

CIVIL RIGHTS INSIDER

Federal Bar Association Civil Rights Law Section's Newsletter

Fall 2019

From the Desk of the Chairperson

Hello again fellow Civil Rights Section members, and thank you for reading the Civil Rights Insider. In addition to substantive articles on a new lawsuit challenging conditions of confinement at 158 detention facilities operated by Immigration and Customs Enforcement, and another on the meaning of Title VII's "on the basis of sex" clause, this issue contains our yearly preview of civil rights cases set to be heard in the Supreme Court this term, a piece I always appreciate for helping me stay on top of new and developing issues in our field.

I'm also happy to report on the FBA's 2019 Annual Meeting in Tampa, Florida. Once again, the Civil Rights Section enjoyed a strong showing at the meeting, with me, past chair Wylie Stecklow, and member Kyle Kaiser attending. The meeting was both informative and enjoyable, with some very interesting presentations—former undercover agent Robert Mazur's talk on money laundering was a high point—and as always good comradery with fellow FBA members. The Section also held its official annual meeting

on September 6, 2019, and I'm pleased to announce the 2019-2020 officers for the Section based on the vote held during the meeting:

- Chair: Stephen Haedicke (second year of two-year term)
- Chair-Elect: Robin Wagner
- Secretary: Kyle Kaiser
- Treasurer: Eric Foley
- Membership: Rob Sinsheimer
- Newsletter: Steve Dane

The Section also received a recognition award for the activities we've worked on over the last year, as well as an award for this newsletter (continuing a trend—the Insider has won an award each of the last three years). And I was very honored to receive the award for Outstanding Section/Division Leader for 2019. Of course, running the Section is a team effort, so I think this award is a tribute to all of us, but especially the officers and board members who have helped me so much over this past year. Thanks to you all, and let's keep up the good work.

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Supreme Court Preview – Fall 2019

by Samuel T. Brandao, Clinical Instructor, Civil Rights and Federal Practice Clinic, Tulane University Law School

Altitude Express Inc. v. Zarda,
No. 17-1623; consolidated with *Bostock v. Clayton County, Georgia*,
No. 17-1618; set for argument October 8, 2019

Starting the term with a bang, the Court will consider whether discrimination because of sexual orientation constitutes prohibited employment discrimination “because of . . . sex” under Title VII. *Zarda* and *Bostock* allege they were fired for being gay and assert that a plain reading covers them: their firings were because of sex in that women would not have been fired for being attracted to men, but, because they are men, they were. They also invoke *Price Waterhouse v. Hopkins*, which confirmed that Title VII prohibits sex stereotyping, urging that a view that men should be attracted to women is a stereotype. Finally, they quote the late Justice Scalia’s opinion for a unanimous 1998 Court in *Oncale v. Sundowner*: “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.” The employers insist that Title VII prohibits only treating one sex better than the other, and that their policies apply equally to gay and lesbian employees—and that members of Congress could never have conceived, in 1964, that Title VII would do more.

The Second Circuit agreed with *Zarda*, whereas the Eleventh Circuit sided with *Clayton County*. Amici have filed briefs on both sides: the employees enjoy the support of a greater number, including major U.S. companies like Apple and Coca-Cola, whereas the employers’ smaller corps includes the federal government.

R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission,
No. 18-107; set for argument October 8, 2019

Also set for the opening argument of the term is a related issue of interpretation of Title VII: whether it prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*. Aimee Stephens was a funeral director for over five years, dressing as a man and going by Anthony, before telling her employer that she planned to transition by dressing as a woman for a year and then undergoing reassignment surgery. Harris Funeral Homes fired her. The EEOC filed a complaint against it in 2014. The trial judge dismissed the case, but the Sixth Circuit reversed. The arguments for both sides parallel those in *Zarda* and *Bostock*, and the Trump EEOC has filed a brief switching sides: it asks the Court to affirm the dismissal of its original complaint, applying the employer’s narrower reading of Title VII.

Babb v. Wilkie,
No. 18-882; not yet set for argument

In yet another employment discrimination case, the Court will decide 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,” requires a plaintiff to prove that age was a but-for cause of the challenged personnel action. *Noris Babb* argues that the EEOC’s regulations reflect the plain meaning of the statute—prohibiting decisions in which age is a negative factor, even if not dispositive—and are entitled to Chevron deference. The government had not yet filed its brief at press time, but the Eleventh Circuit’s decision assumed that the rule governing private-sector ADEA claims ought to apply, despite the differences in statutory language.

Comcast Corp. v. National Association of African American-Owned Media,
No. 18-1171; set for argument November 13, 2019

The Court will consider a similar issue to *Babb* here: whether a claim of race discrimination under Section 1981 fails in the absence of but-for causation. The district court granted Comcast’s motion to dismiss, characterizing the complaint as alleging race was a factor, but not the deciding factor. The Ninth Circuit reversed. The Supreme Court granted certiorari only on the causation question, not on the pleading standard. The government has filed an amicus brief supporting Comcast and arguing that burden-shifting frameworks applicable in constitutional contexts ought not apply to this statutory claim.

Department of Homeland Security v. Regents of the University of California,
No. 18-587; consolidated with *Trump v. NAACP*,
No. 18-588; and consolidated with *McAleenan v. Vidal*,
No. 18-589; set for argument November 12, 2019

DHS’s decision to end DACA is (1) judicially reviewable and (2) unlawful, according to three trial courts that enjoined the government from ending the program the Obama administration began in 2012. The Trump administration asked the Court to review its appeals even before the Courts of Appeals had ruled (the Ninth published its opinion prior to the grant, but the Second and D.C. Circuits did not). The Ninth Circuit reasoned that an agency’s nonenforcement decision, usually a matter of discretion, becomes reviewable if it is based on the agency’s conclusion that its decision was compelled as a matter of law. The government argues that the decision is categorically unreviewable, whatever its motivations. Even if it were reviewable, the government insists, the decision was neither arbitrary or capricious because of the questions surrounding DACA’s legality, and the practical and policy consequences

of that uncertainty. Armies of amici have flocked to both banners.

Espinoza v. Montana Department of Revenue,
No. 18-1195; not yet set for argument

The Court has agreed to interpret its recent free exercise precedent. The Montana Supreme Court struck down a law that allowed individuals to cancel their state tax debts by sending those sums to scholarship funds supporting private schools, including religious schools. The Court will consider the petition filed by three low-income families urging that it violates the religion clauses and the equal protection clause to invalidate a generally available and religiously neutral student-aid program because it affords students the choice of religious schools. Initially, the challengers targeted the Department of Revenue's rule excluding religious schools but allowing other private schools. The Montana Supreme Court's decision abolished all taxpayer funding of private schools, religious or not. The outcome likely hinges on how broadly the Court will read its 2017 opinion in *Trinity Lutheran v. Comer*, which held that Missouri violated the free exercise clause by denying a grant for a new playground surface to a religious preschool. If *Trinity Lutheran* prohibits restricting funds based solely on the religious status of the funding recipient, as opposed to the religious use of those funds, Montana's decision not to fund private education should stand.

Gee v. June Medical Services, LLC,
No. 18-1460, consolidated with *June Medical Services LLC v. Gee*,
No. 18-323; not yet set for argument

As recently as 2016, the Court struck down a Texas law requiring abortion providers to have admitting privileges at hospitals—that law evidently did not protect the health of pregnant women, the Court held, but did substantially burden their right to choose abortion. The Court has now agreed to review a Fifth Circuit opinion upholding a Louisiana law that the parties seemingly agree is identical to that Texas law. The challengers note that the law will reduce Louisiana's abortion providers to one if it goes into effect—Chief Justice Roberts provided the fifth vote to stay its effect pending appeal in February. The Court will also consider Louisiana's appeal from the same case, challenging doctors' third-party standing to challenge regulations on behalf of patients, and the Court could also resolve a circuit split as to the waivability of objections to standing.

Hernandez v. Mesa,
No. 17-1678; set for argument November 12, 2019

Although it has not extended *Bivens* for more than forty years, the Court will have that opportunity in weighing claims that a border patrol agent, standing on American soil, shot and killed a 15-year-old Mexican citizen on the Mexican side of the border. The government filed an amicus brief supporting the officer, arguing that special circumstances and separation of powers considerations counsel against the extension: "Congress's determination to preempt

state tort remedies against Agent Mesa and not to waive sovereign immunity for the United States is precisely the sort of legislative judgment that this Court should respect by declining to substitute a damages remedy of its own."

Kahler v. Kansas,
No. 18-6135; set for argument October 7, 2019

The first argument of the new term gives the Court the opportunity to define States' latitude in interpreting the insanity defense under the Eighth and Fourteenth Amendments. Kahler's conviction for murder was governed by Kansas's 1995 law limiting the defense to cases in which the defendant's illness meant there was no intent to commit the crime. Kahler insists that the constitution requires consideration of whether his mental illness prevented his subjective awareness that his actions were wrong, and that this consideration is so fundamental as to implicate due process. Kansas is one of only five states to have limited the insanity defense, but others might follow if the Court affirms.

Mathena v. Malvo,
No. 18-217; set for argument October 16, 2019

Lee Boyd Malvo was seventeen when he and John Allen Muhammad shot at people in the D.C. area, killing ten and wounding many more. The Fourth Circuit ordered Malvo resentenced in light of the Supreme Court's decisions in *Miller v. Alabama* and *Montgomery v. Louisiana*, which prohibited mandatory sentences of life without parole for juveniles, and made that prohibition retroactive, respectively. The Fourth Circuit reads those decisions, and particularly language in *Montgomery*, more broadly, insisting that, even though Virginia's sentencing scheme did not mandate a life-without-parole sentence, the trial court must determine whether Malvo is that "rare" juvenile offender so beyond redemption as to deserve the punishment. The government filed an amicus brief in support of the warden, arguing that *Montgomery* cannot have expanded *Miller* in making it retroactive, and any language indicating so is dicta that the Court should now clarify.

New York State Rifle & Pistol Association Inc. v. City of New York, New York,
No. 18-280; set for argument December 2, 2019

After the Court granted certiorari to consider whether the Second Amendment precludes New York City's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits, the City urged the Court to declare that changes to the rule and to state law mooted the case. The Court deferred that request and scheduled the case for argument. Because the ban purported to limit travel outside the state, it also implicated the dormant commerce clause and the right to travel. The Second Circuit, applying intermediate scrutiny, affirmed the trial court's holding that the restrictions pass muster, reasoning that the two licensing regimes (premises licenses and concealed-carry licenses) together ensured that

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Civil Rights Groups Charge that ICE Disregards Immigrants' Medical, Mental Health Needs and Ignores Discrimination Against Immigrants with Disabilities

by Tim Fox, co-Executive Director, Civil Rights Education and Enforcement Center, Denver, CO

On August 19, 2019, my organization – the Civil Rights Education and Enforcement Center (CREEC) – filed a nationwide class-action lawsuit against the Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE), and related entities challenging abusive and horrific conditions of confinement at approximately 158 immigration detention centers across the country. CREEC was joined in this effort by Disability Rights Advocates, the Southern Poverty Law Center, and Orrick, Herrington & Sutcliffe.

The lawsuit, which alleges violations of the Due Process Clause of the Fifth Amendment and Section 504 of the Rehabilitation Act, was brought by 15 individual plaintiffs and two nonprofit organizations, and seeks declaratory and injunctive relief on behalf of a class and two subclasses.

The lawsuit alleges that the defendants have a long-standing pattern and practice of failing to adequately monitor and oversee immigration detention centers, most of which are operated by third parties pursuant to contracts with the defendants. As a result, the approximately 55,000 persons detained in immigration detention centers are subjected to a number of recurring and dangerous practices that continue unchecked by the defendants. According to the complaint, these practices constitute “punishment” which the defendants may not, pursuant to the Due Process Clause, impose on civil detainees; place detainees at substantial risk of serious harm; and deny detainees their rights under Section 504.

The 200-page complaint is replete with citations to governmental and nongovernmental reports documenting the defendants’ lengthy history of failing to monitor and oversee detention facilities and thus failing to prevent the resulting dangerous conditions of confinement that exist in those facilities. Many of these reports are from DHS’s own departments and agencies.

For example, in a 2018 report, DHS’s Office of Inspector General found that “ICE’s difficulties with monitoring and enforcing compliance with detention standards stretch back many years and continue today.” That same report found that the main mechanism relied on by defendants to monitor detention centers – inspections by a private contractor – was completely inadequate. In fact, the OIG report quoted ICE employees as describing these inspections as “useless” because they are “very, very, very difficult to fail.”

As a result of defendants’ failure to monitor and oversee detention centers, dangerous practices continue unabated across immigration detention centers. Broadly speaking, these practices fall within three categories: constitutionally inadequate medical and mental health care; improper administration and use of segregation; and failure to provide accommodations and other required measures to detainees with disabilities. The

medical and mental health care claims are brought on behalf of a putative class consisting of all current and future detainees, while the segregation and disability claims are brought on behalf of two discrete subclasses.

Defendants’ employees at the highest levels are fully aware of the grossly inadequate conditions of confinement at detention centers, and the dangers that result to detainees. For example, in a memo from December 2018, an ICE supervisor notified then Acting Deputy Director of ICE Matthew Albence that ICE’s health service agency “is severely dysfunctional and unfortunately preventable harm and death to detainees has occurred” and that “leadership is not focused on preventing horrible recurrences.”

Many of the contractors that defendants use to operate detention centers have been sued repeatedly for inadequate medical and mental health care, and/or have been found to violate applicable detention standards by defendants and other governmental agencies. Nevertheless defendants do not attempt to punish or take other actions to cause these contractors to improve the conditions of confinement. For example, from October 2015 to June 2018, defendants identified 14,003 deficiencies at 106 contract facilities, yet ICE imposed financial penalties only twice. In fact, far from punishing these contractors, ICE often rewards them with new or expanded contracts.

The lawsuit seeks specific injunctive relief requiring defendants to implement effective monitoring and oversight practices, to take actions to rectify substandard conditions of confinement, and to prevent those substandard conditions from recurring in the future.

The lawsuit is captioned *Fraihat v. U.S. Immigration and Customs Enforcement*, Case No. 5:19-cv-01546 (C.D. Cal.), and is currently pending before U.S. District Court Judge Jesus G. Bernal. You can download the complaint at <https://creeclaw.org/fraihat-v-immigration-and-customs-enforcement/>.

Tim Fox is a 1991 graduate of Stanford Law School and the co-Executive Director of the Civil Rights Education and Enforcement Center. He has received numerous awards for his work on civil rights cases. His practice focuses on class action and other systemic change litigation.

Sweeping Change or a Big Sleep? SCOTUS Takes on LGBTQ Employment Law

by Robin B. Wagner, Pitt McGehee Palmer & Rivers, PC, Royal Oak, MI

The Supreme Court has placed LGBTQ¹ employment discrimination rights on its agenda, with oral argument scheduled for October 8, 2019. One case, *EEOC v RG & GR Harris Funeral Homes*, 884 F3d 560 (CA 6, 2018), holds that Title VII prohibits discrimination on the basis of transgender and transitioning status. The other two cases address whether Title VII prohibits discrimination on the basis of sexual orientation and come to opposite conclusions: *Zarda v Altitude Express*, 883 F3d 100 (CA 2, 2018) (holding that Title VII prohibits discrimination on the basis of sexual orientation), and *Bostock v Clayton Co Bd of Comm'rs*, 723 Fed. App'x 964 (CA 11, 2018) (holding that Title VII does not address discrimination on the basis of sexual orientation).

This is an uneasy time for anyone who views Title VII's "on the basis of sex" language as expansive enough to include transgender status and sexual orientation within its ambit. Justice Anthony Kennedy, the author of each Supreme Court decision expanding the rights of sexual minorities², has been replaced on the bench by Justice Brett Kavanaugh, who is understood to be far more conservative on these issues.³ In granting certiorari on these three cases, the Supreme Court could draw a line ending the advancement of LGBTQ rights at marriage equality, rule that "on the basis of sex" does include transgender status and/or sexual orientation within its reach, or articulate some narrower holding that would leave the current legal landscape mostly unchanged and put the ball in the hands of Congress and/or state governments to legislate inclusion of LGBTQ protections in employment discrimination laws.

Not being in any way qualified to prognosticate on the Supreme Court, I instead will provide some clarification of the legal issues presented to the Supreme Court in these cases.

A first point of curiosity for these three cases is the role of the Equal Employment Opportunity Commission (EEOC) and the Department of Justice. The EEOC originally filed the case against the Harris Funeral Homes on behalf of Aimee Stephens, a transgender woman who was fired when she informed the funeral home where she had worked that she would be transitioning from male to female. The EEOC had also written an amicus brief to the *en banc* panel of the Second Circuit in support of Donald Zarda, a gay man fired from his employment as a skydiving instructor because of his sexual orientation, even as the DOJ argued the other side of the case. *See, e.g.*, Alan Feuer, "Justice Department Says Rights Law Doesn't Protect Gays," NY Times July 27, 2017, <https://www.nytimes.com/2017/07/27/nyregion/justice-department-gays-workplace.html>.

However, the EEOC has now filed its brief before the Supreme Court arguing that Title VII should not apply to

transgender individual and transgender status. Brief of Respondent Equal Employment Opportunity Commission, filed Aug. 16, 2019, 18-107, R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission, et al. While the EEOC has not weighed in on the *Zarda* case at the Supreme Court, the Solicitor General has filed briefs and been granted permission to argue on behalf of the employers in all three cases. The Trump Administration has thereby reversed the federal government's prior positions, expressed through the EEOC, that Title VII did extend to transgender persons and to sexual orientation.

What are the Legal Theories in Play for these Cases?

The first and arguably most essential line of cases in these cases comes from *Price Waterhouse v Hopkins*.⁴ The *Price Waterhouse* Court had extended the reach of Title VII by holding that applying gender stereotypes was an unlawful form of discrimination on the basis of sex.⁵ In *Harris Funeral Homes*, the Sixth Circuit reiterated and strengthened its earlier holding that, in light of *Price Waterhouse*, a transgender individual was able to bring suit under Title VII.⁶ "Title VII proscribes discrimination both against women who 'do not wear dresses or makeup' and men who do."⁷ This reasoning is directly descended from the *Price Waterhouse* reasoning that gender stereotyping is a form of sex discrimination: "[n] or . . . does it require expertise in psychology to know that, if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex, and not her interpersonal skills, that has drawn the criticism."⁸

Importantly, the Sixth Circuit also squarely rejected the idea that Title VII was not implicated if gender dress codes and expectations are similarly enforced for men and women: "It is apparent from both *Price Waterhouse* and *Smith* that an employer engages in unlawful discrimination even if it expects both biologically male and female employees to conform to certain notions of how each should behave."⁹ One narrow approach the Supreme Court could take to affirming *Harris* would be to view the facts particular to Aimee Stephens employment circumstances and the demands her employer placed on her that injured her because of her sex—such as demanding her to adhere to a particular dress code that required women and men to wear gender-specific dress codes.¹⁰ This type of ruling would be in keeping with Title VII's fundamental jurisprudence that the discriminatory harm is particular to the experience of the individual.¹¹ It might also stave off the broader holding that Title VII categorically does not apply to transgender individuals.

Looking to Title VII cases addressing sex discrimination

generally, there is a long history of broadly defining “sex” when interpreting Title VII. The Supreme Court has famously reasoned that “statutory prohibitions often go beyond the principal evil, . . . and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed” in holding that Title VII covers same-sex harassment.¹² As the Seventh Circuit noted in its 2017 decision extending Title VII’s protections to sexual orientation, this law “has been understood to cover far more than the simple decision of an employer not to hire a woman for Job A, or a man for Job B.”¹³ The *Zarda* Court similarly recalled that Title VII already had been applied to “traits that are a function of sex, such as life expectancy, . . . and non-conformity with gender norms.”¹⁴

Title VII cases often employ analyses focused on comparators, and such an approach appears to be effective in cases involving LGBTQ issues. For instance, the *Harris* court employed a counterfactual asking whether “Stephens would have been fired if Stephens had been a woman who sought to comply with the women’s dress code. The answer quite obviously [was] no.” Thus, the court determined that it was the plaintiff’s sex—specifically, her transgender status—that caused her termination.¹⁵ The *Zarda* Court also relied on comparator analysis: the Seventh Circuit’s reasoning that a woman attracted to another woman who is treated adversely compared to a man attracted to a woman has been discriminated against on the basis of sex.¹⁶

Title VII jurisprudence also recognizes that legal theories applicable to one type of discrimination apply to the others. The *Price Waterhouse* court explained that “our specific references to gender throughout this opinion, and the principles we announce, apply with equal force to discrimination based on race, religion, or national origin.”¹⁷ The Second Circuit applied this observation to its reasoning in *Zarda* that associational discrimination—the theory that one is discriminated against because of the race, religion, or other attribute of one’s spouse, child, or other close relation—applies equally to sexual orientation.¹⁸ In other words, it may be possible to allege discrimination based on association in a case in which an individual is discriminated against because of his or her partner’s sex.

The key question is whether five justices will sign on to the idea that the evolution of these lines of cases interpreting “sex” discrimination logically and necessarily leads to holding that it applies to sexual orientation and/or transgender individuals and status.

A note on the religious freedom defense

Employers are increasingly asserting a “sincerely held religious belief” defense to Title VII sexual orientation and gender identity claims, arguing that if they are required to tolerate LGBTQ employees, their religious beliefs and those of their customers will be invaded. Defendants are seeking to expand the applicability of the Religious Freedom Restoration Act to Title VII cases as the funeral home did in *Harris*, arguing that the EEOC, a government entity, was imposing on its religious beliefs.¹⁹ The Sixth Circuit rejected

this argument, but it appears in many of the briefs filed by amici in these three cases and may find sympathy among the conservative justices.

Conclusion

In conclusion, this trio of cases being heard on October 8, 2019 are enormously important to the future of Title VII. They will feature arguments challenging fifty years of evolving caselaw interpreting what “sex” means in the context of Title VII and may provide the Court with an opportunity to weigh the rights of LGBTQ workers in relation to the religious beliefs of their employers.

Robin B. Wagner is the Chair-Elect of the Civil Rights Section. She is an associate at Pitt McGehee Palmer & Rivers, where she represents plaintiffs in employment discrimination and civil rights matters.

Endnotes:

¹Lesbian, gay, bisexual, transgender, and queer (or questioning).

²*Romer v. Evans*, 517 US 620 (1996) (striking down a Colo. Const. amendment preventing any government within the state from granting homosexuals or bisexuals protected status because it was not rationally related to a legitimate state interest); *Lawrence v. Texas*, 539 US 558 (2003) (striking down criminal sodomy laws for violating the privacy rights inherent in substantive due process guarantees of the 14th Amendment); *U.S. v. Windsor*, 570 US 744 (2013) (striking down the Defense of Marriage Act, which federally defined marriage as between one man and one woman); and *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (holding that the 14th Amendment requires states to license two people of the same sex to be married).

³*See, e.g.*, Adam Liptak, “How Brett Kavanaugh Would Transform the Supreme Court,” NY Times Sept. 2, 2018. Available at <https://www.nytimes.com/2018/09/02/us/politics/judge-kavanaugh-supreme-court-justices.html>.

⁴*Price Waterhouse v. Hopkins*, 490 US 228; 109 S Ct 1775; 104 L 2d 268 (1989).

⁵*Id.* at 235.

⁶*Harris Funeral Homes*, 884 F3d at 572 (discussing *Smith v. City of Salem*, 378 F3d 566, 573 (CA 6, 2004)).

⁷*Id.* (quoting *Smith*, 378 F3d at 575).

⁸*Price Waterhouse*, 490 US at 256.

⁹*Id.* at 574.

¹⁰*See, e.g.*, Brief for Professors Samuel R. Bagenstos et al. as Amici Curiae in Support of Respondent Stephens, R.G. & G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission, et al., No. 18-107, U.S., filed July 3, 2019.

¹¹*See, e.g.*, *Conn. v. Teal*, 457 US 440, 453 (1982).

¹²*Oncale v. Sundowner Offshore Servs.*, 523 US 75, 79; 118 S Ct 998; 140 L Ed 2d 201 (1998).

¹³*Hively v. Ivy Tech Community College*, 853 F3d 339, 345 (CA 7, 2017) (citing *Meritor Savings Bank, FSB v. Vinson*, 477 US 57; 106 S Ct 2399; 91 L Ed 2d 49 (1986)) (workplace harassment); *Oncale*, 523 US at 79 (same-sex workplace harassment); *City of Los Angeles v. Manhart*, 433 US 702;



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97 S Ct 2912; 53 L Ed 2d 1054 (1978) (assumptions about longevity); and *Price Waterhouse*, 490 US at 228 (gender stereotypes).

¹⁴*Zarda*, 883 F3d at 112 (citing *City of Los Angeles, Dep't of Water & Power v Manhart*, 435 US 702, 711 (1978); *Price Waterhouse*, 490 US at 250-51).

¹⁵*Harris Funeral Homes*, 884 F3d at 575 (discussing *Hively*, 853 F.3d at 345).

¹⁶*Zarda*, 883 F3d at 116 (discussing *Hively*, 853 F3d at 341).

¹⁷*Price Waterhouse*, 490 US at 243, n 9. See also *Hively*, 853 F3d at 349.

¹⁸*Id* at 124-25.

¹⁹*Harris Funeral Homes*, 884 F3d at 585-597.

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the restrictions on premises licenses amount to at most a modest burden on the Second Amendment right. The gun association insists that the ban fails at any level of scrutiny. The government filed an amicus brief in support of the gun association's position, with the exception of its right-to-travel argument.

Ramos v. Louisiana,

No. 18-5924; set for argument October 7, 2019

Oregon is now the only state that allows convictions by a non-unanimous jury—Louisiana voters ended the practice in 2018, but that change was not retroactive. A 10-2 jury convicted Evangelisto Ramos of second-degree murder, and he is serving a sentence of life without parole. He challenges that conviction as a violation of the Sixth Amendment guarantee of a unanimous verdict, incorporated by the Fourteenth Amendment. Louisiana argues that the Sixth Amendment makes no such guarantee, and that even if it did the Court's 1972 decision in *Apodaca v. Oregon* forecloses the possibility of incorporation. Oregon, as amicus, echoes Louisiana's floodgates arguments. The NAACP Legal Defense and Educational Fund notes the racist history of

non-unanimous jury laws—but Louisiana insists its law was motivated by concern for efficient use of judicial resources.

Sam Brandao is a Clinical Instructor with experience enforcing housing equity, civil rights, and disability rights. He joined the Tulane Civil Rights and Federal Practice Clinic in 2016 after completing a two-year Skadden Fellowship, during which he served as a staff attorney at Southeast Louisiana Legal Services in New Orleans. At SLLS, he litigated housing discrimination cases and advocated for policy changes on behalf of persons with disabilities. Brandao clerked for United States District Judge Eldon E. Fallon of the Eastern District of Louisiana and for Circuit Judge Jacques L. Wiener, Jr. of the United States Court of Appeals for the Fifth Circuit. In the Civil Rights and Federal Practice Clinic, he assists Director Lucia Blacksher Rainer in supervising student-attorneys in a range of client representation, including federal cases involving the civil rights of incarcerated citizens, employment discrimination, housing discrimination, and other constitutional claims.

Deadline for Comments on HUD's Proposed Reconsideration of the Fair Housing Act's Disparate Impact Standard, Docket No. FR-6111-P-02

On August 1, 2019, the US Department of Housing and Urban Development (HUD) issued a notice of proposed rulemaking (the "Proposed Rule") seeking public comment on amendments to its "disparate impact" regulation under the Fair Housing Act (FHA). The Proposed Rule was published in the Federal Register on August 20, 2019, and comments are due by October 18, 2019.

More information about the proposed rule and guidance on how to submit comments can be found at www.defendcivilrights.org.

Annual Meeting & Convention 2019 Photo Album

The FBA Annual meeting in Tampa was once again a big success. Below in clock-wise order are Maria Vathis, Immediate Past President of the FBA, attendees at The Florida Aquarium reception hosted by the Tampa Bay Chapter, a group picture of various award recipients, and Stephen Haedicke and Nate Olin.



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