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Pulling Back the Curtain on the Great and Powerful Oz*: SCOTUS and Title VII

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I. INTRODUCTION

As a law student, the *Stetson Law Review* published my first law review article.[1] As a licensed attorney reviewing that article, I have some responses to the topic of my Comment, Title VII employment discrimination based on sex, especially since oral arguments were recently heard at the Supreme Court of the United States (SCOTUS) with three separate but overlapping cases.[2]

First, this Response discusses the legal arguments made by the LGB plaintiffs[3] in the cases against the legal arguments I presented in my previous article. Then, the Response reviews the oral argument heard at SCOTUS for the LGB plaintiffs and provides responses to some points made by the Justices. Finally, this Response examines the future, by discussing not only the possible outcomes from the SCOTUS case but also how that decision can impact already viable legal theories LGB plaintiffs use in employment discrimination cases.

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* *See* THE WIZARD OF OZ (MGM 1939).

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[1] Michelle Moretz, Comment, Baldwin*,* Hively*, and* Christiansen*, Oh-My! Navigating the Yellow Brick Road of Employment Discrimination for LGBT Plaintiffs*, 48 STETSON L. REV. 235 (2019).

[2] Altitude Express, Inc. v. Melissa Zarda and William Moore Jr., Co-Independent Executors of the Estate of Donald Zarda, 17-1623 (S. Ct. 2019); Gerald Bostock v. Clayton County, Georgia, 17-1618 (S. Ct. 2019); R&G & G&R Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission, 18-107 (S. Ct. 2019). This Article will not discuss the briefs or oral arguments of *Harris Funeral Homes* because the Court held separate oral argument from *Zarda* and *Bostock*. In *Harris Funeral Homes*, the petitioner who suffered an adverse employment action was a transgender individual. *See infra* note 3 on limiting the scope of this Article.

[3] In the prior article, the acronym LGBT referenced the individuals at the center of the issue. Moretz, *supra* note 1, at 236 n.9. However, upon review of the cases heard before SCOTUS about Title VII employment discrimination and the cases used in the original article, the article focused more on the lesbian, gay, and bisexual (LGB) plaintiffs and did not include transgender individuals in the analysis. As a way to remain consistent with the prior article's analysis, this Article will use the acronym LGB and focus on individuals in a same-sex relationship or marriage that affects their employment.

II. LEGAL ARGUMENTS[4]

In my previous article, I stated the cleanest solution was for the courts to recognize sexual orientation as sex discrimination under Title VII.[5] However, as many courts had yet to recognize sexual orientation as sex discrimination, I provided two theories: (1) convince the courts to give deference to the Equal Employment Opportunity Commission's (EEOC) determination[6] that sexual orientation discrimination is sex discrimination under Title VII, or (2) plead two different legal theories, associational theory and failure to conform to gender norms[7] based on homosexual stereotypes.[8]

As for the cases before SCOTUS, *Altitude Express, Inc. v. Zarda* came from the Second Circuit where an en banc panel reversed prior precedent and held sexual orientation discrimination is sex discrimination.[9] Chief Judge Katzmann, who also authored the concurrence in *Christiansen*, used the same arguments for the majority decision in *Zarda*.[10] The second case, *Bostock v. Clayton Cty. Bd. of Comm'rs*, comes from the Eleventh Circuit in which the court upheld the dismissal of Mr. Bostock's claim for sex discrimination under Title VII based on sexual orientation as sex discrimination and gender stereotyping.[11] The Eleventh Circuit reiterated its rejection of the argument that *Price Waterhouse v. Hopkins*[12] and *Oncale v. Sundowner Offshore Servs., Inc.*[13] supported a cause of action for sexual orientation discrimination under Title VII, but also stated "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."[14]

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[4] This Article focuses on the arguments made by the petitioners and respondents in both the *Zarda* and *Bostick* cases and does not discuss in depth any arguments made in the many amicus briefs.
[5] Moretz, *supra* note 1, at 267.
[6] Baldwin v. Foxx, Appeal No. 0120133080, 2015 WL 4397641 (EEOC July 15, 2015).
[7] Throughout this Article, sex stereotyping and failure to conform to gender norms are equal and interchangeable.
[8] Moretz, *supra* note 1, at 271–72.
[9] Zarda v. Altitude Exp., Inc., 883 F.3d 100, 108 (2d Cir. 2018) (en banc).
[10] *Compare* Christiansen v. Omnicom Group, Inc., 852 F.3d 195, 202 (2d Cir. 2018) (addressing the three arguments on why discrimination based on sexual orientation is sex discrimination under Title VII, including the associational theory and gender stereotyping), *with Zarda*, 883 F.3d at 113–28 (providing more detailed discussion on how sexual orientation is a subset of sex under Title VII but also including the associational theory and gender stereotyping as other avenues of how sexual orientation fits under sex discrimination under Title VII).
[11] Bostock v. Clayton Cty. Bd. of Comm'rs, 723 F. App'x 964, 965 (11th Cir. 2018).
[12] 490 U.S. 228 (1989).
[13] 523 U.S. 75 (1998).
[14] *Bostock*, 723 F. App'x at 965.

Bostock's and Zarda's briefs[15] track the *Zarda* opinion for their main legal arguments specifically arguing sexual orientation is a subset of sex discrimination. Rather than dive into arguments made by each party, this Response focuses on the distinct differences between my prior article and the legal arguments made in the SCOTUS briefs.[16]

First, my original article argued the easiest solution is for the courts to recognize sexual orientation as sex discrimination under Title VII.[17] However, that original article did not elaborate on the argument because other law review articles[18] specifically addressed this argument; my goal was to allow LGB plaintiffs other avenues to succeed until the courts caught up with the legal argument that sexual orientation is sex discrimination. Bostock's brief makes the cleanest argument on why sexual orientation discrimination is sex discrimination under Title VII:

> Sexual orientation discrimination constitutes sex discrimination under the plain language of Title VII because one simply cannot consider an individual's sexual orientation without first considering his sex . . . . Because a person's sex is a necessary element of his sexual orientation, it follows without question that one cannot define a person's sexual orientation without first taking his sex into account.[19]

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[15] In *Zarda*, the company, Altitude Express, appealed the Second Circuit's decision to SCOTUS, while in *Bostock*, Mr. Bostock appealed the Eleventh Circuit's decision to SCOTUS. Zarda is the respondent in his case while Bostock is the petitioner in his case. Thus, to avoid confusion, this Response uses each individual's name and forgoes using petitioner and respondent to identify them except when citing the SCOTUS briefs.

[16] For more information about the similar arguments, see Moretz, *supra* note 1, at 247–54 (discussing the legal theories of associational theory and gender stereotyping (or failure to conform to gender norms)); Br. for Resp't at 23–36, *Altitude Exp., Inc, v. Zarda*, 2019 WL 2745391 (U.S. June 26, 2019) (No. 17-1623) [hereinafter Br. for Resp't Donald Zarda] (even though Mr. Donald Zarda is deceased, his estate continues the litigation); Br. for Pet'r at 18–29, *Bostock v. Clayton Cty., Ga.*, 2019 WL 2763119 (U.S. June 26, 2019) (No.17-1618) [hereinafter Br. for Pet'r Gerald Bostock].

[17] Moretz, *supra* note 1, at 267.

[18] *E.g.*, William N. Eskridge, Jr., *Title VII's Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 YALE L.J. 322 (2017); Matthew W. Green, *Same-Sex Sex and Immutable Traits: Why* Obergefell v. Hodges *Clears a Path to Protecting Gay and Lesbian Employees from Workplace Discrimination Under Title VII*, 20 J. GENDER RACE & JUST. 1 (2017); Anthony Michael Kreis, *Against Gay Potemkin Villages: Title VII and Sexual Orientation Discrimination*, 96 TEX. L. REV. ONLINE 1 (2017). Since the decisions from the Seventh and Second Circuit finding sexual orientation is discrimination under Title VII sex discrimination, many law review articles have addressed this topic. *See, e.g.*, Katie Eyer, *Statutory Originalism and LGBT Rights*, 54 WAKE FOREST L. REV. 63 (2019); Marc Chase McAllister, *Sexual Orientation Discrimination as a Form of Sex-Plus Discrimination*, 67 BUFF. L. REV. 1007 (2019); Kathryn B. Thiel, Comment, *Woke Dicta: The Discord Over Statutory Interpretation, Sexual Orientation Discrimination, and the Scope of Title VII*, 29 GEO. MASON U. C.R. L.J 191 (2019).

[19] Br. for Pet'r Gerald Bostock, *supra* note 16, at 13–14 (citations omitted).

The opposing parties rely on the legislative history[20] rather than the statutory text because they struggle to find clear legal arguments to refute the statutory text.[21]

Second, neither Bostock nor Zarda makes an argument urging deference to the EEOC as discussed in my prior article. While my prior article discussed reasons why SCOTUS does not often defer to the EEOC on employment discrimination cases,[22] Zarda's brief only mentions the EEOC case of *Baldwin v. Foxx* in its statement of the case,[23] and Bostock's brief does not discuss *Baldwin*.[24] While my argument to convince courts to give deference to the EEOC was not new or exciting, the little discussion of *Baldwin* is striking because the theories used by Zarda and Bostock come from the theories developed by the EEOC in *Baldwin*.[25] Also worth noting is that the EEOC's position remains the same as put forth in *Baldwin*,[26] despite the change in leadership within the executive branch since the EEOC decided *Baldwin*.[27] Even though there is reluctance to go all in on deference to the EEOC, Zarda's and

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[20] Br. for Pet'r at 11–30, *Altitude Exp., Inc. v. Zarda*, 2019 WL 3958415 (U.S. Aug. 16, 2019) (No. 17-1623).

[21] *Id.* at 30–52. Altitude Express argues Zarda's theories require a sex-plus consideration by considering the individual's sex and then their sexual preference. *Id.* at 33–36. Altitude Express' brief insinuates certain policies and practices such as separate restrooms, sleeping facilities, and fitness tests will be upended as a result of finding for Zarda. *Id.* at 55. While Clayton County did not discuss those policies in its brief, they appeared at oral argument. Oral Argument for Bostock v. Clayton County Georgia, Tr. 12:1–14, 15:2–11, Oct. 8, 2019, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2019/17-1618_7k47.pdf [hereinafter Oral Argument]. However, this discussion of separate bathrooms was unnecessary because neither case was about the use of bathrooms as a point of adverse action. While there may have been a conceptual link in the case involving a transgender individual, *R&G & G&R Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission*, commentators found it bizarre the Justices kept asking about it in the sexual orientation case. *See* Strict Scrutiny Podcast, *Rick Perry and the German Policeman*, 38:16–38:40, http://strictscrutinypodcast.com/podcast/rick-perry/ (Oct. 21, 2019) [hereinafter Strict Scrutiny Podcast].

[22] Moretz, *supra* note 1, at 267–71.

[23] Br. for Resp't Donald Zarda, *supra* note 16, at 5–6.

[24] The brief uses other cases from the EEOC in support of its argument for associational discrimination. *See* Br. for Pet'r Gerald Bostock, *supra* note 16, at 19 n.5.

[25] *Compare* Moretz, *supra* note 1, at 238–39 (discussing the legal theories developed in *Baldwin*) *with* Zarda v. Altitude Express, 883 F.3d 100, 124–25, 131 (2d Cir. 2018) (using the same legal theories developed in *Baldwin* as basis for overruling precedent and determining sexual orientation is sex discrimination under Title VII).

[26] *What You Should Know About EEOC and the Enforcement Protections for LGBT Workers*, EEOC, https://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm (last visited Feb. 2, 2020).

[27] While the EEOC is an independent agency, it is worth noting the Chair of the EEOC is a Republican-appointed individual, but likely the reason the EEOC has not changed its position is because of the lack of a complete commission and the Chair only being recently confirmed to the position. *See The Commission and the General Counsel*, EEOC, https://www.eeoc.gov/eeoc/commission.cfm (last visited Feb. 2, 2020).

Bostock's briefs could have used *Baldwin* in a much better capacity to further illustrate their already persuasive arguments.

III. ORAL ARGUMENTS

As an initial matter, the oral arguments discussed involve two cases, *Altitude Express v. Zarda* and *Bostock v. Clayton Cty., Ga.*, which SCOTUS consolidated.[28] There are two major points regarding oral argument worth noting.[29] First, Pam Karlan,[30] arguing for the employees, made an excellent point on how men and women are treated differently but what matters is if the differential treatment subjects one sex to a disadvantage in employment situations.[31] Best summed up by Ms. Karlan:

> When I got up, the Chief Justice said to me, "Ms." Karlan, I am willing to bet any amount of money I have that when Mr. Harris gets up, he is going to say "Mr." Harris. He treated us differently because of sex. That is not discriminatory because neither of us has been subjected to a disadvantage.[32]

While there is no denying men and women are treated differently, often legitimate reasons exist for having requirements that favor one sex over the other—bona fide qualifications. However, when there are no legitimate reasons and a male applicant is not hired because he told the employer he married his partner, Will, over the weekend, but the employer instead hires the female applicant who married her partner, Will, then employment discrimination based on sex has occurred.

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[28] Amy Howe, *Court to Take Up LGBT Rights in the Workplace (Updated)*, SCOTUSBLOG (Apr. 22, 2019), https://www.scotusblog.com/2019/04/court-to-take-up-lgbt-rights-in-the-workplace/ (discussing the Justices taking up three different cases involving Title VII but consolidating *Zarda* and *Bostock* for one hour of oral argument).

[29] While this Response only discusses two points from oral argument, another point that took up more time than necessary before the Supreme Court was bathrooms. In the argument, both Justices Gorsuch and Ginsburg ask how the test Ms. Karlan is setting forth would handle bathrooms. Oral Argument, *supra* note 21, at 15:2–11 (Justice Gorsuch), 16:17–23 (Justice Gorsuch); 20:15–23 (Justice Ginsberg). While there are definite conversations to be had about bathrooms and how using one bathroom over another affects individuals, this oral argument was not the time or place. Ms. Karlan did steer the Justices back to the specific issue at hand: adverse employment action. "Title VII has a special provision in 703(a)(ii) that says, when you segregate people, the question is whether the segregation denies them employment opportunities." *Id.* at 21:2–6.

[30] Pam Karlan is the co-director of Stanford Law School's Supreme Court Litigation Clinic. *Pamela S. Karlan Biography*, STANFORD LAW, https://law.stanford.edu/directory/pamela-s-karlan/ (last visited Jan. 4, 2020).

[31] Oral Argument, *supra* note 21, at 11:4–12.

[32] *Id.* at 12:18–24. As a result of this exchange, Chief Justice Roberts made efforts to not call Mr. Harris by "Mr." but rather indicated it was Mr. Harris's turn to speak by stating "Counsel." *Id.* at 31:3–5.

The second point from oral arguments is the idea of separate but equal, where homosexual men and women are being treated the same but are being treated different than heterosexual men and women. Justice Alito presents this hypothetical:

> Let's imagine that the decisionmaker in a particular case is behind the veil of ignorance and the subordinate who has reviewed the candidates for a position says: I'm going to tell you two things about this candidate. This is the very best candidate for the job, and this candidate is attracted to members of the same sex. And the employer says: Okay, . . . I'm not going to hire this person for that reason. Is that discrimination on the basis of sex, where the employer doesn't even know the sex of the individual involved?[33]

While both the Solicitor General Noel Francisco and Mr. Jeffrey Harris, the advocate for the employers, said this is sexual orientation discrimination and not sex discrimination,[34] they miss the point. Even though the employer does not know the sex of the candidate, an assumption is being made about the sex because of the same-sex relationship resulting in discrimination on the basis of sex. This assumption considers the sex of the candidate because if the person is in a same-sex relationship, the employer is saying it does not want to hire an individual who is in a same-sex relationship but would have no qualms about hiring an individual in a heterosexual relationship. Ms. Karlan conceded to Justice Alito's argument,[35] although she should not have because the sex of the applicant is being considered even without the gender being expressly stated.[36]

IV. PREDICTING THE FUTURE

After listening to oral arguments, this case will likely split 5–4. Most likely, Justices Ginsburg, Sotomayor, Kagan, and Breyer will vote together, and Justices Thomas, Alito, and Roberts will vote together. The other two votes remain uncertain. Because Justice Kavanaugh did not actively participate in this oral argument, it is impossible to know what questions he has about this employment discrimination issue.[37] But based upon prior decisions, Justice Kavanaugh will likely join his fellow

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[33] *Id.* at 51:16–52:4.
[34] *Id.* at 52:7–15 (Mr. Harris); 61:1–6 (Solicitor General).
[35] *Id.* at 69:6–9.
[36] *See also* Strict Scrutiny Podcast, *supra* note 21, at 48:20–52:30 (discussing Ms. Karlan's answer to Justice Alito's question and stating her concession was not warranted but also addressing issues about what Justice Alito's question was really getting at).
[37] Justice Kavanaugh's one question was "Are you drawing a distinction between the literal meaning of 'because of sex' and the ordinary meaning of 'because of sex'? And, if so, how are we supposed to think about ordinary meaning in this case?" Oral Argument, *supra* note 21, at 47:20–25. This one

conservative justices.[38] Justice Gorsuch, a staunch textualist, appeared to be the most conflicted in oral argument.[39] While Justice Gorsuch focused on the "massive social upheaval"[40] that would result from this decision, he loses sight of the fact that any decision here will not affect bona fide qualification and sex-based distinctions that are not causing any adverse employment reaction. Rather, as noted by Justice Ginsberg, "[y]ou have to have someone who's injured,"[41] and this case focuses on individuals who lost employment for no other reason than because of their attraction to someone of the same sex.

What is most interesting about this case is how SCOTUS' ultimate decision, which we likely will not know until the end of the term, may affect current SCOTUS case law in decisions.[42] As discussed in my prior article, *Price Waterhouse* determined sex stereotyping—failing to conform to gender norms—violates Title VII.[43] Sex stereotyping is still a problematic theory for LGB plaintiffs to use because the courts often find it difficult to "draw distinctions between the demeanor and appearance stereotyping of the plaintiff and knowledge about the plaintiff's sexuality as a way to differentiate between failure to conform to gender norms and sexual orientation discrimination."[44] Even though sex stereotyping is not the clearest, it still provides an avenue for relief for LGB plaintiffs. How SCOTUS' decision in this case is written may impact prior precedent, possibly ruling out or preventing the use of sex stereotyping as a viable legal theory.[45]

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question provides little answer to his views while many of the other Justices' questions pointed toward how they felt the question in this case should be answered.

[38] *See* Dr. Adam Feldman, *Is Kavanaugh as Conservative as Expected?*, EMPIRICAL SCOTUS (Apr. 3, 2019), https://empiricalscotus.com/2019/04/03/kavanaugh-conservative/ (reviewing Justice Kavanaugh's voting pattern from his first year on the Court to show he leans more right with the conservatives on the court).

[39] Amy Howe, *Argument Analysis: Justices Divided on Federal Protections for LGBT Employees (UPDATED)*, SCOTUSBLOG (Oct. 8, 2019), https://www.scotusblog.com/2019/10/argument-analysis-justices-divided-on-federal-protections-for-lgbt-employees/. *See also* Oral Argument, *supra* note 21, at 44–45 (showing Justice Gorsuch addressing the liberal causation standard in Title VII employment discrimination cases and understanding sex—biological gender—was part of the cause); Strict Scrutiny Podcast, *supra* note 21, at 9:01–9:25 (playing a clip from oral argument showing Justice Gorsuch's signaling he thought this was discrimination on the basis of sex). *Contra* Oral Argument, *supra* note 21, at 60:1–6 ("[W]e interpret statutes now. We look to laws. We don't look to predictions. We don't look to desires. We don't look to wishes. We look to laws. Why doesn't that mean your argument fail?").

[40] Howe, *supra* note 39.

[41] Oral Argument, *supra* note 21, at 48:10–12 (repeating the sentence twice to reiterate this situation is not about bathrooms or showing facilities).

[42] Price Waterhouse v. Hopkins, 490 U.S. 228 (1989); *see also* Oncale v. Sundowner Offshore Servs. Inc., 523 U.S. 75 (1998).

[43] Moretz, *supra* note 1, at 245; *see also Price Waterhouse*, 490 U.S. at 250.

[44] Moretz, *supra* note 1, at 250.

[45] *See generally* Ian Millhiser, *The Supreme Court Showdown Over LGBTQ Discrimination, Explained*, VOX (Oct. 8, 2019), https://www.vox.com/2019/10/2/20883827/supreme-court-lgbtq-discrimination-

I am cautiously optimistic that Justice Gorsuch will follow his textualist interpretations of the law and find for the employees. If Justice Gorsuch sides with the employers, hopefully SCOTUS will carve out an opinion that is only applicable to the situation at hand and does not affect any prior employment discrimination precedents.[46]

title-vii-civil-rights-gay-trans-queer (discussing sex stereotyping and sexual harassment case law from SCOTUS and how these decisions would affect that precedent).

[46] *See* Masterpiece Cakeshop, LTD., v. Colorado Civil Rights Comm'n, 138 S. Ct. 1719, 1723–24 (2018) (providing a limited holding based upon religious neutrality in administrative proceedings rather than addressing religious objections to providing services for same-sex couples).