litigating claims against a defendant that it lost in a previous action against the same defendant and claims that the plaintiff could have brought in that earlier action but did not. Ultimately, the doctrine promotes efficiency in litigation.
- Based on the Supreme Court's analysis of issue preclusion in *Parklane Hosiery Company v. Shore*, 439 U.S. 322 (1979), where the Court determined that "under certain conditions, the doctrine of issue preclusion may be invoked by a plaintiff to estop a defendant from raising issues it lost in a previous proceeding," the court of appeals determined that the same principles underlying claim preclusion still apply "when that which is sought to be precluded is a defense [ ]" rather than a claim.
- The court noted certain efficiencies that defense preclusion would promote: defendants would have an incentive to litigate all relevant defenses in an initial action; plaintiffs would have more confidence in the finality of prior judicial victories; and finally, "defense preclusion prevents wasteful follow-on actions that would not have been filed had the defense been asserted (and maintained) at the first opportunity."
- The court acknowledged the potential concerns with permitting defense preclusion: it would be unfair to preclude a defense that the defendant had little to no incentive to raise in the earlier action; defendants should be given more latitude about ending a suit against them with as little cost as possible without fear of abandoning a defense, since they didn't choose to go to court; and defense preclusion may not be fair in all circumstances, such as a pro se defendant who doesn't initially raise their best defense. Ultimately, the court concluded that the best way to balance these concerns is "to grant trial courts broad discretion to determine when it should be applied."
- The court outlined the elements for defense preclusion, and concluded that they were easily met in this case. Defense preclusion bars a party from raising a defense where (i) a previous action involved an adjudication on the merits; (ii) the previous action involved the same parties or those in privity with them; (iii) the defense was either asserted or could have been asserted, in the prior action; and (iv) the district court, in its discretion,

concludes that preclusion of the defense is appropriate because efficiency concerns outweigh any unfairness to the party whose defense would be precluded.

SCOTUS appeal:

- In support of its petition for cert, Lucky Brand argued that the Second Circuit had created a circuit split with its decision and that its decision could not be reconciled with SCOTUS precedent. Consistent with this precedent, other circuits have all held that "a defendant cannot be barred from asserting a defense against a new claim unless that defense has been previously adjudicated against the defendant, in which case issue preclusion applies." Further, the Second Circuit's ruling was inconsistent with the Federal Rules of Civil Procedure and was fundamentally unfair to defendants.
- In response, Marcel argued that the court of appeals decision *was* consistent with SCOTUS and other circuits' precedent. Further, "preclusion avoids an improper collateral attack on the prior judgment between the parties[.]" Marcel also argued that the case was not an appropriate cause to resolve the question presented because the question is "irrelevant to the action's outcome in this pre-answer, pre-discovery judgment enforcement action."
- In Lucky Brand's brief on the merits, it argued that that claim preclusion could not be properly applied here to bar its release defense because claim preclusion does not bar claims that are predicated on events that postdate the filing of the initial complaint, and lower court decisions in this matter recognized that all of the facts giving rise to the claims now at issue arose after the parties' prior litigation ended. Issue preclusion is also inapplicable because this doctrine only bars re-litigation of issues if they were "actually litigated and resolved" in a prior case, and here the release defense was "in no way" actually litigated and determined in the 2005 case. Lucky Brand reiterated the arguments from its petition for cert that the court of appeals' ruling was inconsistent with SCOTUS and other circuit courts' precedent and that the decision was inconsistent the Federal Rules of Civil Procedure. Lastly, Lucky Brand argued that the court of appeals' decision would result in unnecessary and inefficient over-litigation of defenses.
- Marcel's brief on the merits is due by November 12, 2019.

V. One More to Watch

As of the date of this presentation, the SCOTUS has not yet decided whether to grant cert in *Domino's Pizza, LLC v. Robles*, a case involving website accessibility under Title III of the Americans with Disabilities Act (ADA). We will be keeping an eye on this one, because it is a very significant topic in ADA law and would be relevant to every employing office in the legislative branch.

Domino's Pizza, LLC v. Robles
SCOTUS docket no. 18-1539
Petition for Writ of Certiorari filed: June 13, 2019
Decision below: *Robles v. Domino's Pizza, LLC*, 913 F.3d 898 (9th Cir. 2019)

Question presented: Whether Title III of the ADA requires a website or mobile phone application that offers goods or services to the public to satisfy discrete accessibility requirements with respect to individuals with disabilities?

History:

- Guillermo Robles, who is blind, alleged that he could not order pizza through the Domino's web site or mobile app because they did not work with his screen-reading software. Specifically, he alleged that neither portal was in compliance with version 2.0 of W3C's Web Content Accessibility Guidelines ("WCAG 2.0"), which he contended would give vision-impaired individuals equal access to Domino's online services.
- Domino's argued that its due process rights would be violated if it were held liable, because the Department of Justice had not yet promulgated regulations governing website accessibility or provided meaningful guidance to specify what criteria must be satisfied. The district court found merit in this argument, and dismissed the complaint without prejudice pursuant to the primary jurisdiction doctrine, holding that "Congress has vested the Attorney General with promulgating regulations clarifying how places of public accommodation must meet their statutory obligations of providing access to the public under the comprehensive ADA," and that "Such regulations and technical assistance are necessary for the Court to determine what obligations a regulated individual or institution must abide by in order to comply with Title III." *Robles v. Domino's Pizza, LLC*, No. CV 16–06599 SJO (SPx), 2017 WL 1330216, at *8 (C.D. Cal. Mar. 20, 2017), *rev'd*, 913 F.3d 898 (9th Cir. 2019).
- On appeal, the Ninth Circuit Court of Appeals reversed and remanded the case.
    - The court skirted the issue of whether a website can be a "place of public accommodation" standing alone; instead the court focused on the nexus between the Domino's website and app and its physical restaurants, and held that Title III of the ADA applied to the online ordering system because the web site and app "facilitate access" and "connect customers" to the physical restaurants, which are indisputably places of public accommodation.
    - The court then rejected Domino's due process argument. First, it noted that between the ADA's clear language about "full and equal enjoyment" of goods and services, and the DOJ's consistently held position since 1996 that Title III applies to websites of public accommodations, "at least since 1996, Domino's has been

on notice that its online offerings must effectively communicate with its disabled customers and facilitate 'full and equal enjoyment' of Domino's goods and services." Addressing Domino's arguments regarding the absence of specific technical regulations – i.e., that it lacked "fair notice of what specifically the ADA requires companies to do in order to make their websites accessible" – the court held that the lack of specific regulations does not eliminate an entity's statutory obligation, and the Constitution "does not require that Congress or DOJ spell out exactly how Domino's should fulfill this obligation." The court explained that the lack of specific regulations gives Domino's some flexibility in determining how to comply with the ADA, rather than absolving it of its statutory duty to comply.

SCOTUS appeal:

- In support of its cert petition, Domino's states that "Federal courts of appeals have long split over whether Title III imposes accessibility requirements on web-only businesses with no fixed physical location. And the same line of cases has produced confusion in the circuits over whether Title III imposes discrete accessibility requirements on websites maintained by businesses whose brick-and-mortar locations constitute ADA-covered public accommodations." Referencing the "flood" of recent lawsuits over website accessibility, Domino's urges the SCOTUS to take up the issue "to stem a burdensome litigation epidemic… Unless this Court steps in now, defendants must retool their websites to comply with Title III without any guidance on what accessibility in the online environment means for individuals with the variety of disabilities covered by the ADA."
- Opposing the petition, Robles argues that, in fact, there is no circuit split. Contrary to the assertion in the cert petition, the Ninth Circuit did not hold that Title III applied to standalone websites; rather, it held that Title III applied because of the nexus between the online services and Domino's physical restaurants, and according to Robles, "Every court of appeals to have discussed the question has appeared to agree that Title III applies at least in cases in which such a 'nexus' exists." The increase in litigation in this area does not require the SCOTUS to take up the case; on the contrary, the rising number of lawsuits "just means that this Court will have plenty of opportunities to address these issues in the future, after the usual process of percolation in the courts of appeals. Such percolation will be particularly helpful in illuminating just what sorts of barriers to web access impede 'full and equal enjoyment' of the goods and services of places of public accommodation, what sorts of online technologies or alternatives to web access might in particular cases overcome those barriers, and so forth. Particularly given the rapidly evolving technology in the world of websites and mobile apps, this Court should proceed with caution in this area. It should not rush headlong to decide an issue that does not meet its normal standards for certiorari." (quotations and citations omitted)
- Robles also asserts that because the due process and primary jurisdiction issues were left out of the cert petition, Domino's has abandoned those arguments.

VI. Resources

For up-to-date information about the SCOTUS docket and the laws applied by the CAA, please see the following:

- Official SCOTUS website: https://www.supremecourt.gov
  - Bostock/Zarda – https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/17-1618.html
  - Harris Funeral Homes – https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-107.html
  - Babb – https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-882.html
  - Lucky Brand – https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-1086.html
  - Robles – https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-1539.html

- SCOTUSblog – analysis and commentary: https://www.scotusblog.com
  - Bostock – https://www.scotusblog.com/case-files/cases/bostock-v-clayton-county-georgia/
  - Zarda – https://www.scotusblog.com/case-files/cases/altitude-express-inc-v-zarda/
  - Harris Funeral Homes – https://www.scotusblog.com/case-files/cases/r-g-g-r-harris-funeral-homes-inc-v-equal-opportunity-employment-commission/
  - Babb – https://www.scotusblog.com/case-files/cases/babb-v-wilkie/
  - Lucky Brand – https://www.scotusblog.com/case-files/cases/lucky-brand-dungarees-inc-v-marcel-fashion-group-inc/
  - Robles – https://www.scotusblog.com/case-files/cases/dominos-pizza-llc-v-robles/

- OCWR website: https://www.ocwr.gov