# Top Cases of 2019

1. **Transgender military ban**

In June 2016, the Obama administration announced a new policy that, for the first time, would allow transgender troops to serve openly in the U.S. military. In July 2017, President Trump tweeted that transgender people would not be allowed to "serve in any capacity in the U.S. military," citing medical costs and disruption. The next month, the Department of Defense formalized the ban, and the American Civil Liberties Union (ACLU) initiated a lawsuit on behalf of six transgender service members.

In October 2017, a federal judge from the District of Columbia issued a preliminary injunction in the case of *Jane Doe 2 v. Trump*, effectively blocking the ban from being enforced, finding the administration's justification for the ban to be pretextual and the plaintiffs' claims of due process violations to be meritorious. The next month, a second federal judge out of Maryland issued a second injunction in the case *Stone v. Trump*, holding that the policy likely violated the Equal Protection Clause. The Maryland judge further ordered the government to continue paying for service members' transitions, a component of the opinion that was not included in the first injunction out of D.C.

After the initial backlash from federal courts, the Trump administration revised its policy. In a February 2018 memo to President Trump, former Secretary of Defense James Mattis proposed a plan that purported not to be a blanket ban on transgender individuals; however, as D.C. district court judge Colleen Kollar-Kotelly noted, the Mattis plan "effectively implements such a ban by targeting proxies of transgender status, such as 'gender dysphoria' and 'gender transition,' and by requiring all members to serve 'in their biological sex.'" To alleviate due process concerns, the Mattis plan contains a "grandfather clause" that allows openly-serving transgender troops to continue serving as long as they came out as trans before the ban was implemented. The administration asked the D.C. district court to lift the injunction after the Mattis plan was announced, but the court refused, identifying no fundamental change between the initial ban and the Mattis plan. However, the D.C. Court of Appeals reversed and lifted the district court's injunction.

Additionally, two other challenges to the trans ban out of the Ninth Circuit Court of Appeals, *Karnoski v. Trump* and *Stockman v. Trump,* resulted in injunctions, both of which the

Ninth Circuit affirmed. In November 2018, the Trump administration asked the Supreme Court to weigh in on the trans military ban. On January 12, 2019, the Court lifted the two Ninth Circuit injunctions and allowed the policy to proceed in a 5-4 vote. Following the Supreme Court's decision, the district court in Maryland lifted the remaining injunction, and the Mattis policy was implemented in April 2019.

**2. Title VII**

In the fall of 2019, the Supreme Court is scheduled to rule on the scope of Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, religion, sex, and national origin. The question before the Court is whether the "sex" provision in Title VII encompasses discrimination on the basis of sexual orientation and gender identity. Three cases are pending before the Court: *Zarda v. Altitude Express, Inc.*, *Bostock v. Clayton County Board of Commissioners*, and *R.G. and G.R. Harris Funeral Homes v. EEOC*.

*Zarda v. Altitude Express* arose out of an dispute between Donald Zarda and his employer, Altitude Express, over the reasons for Zarda's termination. Zarda was a skydiving instructor who told a female customer that he was gay. The customer's boyfriend complained to management, after which Zarda was fired. Zarda brought suit in the Eastern District of New York, alleging he was fired because he failed to conform to traditional stereotypes of masculinity. The district court ruled against Zarda, distinguishing sex and sexual orientation, and a panel of judges from the Second Circuit Court of Appeals affirmed the judgment. Sitting *en banc*, the Second Circuit reversed the previous rulings and held that Zarda was impermissibly discriminated against on the basis of sex because "sexual orientation discrimination is motivated, at least in part, by sex and thus is a subset of sex."

*Bostock v. Clayton County* was consolidated with *Zarda* before the Supreme Court because both cases present the same question: whether Title VII's prohibition on sex discrimination encompasses discrimination on the basis of sexual orientation. Plaintiff Gerald Bostock was employed as a child welfare services coordinator by Clayton County, Georgia, for ten years, during which he received numerous positive performance reviews and accolades. However, shortly after he came out as gay, he was terminated by the county for "conduct unbecoming of its employees." He filed suit in the Northern District of Georgia. The district court dismissed his suit for failure to state a claim, finding that Bostock's suit was predicated on an interpretation of sex discrimination that includes sexual orientation discrimination, contrary to

Eleventh Circuit precedent that rejected that argument. The Eleventh Circuit affirmed the district court's decision and denied Bostock's petition for a rehearing *en banc*. Because of the circuit split created by the *Bostock* and *Zarda* decisions, the Supreme Court granted certiorari.

*R.G. and G.R. Harris Funeral Homes v. EEOC* presents a slightly different variation of the Title VII question in *Zarda* and *Bostock*: whether the prohibition on sex discrimination extends to discrimination on the basis of gender identity. Aimee Stephens, a transgender woman, had been employed by Harris Funeral Homes for several years before she announced she had decided to live as a woman and was subsequently terminated. She filed a complaint with the EEOC, who filed a lawsuit on her behalf that she later joined. The district court held for the funeral home, finding that requiring the funeral home to retain a trans employee would unduly burden the religious liberties of the corporation's owner's religious beliefs. The Sixth Circuit Court of Appeals reversed, finding that Title VII's sex provision protects transgender employees from discrimination on the basis of gender identity. The court further explained that even if their interpretation of Title VII infringed on the funeral home owner's religious beliefs, enforcing Title VII was the least restrictive means to achieve the EEOC's end of combating sex discrimination. The Supreme Court granted certiorari and agreed to hear this case in conjunction with *Zarda* and *Bostock*.

### 3. 2020 Census

Article I, Section 2 of the Constitution mandates that the federal government conduct an "actual enumeration" of the number of people living in the United States every ten years. Although a national population count is all that is required of the decennial census, the government soon began to use the census to collect additional information about the U.S. population and economy.

In March 2019, Commerce Secretary Wilbur Ross announced that the 2020 census would include a question asking respondents to identify their citizenship status for the first time since 1950. Numerous states, including New York, sued, alleging that the citizenship question would depress response rates within immigrant communities and distort the actual population count. In response, the Department of Commerce argued that the citizenship question was necessary to enforce the Voting Rights Act. A federal district court judge in New York held that the question was unconstitutional and the VRA enforcement rationale provided by the Department of Commerce was merely pretextual. The case *Department of Commerce, et al. v.*

*New York* is now pending before the Supreme Court. The Court will decide (1) whether the district court erred in enjoining Secretary Ross from including a citizenship question and (2) whether courts can look outside the administrative record and subpoena agency decision-makers when determining the reasons for an agency decision.

### 4. Partisan Gerrymandering

This term, the Supreme Court will determine the constitutionality of drawing state legislative districts to advantage a political party. This practice, commonly referred to as partisan gerrymandering, has never been conclusively addressed by the Court. During the 2017-2018 term, the Court punted cases of political redistricting out of Maryland and Wisconsin. In the 2004 case *Vieth v. Jubelirer*, a plurality of the Court determined that partisan gerrymandering cases presented a non-justiciable political question, but Justice Kennedy wrote a concurrence opining that not all cases of political gerrymandering were outside the realm of judicial review and that the Court could intervene to correct an established constitutional violation if plaintiffs could prove the injury.

Before the Court are two cases out of Maryland and North Carolina alleging political gerrymandering to benefit Democrats and Republicans, respectively. The Maryland case of *Benisek v. Lamone*, which has been before the court twice already, will appear for a third time for final adjudication. Maryland's Attorney General is appealing a district court ruling that requires the state to redraw its 2011 congressional redistricting plan before the 2020 election. The district court found that state officials specifically intended to flip control of the 6th Congressional District, which Rep. David Trone (D) won in November, from Republicans to Democrats. *Rucho v. Common Cause* is a consolidation of two separate cases challenging North Carolina's redistricting. Republican lawmakers are appealing a second ruling from a three-judge district court panel striking down the state's 2016 congressional maps as unconstitutional violations of the Equal Protection Clause, the First Amendment, and Article I of the Constitution.

These cases present three issues before the Court: (1) whether plaintiffs have standing to challenge the congressional redistricting plans, (2) whether partisan gerrymandering is a justiciable issue, and (3) whether the Maryland and North Carolina maps, as drawn, constitute an unconstitutional partisan gerrymander.

## 5. Racial Gerrymandering

Racial gerrymandering occurs when a legislative map spreads racial minorities across voting districts in order to dilute their political power. The case *Virginia House of Delegates v. Bethune-Hill* was brought by twelve Virginia voters who alleged that the legislature had racially gerrymandered the congressional map in violation of the Equal Protection Clause of the Fourteenth Amendment. Plaintiffs contend that the Virginia legislature relied predominantly on race when constructing the twelve majority-black districts during the 2011 redistricting cycle.

*Bethune-Hill* arose in 2014 when black Virginia voters alleged that twelve legislative districts were drawn with race as the predominant factor. The district court initially found in favor of the Virginia legislature, holding that eleven of the twelve districts were not racially gerrymandered and that, although the twelfth district was drawn with race as the predominant factor, the government's decision to draw those congressional districts was narrowly tailored to further a compelling government interest; in other words, that the redistricting plan survived strict scrutiny. Plaintiffs appealed this decision to the Supreme Court, which heard the case in 2017. (Redistricting cases are among the few types of cases with the right of automatic appeal to the Supreme Court.) The Court upheld one of the districts, but determined that the Virginia district court had applied the wrong legal standard to the other eleven districts and remanded the case for further proceedings consistent with the Court's opinion. On remand, the district court found that race predominated over traditional redistricting factors in the eleven districts in question and that the Virginia legislature did not meet its burden of proving that their racial gerrymandering was narrowly tailored to further the interest of compliance with the Voting Rights Act. This time, the Virginia House of Delegates appealed this ruling to the Supreme Court, who heard oral arguments in March 2019.

This case presents two questions before the Court: (1) whether the Virginia state legislature has standing to appeal this case, and (2) whether the eleven districts in question constitute unconstitutional racial gerrymanders. The Virginia House of Delegates contends that they have standing to appeal because they have a "personal stake in the outcome of the case" because they drew the map at issue. They further assert that because Virginia is required to comply with the Voting Rights Act, race was considered but was not the predominant factor. In the alternative, they argue that even if race was the primary motivating factor for redistricting, the legislature believed in good faith that they were obligated consider race in order to comply with the VRA.

Amy Howe *Independent Contractor and Reporter*
Posted Thu, December 13th, 2018 6:56 pm

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# Government returns to Supreme Court on military transgender ban

Last month the Trump administration asked the justices to allow it to bypass the courts of appeals and immediately take up three cases (here, here and here) challenging the government's ban on service in the military by most transgender individuals. Today the administration was back at the Supreme Court, giving the government a back-up option: If the justices don't want to bypass the courts of appeals, they should at least allow the government to enforce the ban while the appeals play out. The application for emergency relief was the second one this week from the government, which on Tuesday asked the justices to allow it to enforce a policy that would bar immigrants who enter the country illegally along the southern border from seeking asylum. These kinds of requests for emergency relief have been made necessary, the Trump administration contended, because the lower courts have often gone too far, thwarting the government's efforts to implement important policies.

The three cases now at the Supreme Court were filed in federal trial courts by current and would-be service members in Washington state, California and the District of Columbia in 2017, after President Donald Trump announced on Twitter that the U.S. military would not allow transgender individuals to serve "in any capacity." All three courts blocked the government from enforcing the policy.

In 2018, the president directed the military to implement a memorandum from Secretary of Defense James Mattis, with recommendations from a panel of senior military officials, that would effectively ban transgender individuals from serving in the military. The trial courts rejected the government's requests to allow it to implement the policy outlined in the new memorandum, and the government appealed.

Before the federal courts of appeals issued their rulings, U.S. solicitor general Noel Francisco went to the Supreme Court, asking the justices to weigh in – a relatively rare move known as "certiorari before judgment." Francisco argued that the justices should step in immediately because allowing transgender individuals to serve in the military would create "too great a risk to military effectiveness and lethality": The government can't afford to keep the old policy in place for a year while it waits for the courts of appeals to issue their rulings and then appeals to the Supreme Court.

The service members in the three cases are scheduled to respond to the government's appeals on December 24; the justices are likely to announce in early to mid-January whether they will take up the cases. But petitions for certiorari before judgment are not granted often; perhaps in recognition of that fact, the federal government today filed another set of briefs (here, here and here) that provides the justices with an alternative if they deny review of the petitions: putting the lower courts' rulings on hold – and allowing the government to enforce the transgender ban – while the government's appeals are pending.

Francisco explained that the government is not asking the justices to put the lower-court rulings on hold if they grant review of the petitions for certiorari before judgment. If those petitions are granted, the court would presumably hear oral argument in the spring and issue its decision by the end of June. If the government prevails, Francisco reasoned, it could begin to implement what he described as the "Mattis policy" relatively soon after that, so temporary relief would not be required.

But if the court does not take up the cases now, Francisco continued, the government likely would not be able to implement its policy "for at least another year and likely well into 2020—a period too long for the military to be forced to maintain a policy that it has determined, in its professional judgment, to be contrary to the national interest."

At a minimum, Francisco suggested, the court should narrow the scope of the lower courts' orders so that they would only apply to the specific individuals challenging the transgender ban. The government would then be able to implement the policy more broadly while litigating its appeals.

The government's filings seemed to acknowledge the unusual volume of requests by the government for the court's intervention, emphasizing that it "is with great reluctance that we seek such emergency relief in this Court." But the government blamed the need to file such requests on what it characterized as the "growing trend in which federal district courts" have issued "nationwide injunctions, typically on a preliminary basis, against major policy initiatives." These kinds of orders, the government continued, "previously were rare," but "in recent years they have become routine" – 25 in the past two years, "blocking a wide range of significant policies involving national security, national defense, immigration, and domestic issues."

The government has asked the justices to consider today's request in early January at the same time as its petitions for certiorari before judgment. Because the three cases hail from different parts of the country, two of the requests go to Justice Elena Kagan, who handles emergency requests from California and Washington, while the third goes to Chief Justice John Roberts, who handles emergency requests from the District of Columbia. Both justices could ask the challengers to respond to today's request, and could do so quickly.

*This post was first published at Howe on the Court.*

**OFFICE OF THE DEPUTY SECRETARY OF DEFENSE**
**1010 DEFENSE PENTAGON**
**WASHINGTON, DC 20301-1010**

March 12, 2019

MEMORANDUM FOR CHIEF MANAGEMENT OFFICER OF THE DEPARTMENT OF DEFENSE
SECRETARIES OF THE MILITARY DEPARTMENTS
CHAIRMAN OF THE JOINT CHIEFS OF STAFF
UNDER SECRETARIES OF DEFENSE
CHIEF OF THE NATIONAL GUARD BUREAU
GENERAL COUNSEL OF THE DEPARTMENT OF DEFENSE
DIRECTOR OF COST ASSESSMENT AND PROGRAM EVALUATION
INSPECTOR GENERAL OF THE DEPARTMENT OF DEFENSE
DIRECTOR OF OPERATIONAL TEST AND EVALUATION
CHIEF INFORMATION OFFICER OF THE DEPARTMENT OF DEFENSE
ASSISTANT SECRETARY OF DEFENSE FOR LEGISLATIVE AFFAIRS
ASSISTANT TO THE SECRETARY OF DEFENSE FOR PUBLIC AFFAIRS
DIRECTOR OF NET ASSESSMENT
DIRECTORS OF THE DEFENSE AGENCIES
DIRECTORS OF THE DOD FIELD ACTIVITIES

SUBJECT: Directive-type Memorandum (DTM)-19-004 – Military Service by Transgender Persons and Persons with Gender Dysphoria

References: See Attachment 1.

Purpose. This DTM:

- Implements the policy in the February 22, 2018 Secretary of Defense Memorandum and the February 2018 DoD Report and Recommendations on Military Service by Transgender Persons, assigns responsibilities, and prescribes procedures regarding the standards for accession, retention, separation, in-service transition, and medical care for Service members and applicants with gender dysphoria, as applicable.

- Approves updates to the separation processing guidance in DoD Instructions (DoDIs) 1332.14 and 1332.30. These DoDIs will be administratively changed in accordance with Attachment 4 of this DTM; the changes will be effective 30 days after publication of this DTM.

- Is effective April 12, 2019. This DTM will be incorporated into DoDIs 1300.28, 1332.14, 1332.30, and 6130.03, and supersedes any contradictory

guidance in those publications. This DTM will expire effective March 12, 2020.

Applicability. This DTM applies to OSD, the Military Departments (including the Coast Guard at all times, including when it is a Service in the Department of Homeland Security by agreement with that Department), the Office of the Chairman of the Joint Chiefs of Staff and the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities within the DoD.

Definitions. See Glossary.

Policy. It is DoD policy that:

- Service in the Military Services is open to all persons who can meet the high standards for military service and readiness without special accommodations.

- All Service members and applicants for accession to the Military Services must be treated with dignity and respect. No person, solely on the basis of his or her gender identity, will be:

  - Denied accession into the Military Services;

  - Involuntarily separated or discharged from the Military Services;

  - Denied reenlistment or continuation of service in the Military Services; or

  - Subjected to adverse action or mistreatment.

- Except where a provision of policy has granted an exception, transgender Service members or applicants for accession to the Military Services must be subject to the same standards as all other persons.

  - When a standard, requirement, or policy depends on whether the individual is a male or a female (e.g., medical fitness for duty; physical fitness and body fat standards; berthing, bathroom, and shower facilities; and uniform and grooming standards), all persons will be subject to the standard, requirement, or policy associated with their biological sex.

  - Transgender persons may seek waivers or exceptions to these or any other standards, requirements, or policies on the same terms as any other person.

- Service members who access in their preferred gender or received a diagnosis of gender dysphoria from, or had such diagnosis confirmed by, a military

medical provider before the effective date of this DTM will be allowed to continue serving in the military pursuant to the policies and procedures in effect before the effective date of this DTM.

- Accession and retention standards for gender dysphoria and the treatment of gender dysphoria will be aligned with analogous conditions and treatments, including stability periods and surgical procedures.

Responsibilities. See Attachment 2.

Procedures. See Attachment 3.

Information Collections. The requests for medical reports and history referred to in Paragraph 2.b. of Attachment 3 do not require licensing with a report control symbol in accordance with Paragraph 1.b.(13) in Enclosure 3 of Volume 1 of DoD Manual 8910.01.

Releasability. Cleared for public release. Available on the DoD Issuances Website at https://www.esd.whs.mil/DD/.

David L. Norquist
Performing the Duties of the
Deputy Secretary of Defense

Attachments:
As stated

cc:
Secretary of Homeland Security
Commandant, U.S. Coast Guard

## ATTACHMENT 1

## REFERENCES

Assistant Secretary of Defense for Health Affairs Memorandum, "Guidance for Treatment of Gender Dysphoria for Active and Reserve Component Service Members," July 29, 2016

Commandant Instruction M1850.2 (series), "Physical Disability Evaluation System," May 19, 2006

Department of Defense, "Department of Defense Report and Recommendations on Military Service by Transgender Persons," February 2018

Department of Defense, "Transgender Service in the U.S. Military Implementation Handbook," September 30, 2016

Directive-type Memorandum 16-005, "Military Service of Transgender Service Members," June 30, 2016

DoD 6025.18-R, "DoD Health Information Privacy Regulation," January 24, 2003

DoD Instruction 5400.11, "DoD Privacy and Civil Liberties Programs," January 29, 2019

DoD Instruction 1300.28, "In-Service Transition for Transgender Service Members," June 30, 2016

DoD Instruction 1332.14, "Enlisted Administrative Separations," January 27, 2014, as amended

DoD Instruction 1332.18, "Disability Evaluation System (DES)," August 5, 2014, as amended

DoD Instruction 1332.30, "Commissioned Officer Administrative Separations," May 11, 2018

DoD Instruction 1332.45, "Retention Determinations For Non-Deployable Service Members," July 30, 2018

DoD Instruction 6130.03, "Medical Standards for Appointment, Enlistment, or Induction in the Military Services," May 6, 2018

DoD Instruction 6490.10, "Continuity of Behavioral Health Care for Transferring and Transitioning Service Members," March 26, 2012, as amended

DoD Manual 8910.01, Volume 1, "DoD Information Collections Manual: Procedures for DoD Internal Information Collections," June 30, 2014, as amended

Secretary of Defense Memorandum, "Military Service by Transgender Individuals," February 22, 2018

United States Code, Title 10, Section 1074

United States Department of Defense, "Transgender Service in the U.S. Military Implementation Handbook," September 30, 2016

ATTACHMENT 2

RESPONSIBILITIES

1. UNDER SECRETARY OF DEFENSE FOR PERSONNEL AND READINESS (USD(P&R)). The USD(P&R):

a. Will revise DoDIs 1300.28, 1332.14, 1332.30, and 6130.03, consistent with this DTM. Unless otherwise specified in this DTM, if these issuances are inconsistent with this DTM, this DTM will govern.

b. Will revise the U.S. DoD Transgender Service in the U.S. Military Implementation Handbook, consistent with this DTM.

c. Will disseminate the revised handbook to all Military Departments and the United States Coast Guard (USCG).

2. ASSISTANT SECRETARY OF DEFENSE FOR HEALTH AFFAIRS. Under the authority, direction, and control of the USD(P&R), the Assistant Secretary of Defense for Health Affairs will issue medical guidance as appropriate.

3. SECRETARIES OF THE MILITARY DEPARTMENTS. The Secretaries of the Military Departments:

a. As necessary and appropriate, will develop implementing guidance for their respective Departments and Services consistent with the policies and procedures in this DTM.

b. May grant waivers in accordance with Paragraph 3 in Attachment 3 of this DTM, in whole or in part, in individual cases. Waiver authority permitting an applicant or Service member, who is not exempt pursuant to this policy, to serve in his or her preferred gender may be delegated, in writing, no lower than the Military Service Personnel Chiefs. All other waiver authority remains with the Service-designated waiver authority.

4. COMMANDANT, USCG. The Commandant, USCG:

a. As necessary and appropriate, will develop implementing guidance for the USCG consistent with the policies and procedures in this DTM.

b. May grant waivers in accordance with Paragraph 3 in Attachment 3 of this DTM, in whole or in part, in individual cases. Waiver authority permitting an applicant or Service member, who is not exempt pursuant to this policy, to serve in his or her preferred gender may

not be delegated lower than the Assistant Commandant for Human Resources. All other waiver authority remains with the Service-designated waiver authority.

ATTACHMENT 3

PROCEDURES

1. SECTION I: EXEMPT INDIVIDUALS.

a. Applicability. Individuals are exempt from Paragraph 2 of this attachment if they, before the effective date of this DTM:

(1) Entered into a contract for enlistment into the Military Services using DD Form 4, "Enlistment/Reenlistment Document Armed Forces of the United States," available on the DoD Forms Management Program website at https://www.esd.whs.mil/Directives/forms/, or an equivalent, or were selected for entrance into an officer commissioning program through a selection board or similar process; and

(2) Either:

(a) Were medically qualified for Military Service or selected for entrance into an officer commissioning program in their preferred gender in accordance with DTM-16-005; or

(b) As a Service member, received a diagnosis of gender dysphoria from, or had such diagnosis confirmed, by a military medical provider.

b. Appointment, Enlistment, or Induction into the Military Services. Individuals who are exempt will be accessed or commissioned based on the following medical standards, provided they are medically qualified in all other respects in accordance with DoDI 6130.03:

(1) A history of gender dysphoria is disqualifying, unless, as certified by a licensed mental health provider, the applicant has been stable without clinically significant distress or impairment in social, occupational, or other important areas of functioning for 18 months.

(2) A history of medical treatment associated with gender transition is disqualifying, unless, as certified by a licensed medical provider:

(a) The applicant has completed all medical treatment associated with the applicant's gender transition; and

(b) The applicant has been stable in the preferred gender for 18 months; and

(c) If the applicant is presently receiving cross-sex hormone therapy post-gender transition, the individual has been stable on such hormones for 18 months.

(3) A history of sex reassignment or genital reconstruction surgery is disqualifying, unless, as certified by a licensed medical provider:

(a) A period of 18 months has elapsed since the date of the most recent of any such surgery; and

(b) No functional limitations or complications persist and any additional surgery is not required.

c. In-Service Transition. Service members who are exempt may continue to receive all medically necessary treatment, as defined in DoDI 1300.28, to protect the health of the individual, obtain a gender marker change in the Defense Enrollment Eligibility Reporting System (DEERS) in accordance with DoDI 1300.28; and serve in their preferred gender.

d. Separation And Retention. Service members who are exempt:

(1) May not be separated, discharged, or denied reenlistment or continuation of service solely on the basis of gender identity.

(2) May be retained without a waiver pursuant to this DTM. A Service member whose ability to serve is adversely affected by a medical condition or medical treatment related to his or her gender identity or gender transition should be treated, for purposes of separation and retention, in a manner consistent with a Service member whose ability to serve is similarly affected for reasons unrelated to gender identity or gender transition.

## 2. SECTION II: NONEXEMPT INDIVIDUALS.

a. Applicability. Individuals are not exempt if they do not meet the criteria in Paragraph 1.a. of this attachment.

b. Appointment, Enlistment, or Induction into the Military Services. Individuals who are not exempt will be accessed or commissioned based on the following medical standards, provided they are medically qualified in all other respects in accordance with DoDI 6130.03:

(1) A history or diagnosis of gender dysphoria is disqualifying unless:

(a) As certified by a licensed mental health provider, the applicant demonstrates 36 consecutive months of stability in the applicant's biological sex immediately preceding submission of the application without clinically significant distress or impairment in social, occupational, or other important areas of functioning; and

(b) The applicant demonstrates that the applicant has not transitioned to his or her preferred gender and a licensed medical provider has determined that gender transition is not medically necessary to protect the health of the individual; and

(c) The applicant is willing and able to adhere to all applicable standards, including the standards associated with the applicant's biological sex.

(2) A history of cross-sex hormone therapy or a history of sex reassignment or genital reconstruction surgery is disqualifying.

(3) The accession standards will be reviewed no later than 24 months from the effective date of this DTM, and every 24 months thereafter, and may be maintained or changed, as appropriate, to ensure:

(a) Consistency with applicable medical standards and clinical practices; and

(b) The readiness and combat effectiveness of the Military Services.

c. In-Service Transition. Individuals who are not exempt must adhere, like all other Service members, to the standards associated with their biological sex. These nonexempt Service members may consult with a military medical provider, receive a diagnosis of gender dysphoria, and receive mental health counseling, but may not obtain a gender marker change in DEERS or serve in their preferred gender.

d. Retention. Service members who are not exempt may be retained without a waiver if they receive a diagnosis of gender dysphoria on or after the effective date of this DTM, provided that:

(1) A military medical provider has determined that gender transition is not medically necessary to protect the health of the individual; and

(2) The Service member is willing and able to adhere to all applicable standards, including the standards associated with his or her biological sex.

e. Separation. Service members who are not exempt:

(1) May not be separated, discharged, or denied reenlistment or continuation of service solely based on gender identity.

(2) May not be separated solely based on a diagnosis of gender dysphoria without first being medically evaluated for possible referral to the Disability Evaluation System (DES) pursuant to DoDI 1332.18 or the USCG Physical Disability Evaluation System (PDES), pursuant to Commandant Instruction (COMDTINST) M1850.2 (series).

(3) If referral to the DES is not appropriate in accordance with DoDI 1332.18 or the USCG PDES, in accordance with COMDTINST M1850.2 (series), may be subject to processing for administration separation in accordance with Attachment 4 and the following guidance:

(a) The Secretary of the Military Department concerned or the Commandant, USCG, may authorize separation based on conditions and circumstances not constituting a physical disability that interfere with assignment to or performance of duty.

1. Service members are ineligible for referral to the DES or USCG PDES when they have a condition not constituting a physical disability as described in DoDI 1332.18 or COMDTINST M1850.2 (series).

2. Service members may be referred to the DES or USCG PDES if they have a diagnosis of gender dysphoria and of co-morbidities that are appropriate for disability evaluation processing in accordance with DoDI 1332.18 or COMDTINST M1850.2 (series), before processing for administrative separation.

(b) Service members with a diagnosis of gender dysphoria may be subject to the initiation of administrative separation processing in accordance with Paragraph 2.e. of this attachment if they are unable or unwilling to adhere to all applicable standards, including the standards associated with their biological sex.

(c) Nothing in this guidance precludes appropriate disciplinary action for Service members who refuse orders from lawful authority to comply with applicable standards.

3. SECTION III. ADDITIONAL POLICY GUIDANCE.

a. Waivers.

(1) The Military Departments and the USCG may grant waivers, in whole or in part, to the requirements in this attachment in individual cases.

(2) If a waiver is granted permitting an applicant or Service member, who is not exempt under Paragraph 1 of this attachment, to serve in his or her preferred gender, such an individual will be considered from that point forward to be exempt in accordance with Paragraph 1.

(3) The provisions concerning who may qualify as exempt under Paragraph 1.a. of this attachment may not be waived; a person who is exempt under Paragraph 1.a. may not have his or her exempt status revoked.

b. Medical Policy.

(1) For Service members who have been diagnosed with gender dysphoria and are exempt, the Military Departments and Services will handle requests for medical care and treatment in accordance with DoDI 1300.28 and the July 29, 2016 Assistant Secretary of Defense for Health Affairs Memorandum.

(2) For Service members who have been diagnosed with gender dysphoria and are not exempt, the Military Departments and the USCG:

(a) Will provide necessary care consistent with Section 1074 of Title 10, United States Code and the July 29, 2016 Assistant Secretary of Defense for Health Affairs Memorandum for as long as the individual remains a Service member as set forth in a medical treatment plan developed with the military medical provider and provided to the commander.

(b) Will take appropriate action to facilitate the continuity of health care consistent with DoDI 6490.10 if the Service member is to be separated from military service.

c. Equal Opportunity. The DoD and the USCG provide equal opportunity to all Service members, in an environment free from harassment and discrimination on the basis of race, color, national origin, religion, sex, gender identity, or sexual orientation.

d. Protection of Personally Identifiable Information (PII) and Protected Health Information.

(1) The Military Departments and the USCG will:

(a) In accordance with DoDI 5400.11, in cases where there is a need to collect, use, maintain, or disseminate PII in accordance with this issuance or Military Department and Service regulations, policies, or guidance, protect against unwarranted invasions of personal privacy and the unauthorized disclosure of such PII.

(b) Maintain such PII so as to protect the individual's rights, consistent with federal law and policy.

(2) Disclosure of protected health information will be consistent with DoD 6025.18-R.

e. Education And Training. Revised training will occur at the Military Department's and USCG's discretion.

f. Other. The Military Departments and Military Services recognize a Service member's status as male or female by the member's gender marker in the DEERS.

(1) The Military Services apply all standards that involve consideration of the Service member's status as male or female on the basis of the member's gender marker in DEERS such as:

(a) Uniforms and grooming.

(b) Body composition assessment.

(c) Physical readiness testing.

(d) Military Personnel Drug Abuse Testing Program participation.

(2) As to facilities subject to regulation by the Military Departments and the USCG, the Service member will use those berthing, bathroom, and shower facilities associated with the member's gender marker in DEERS.

## ATTACHMENT 4

## PROCESSING CHANGES TO DoDIs 1332.14 AND 1332.30

1. The following will be added to DoD Instruction 1332.14, Enclosure 3, Paragraph 3.a.(8):

"(h) The Secretary concerned may authorize separation on the basis of conditions and circumstances not constituting a physical disability that interfere with assignment to or performance of duty based on a diagnosis of gender dysphoria where the Service member is unable or unwilling to adhere to all applicable standards, including the standards associated with his or her biological sex, or seeks transition to another gender.

1. Separation processing will not be initiated until the enlisted Service member has been formally counseled on his or her failure to adhere to such standards and has been given an opportunity to correct those deficiencies, or has been formally counseled that his or her indication that he or she is unable or unwilling to adhere to such standards may lead to processing for administrative separation and has been given an opportunity to correct those deficiencies.

2. Separation processing will not be initiated until the enlisted Service member has been counseled in writing that the condition does not qualify as a disability."

2. The following will be added to DoD Instruction 1332.30, Paragraph 9.2.d.:

"d. The Secretary concerned may authorize separation of a commissioned officer on the basis of conditions and circumstances not constituting a physical disability that interfere with assignment to or performance of duty based on a diagnosis of gender dysphoria where the commissioned officer is unable or unwilling to adhere to all applicable standards, including the standards associated with his or her biological sex, or seeks transition to another gender.

(1) Separation processing will not be initiated until the commissioned officer has been formally counseled on his or her failure to adhere to such standards and has been given an opportunity to correct those deficiencies, or has been formally counseled that his or her indication that he or she is unable or unwilling to adhere to such standards may lead to processing for administrative separation and has been given an opportunity to correct those deficiencies.

(2) Separation processing will not be initiated until the commissioned officer has been counseled in writing that the condition does not qualify as a disability."

## GLOSSARY

### PART I. ABBREVIATIONS AND ACRONYMS

| | |
|---|---|
| DEERS | Defense Enrollment Eligibility Reporting System |
| DES | Disability Evaluation System |
| DoDI | DoD instruction |
| DTM | directive-type memorandum |
| PDES | Physical Disability Evaluation System |
| PII | personally identifiable information |
| USCG | United States Coast Guard |
| USD(P&R) | Under Secretary of Defense for Personnel and Readiness |

### PART II. DEFINITIONS

These terms and their definitions are for the purpose of this issuance.

biological sex. A person's biological status as male or female based on chromosomes, gonads, hormones, and genitals.

cross-sex hormone therapy. The use of feminizing hormones in an individual with a biological sex of male or the use of masculinizing hormones in an individual with a biological sex of female.

gender identity. An individual's internal or personal sense of gender, which may or may not match the individual's biological sex.

gender marker. Data element in DEERS that identifies a Service member's status as male or female.

gender transition. A form of treatment for the medical condition of gender dysphoria may involve:

Social transition, also known as "real life experience," to allow the patient to live and work in his or her preferred gender without any cross-sex hormone treatment or surgery and may also include a legal change of gender, including changing gender on a passport, birth certificate, or through a court order; or

Medical transition to align secondary sex characteristics with the patient's preferred gender using any combination of cross sex hormone therapy or surgical and cosmetic procedures; or

Surgical transition, also known as sex reassignment surgery, to make the physical body, both primary and secondary sex characteristics, resemble as closely as possible the patient's preferred gender.

PII. Information used to distinguish or trace an individual's identity, such as name, social security number, date and place of birth, mother's maiden name, biometric records, home phone numbers, other demographic, personnel, medical, and financial information. PII includes any information that is linked or linkable to a specified individual, alone, or when combined with other personal or identifying information.

preferred gender. The gender with which an individual identifies.

stable or stability. The absence of clinically significant distress or impairment in social, occupational, or other important areas of functioning associated with a marked incongruence between an individual's experienced or expressed gender and the individual's biological sex.

transgender. Individuals who identify with a gender that differs from their biological sex.

**(ORDER LIST: 586 U.S.)**

**TUESDAY, JANUARY 22, 2019**

## ORDERS IN PENDING CASES

18A625 TRUMP, PRESIDENT OF U.S., ET AL. V. KARNOSKI, RYAN, ET AL.

The application for stay presented to Justice Kagan and by her referred to the Court is granted, and the District Court's December 11, 2017 order granting a preliminary injunction is stayed pending disposition of the Government's appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the Government's petition for a writ of certiorari, if such writ is sought. If a writ of certiorari is sought and the Court denies the petition, this order shall terminate automatically. If the Court grants the petition for a writ of certiorari, this order shall terminate when the Court enters its judgment.

Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application.

18A627 TRUMP, PRESIDENT OF U.S., ET AL. V. STOCKMAN, AIDEN, ET AL.

The application for stay presented to Justice Kagan and by her referred to the Court is granted, and the District Court's December 22, 2017 order granting a preliminary injunction is stayed pending disposition of the Government's appeal in the United States Court of Appeals for the Ninth Circuit and disposition of the Government's petition for a writ of certiorari, if such writ is sought. If a writ of certiorari is sought and the Court denies the petition, this order shall

terminate automatically. If the Court grants the petition for a writ of certiorari, this order shall terminate when the Court enters its judgment.

Justice Ginsburg, Justice Breyer, Justice Sotomayor, and Justice Kagan would deny the application.

18A669 IN RE GRAND JURY SUBPOENA

The applications for leave to file the application for stay, the response, and the reply under seal presented to The Chief Justice and by him referred to the Court are granted.

18M89 GARCIA, EDGAR B. V. UNITED STATES

The motion for leave to file a petition for a writ of certiorari with the supplemental appendix under seal is granted.

18M90 HARRIS, NICHOLAS V. FULLER, LINDA

The motion to direct the Clerk to file a petition for a writ of certiorari out of time is denied.

18M93 IN RE GRAND JURY SUBPOENA

The motion for leave to file a petition for a writ of certiorari under seal with redacted copies for the public record is granted.

17-1657 MISSION PRODUCT HOLDINGS, INC. V. TEMPNOLOGY, LLC

The motion of the Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument is granted.

17-1705 PDR NETWORK, LLC, ET AL. V. CARLTON & HARRIS CHIROPRACTIC

The motion of petitioners to dispense with printing the joint appendix is granted.

17-1717 ) AMERICAN LEGION, ET AL. V. AMERICAN HUMANIST ASSN., ET AL.
)
18-18 ) MARYLAND-NATIONAL CAPITAL PARK V. AMERICAN HUMANIST ASSN., ET AL.

The motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument is granted. The joint motion of petitioners for enlargement of time for oral argument and for divided argument is granted and the time is divided as follows: 15 minutes for petitioner in No. 18-18, 10 minutes for petitioners in No. 17-1717, 10 minutes for the Acting Solicitor General as *amicus curiae*, and 35 minutes for respondents.

18-6048 IN RE DANIEL A. SPOTTSVILLE

The motion of petitioner for reconsideration of order denying leave to proceed *in forma pauperis* is denied.

**CERTIORARI GRANTED**

18-280 NY STATE RIFLE & PISTOL, ET AL. V. NEW YORK, NY, ET AL.

The petition for a writ of certiorari is granted.

**CERTIORARI DENIED**

17-6891 WOOD, TREMANE V. OKLAHOMA

17-6943 JONES, JULIUS D. V. OKLAHOMA

18-475 ZAREMBA FAMILY FARMS, ET AL. V. ENCANA OIL & GAS INC.

18-500 FIRST PRESBYTERIAN, ET AL. V. DOE, JOHN

18-506 HASSELL, DAWN L. V. YELP, INC.

18-561 BERKLEY, ORUS A., ET AL. V. FERC, ET AL.

18-615 MUNRO, BRUCE, ET AL. V. LUCY ACTIVEWEAR INC., ET AL.

18-618 GUTIERREZ, DOLORES, ET AL. V. WELLS FARGO BANK, ET AL.

18-628 COOPER, REBEKAH V. HAQ, EHTSHAM, ET AL.

18-630 RICHARDS, CHARLES A. V. DES MOINES POLICE DEPT., ET AL.

18-634 EL-SABA, AED V. UNIVERSITY OF SOUTH ALABAMA

18-646 MARQUETTE TRANSP. CO., ET AL. V. ENTERGY MS, INC.

18-647 PULTE HOMES OF NEW YORK LLC V. CARMEL, NY, ET AL.

18-655 SPITZER, CRAIG J. V. ALJOE, TRISHA A., ET AL.

18-659 MASOMI, MOSTAFA V. MADADI, MEHRANDOKHT

18-660 TAGGART, KENNETH J. V. WELLS FARGO BANK, N.A., ET AL.

18-662 McDONALD, MARY V. WICHITA, KS

18-665 ALVIS, JAMES M. V. SCHILLING, LELAND W.

18-764 STEINMETZ, OSCAR H. V. UNITED STATES

18-793 BREWSTER, MARION Q. V. UNITED STATES

18-5694 JAMES, TAUMU V. ASUNCION, WARDEN

18-5760 BROWN, WILLIAM B. V. MANSUKHANI, WARDEN

18-5965 HARMON, RAYBURN S. V. UNITED STATES

18-6062 IBARRA, RAMIRO R. V. DAVIS, DIR., TX DCJ

18-6097 MARQUEZ, LEONARD G. V. UNITED STATES

18-6330 RODRIGUES, JOSE A. V. DAVIS, WARDEN

18-6375 WHISBY, MICHAEL V. UNITED STATES

18-6378 PEEDE, ROBERT I. V. FLORIDA

18-6650 DUPLESSIS-JEAN, IMRAN V. WHITAKER, ACTING ATT'Y GEN.

18-6708 WILLIAMS, CLIFFORD D. V. OHIO

18-6722 PORTER, CRAIG V. TEXAS

18-6735 TAYLOR, PERRY A. V. FLORIDA

18-6740 LASHER, LENA V. BUREAU OF OCCUPATIONAL AFFAIRS

18-6743 KULICK, ROBERT J. V. LEISURE VILLAGE ASSN., INC.

18-6744 SCHAEFER, WESLEY W. V. DAVIS, DIR., TX DCJ

18-6749 BARNES, JAMES V. JONES, SEC., FL DOC, ET AL.

18-6762 THOMAS, EDWARD L. V. TEXAS

18-6769 MIDDLETON, KENNETH G. V. PASH, RONDA

18-6785 SCOTT, CHRISTOPHER V. ILLINOIS

18-6786 HILL, CURTIS J. V. LIZARRAGA, WARDEN

18-6788 BEAN, RHETT V. HAMILTON, WARDEN

18-6790 OTWORTH, CLARENCE V. TRUMP, PRESIDENT OF U.S.

18-6832 WEST, KEDDRON R. V. GEORGIA

18-6843 DAILEY, JAMES M. V. FLORIDA

18-6880 LENZ, JASON A. V. JONES, SEC., FL DOC, ET AL.

18-6889 BOOKER, STEPHEN T. V. FLORIDA

18-6945 WASHINGTON, WILLIAM N. V. FRAUENHEIM, WARDEN

18-6973 MINOR, ANDY E. V. MISSISSIPPI

18-7072 HARPER, KENNETH V. UNITED STATES

18-7077 PULHAM, JC C. V. UNITED STATES

18-7078 O'SHAUGHNESSY, JOSEPH V. UNITED STATES

18-7079 MORILLO, FRANKLYN V. UNITED STATES

18-7108 PRYER, TIMOTHY G. V. GARDNER, THOMAS

18-7138 ALVAREZ-MORENO, ANTONIO V. UNITED STATES

18-7144 RUSSELL, RODNEY V. UNITED STATES

18-7156 JOHNSON, ANTONEZ T. V. UNITED STATES

The petitions for writs of certiorari are denied.

18-676 TRUMP, PRESIDENT OF U.S., ET AL. V. KARNOSKI, RYAN, ET AL.

The motion of Foundation for Moral Law for leave to file a brief as *amicus curiae* is granted. The petition for a writ of certiorari before judgment is denied.

18-677 TRUMP, PRESIDENT OF U.S., ET AL. V. DOE 2, JANE, ET AL.

18-678 TRUMP, PRESIDENT OF U.S., ET AL. V. STOCKMAN, AIDEN, ET AL.

The petitions for writs of certiorari before judgment are denied.

18-6684 MATELYAN, ARIKA V. FOX 11

18-6736 WHITNEY, JAMES E. V. GLOVER, CINDY, ET AL.

The motions of petitioners for leave to proceed *in forma pauperis* are denied, and the petitions for writs of certiorari are dismissed. See Rule 39.8.

18-6882 CRAIN, WILLIE S. V. FLORIDA

The petition for a writ of certiorari is denied. Justice Sotomayor, dissenting from the denial of certiorari: I dissent for the reasons set out in *Reynolds* v. *Florida*, 586 U. S. ___ (2018) (Sotomayor, J., dissenting).

18-7048 NANCE, JIMMY L. V. UNITED STATES

The motion of petitioner for leave to proceed *in forma pauperis* is denied, and the petition for a writ of certiorari is dismissed. See Rule 39.8. As the petitioner has repeatedly abused this Court's process, the Clerk is directed not to accept any further petitions in noncriminal matters from petitioner unless the docketing fee required by Rule 38(a) is paid and the petition is submitted in compliance with Rule 33.1. See *Martin* v. *District of Columbia Court of Appeals*, 506 U. S. 1 (1992) (*per curiam*).

**MANDAMUS DENIED**

18-6745 IN RE DONALD L. SPENCER

18-6868 IN RE PETER T. ROUKIS

The petitions for writs of mandamus are denied.

18-6825 IN RE ALONZO D. SHEPHARD

The petition for a writ of mandamus and/or prohibition is denied. The Chief Justice and Justice Kavanaugh took no part in the consideration or decision of this petition.

## REHEARINGS DENIED

17-9054 TOWBRIDGE, OTIS L. V. FLORIDA

17-9213 WILLIAMS, STEVEN D. V. KENT, WARDEN

18-344 SHAO, LINDA V. McMANIS FAULKER, LLP

18-5420 HEAGY, TYLER T. V. PENNSYLVANIA

18-5548 TUTTLE, BRIAN V. ALLIED NEVADA GOLD CORP., ET AL.

18-5569 WEISNER, SEAN V. DAVIS, DIR., TX DCJ

The petitions for rehearing are denied.

# SUPREME COURT OF THE UNITED STATES

## JOSEPH A. KENNEDY *v.* BREMERTON SCHOOL DISTRICT

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

No. 18–12. Decided January 22, 2019

The petition for a writ of certiorari is denied.

Statement of JUSTICE ALITO, with whom JUSTICE THOMAS, JUSTICE GORSUCH, and JUSTICE KAVANAUGH join, respecting the denial of certiorari.

I concur in the denial of the petition for a writ of certiorari because denial of certiorari does not signify that the Court necessarily agrees with the decision (much less the opinion) below. In this case, important unresolved factual questions would make it very difficult if not impossible at this stage to decide the free speech question that the petition asks us to review.

I

Petitioner Joseph Kennedy claims that he lost his job as football coach at a public high school because he engaged in conduct that was protected by the Free Speech Clause of the First Amendment. He sought a preliminary injunction awarding two forms of relief: (1) restoration to his job and (2) an order requiring the school to allow him to pray silently on the 50-yard line after each football game. The latter request appears to depend on petitioner's entitlement to the first—to renewed employment—since it seems that the school would not permit members of the general public to access the 50-yard line at the relevant time.

The key question, therefore, is whether petitioner showed that he was likely to prevail on his claim that the termination of his employment violated his free speech rights, and in order to answer that question it is necessary

to ascertain what he was likely to be able to prove regarding the basis for the school's action. Unfortunately, the answer to this second question is far from clear.

On October 23, 2015, the superintendent wrote to petitioner to explain why the district found petitioner's conduct at the then-most recent football game to be unacceptable. And in that letter, the superintendent gave two quite different reasons: first, that petitioner, in praying on the field after the game, neglected his responsibility to supervise what his players were doing at that time and, second, that petitioner's conduct would lead a reasonable observer to think that the district was endorsing religion because he had prayed while "on the field, under the game lights, in BHS-logoed attire, in front of an audience of event attendees." 869 F. 3d 813, 819 (CA9 2017). After two subsequent games, petitioner again kneeled on the field and prayed, and the superintendent then wrote to petitioner, informing him that he was being placed on leave and was forbidden to participate in any capacity in the school football program. The superintendent's letter reiterated the two reasons given in his letter of October 23. And the district elaborated on both reasons in an official public statement explaining the reasons for its actions.

When the case was before the District Court, the court should have made a specific finding as to what petitioner was likely to be able to show regarding the reason or reasons for his loss of employment. If the likely reason was simply petitioner's neglect of his duties—if, for example, he was supposed to have been actively supervising the players after they had left the field but instead left them unsupervised while he prayed on his own—his free speech claim would likely fail. Under those circumstances, it would not make any difference that he was praying as opposed to engaging in some other private activity at that time. On the other hand, his free speech claim would have

far greater weight if petitioner was likely to be able to establish either that he was not really on duty at the time in question or that he was on duty only in the sense that his workday had not ended and that his prayer took place at a time when it would have been permissible for him to engage briefly in other private conduct, say, calling home or making a reservation for dinner at a local restaurant.

Unfortunately, the District Court's brief, informal oral decision did not make any clear finding about what petitioner was likely to be able to prove. Instead, the judge's comments melded the two distinct justifications:

> "He was still in charge. He was still on the job. He was still responsible for the conduct of his students, his team. . . . And a reasonable observer, in my judgment, would have seen him as a coach, participating, in fact leading an orchestrated session of faith . . . ." App. to Pet. for Cert. 89.

The decision of the Ninth Circuit was even more imprecise on this critical point. Instead of attempting to pinpoint what petitioner was likely to be able to prove regarding the reason or reasons for his loss of employment, the Ninth Circuit recounted all of petitioner's prayer-related activities over the course of several years, including conduct in which he engaged as a private citizen, such as praying in the stands as a fan after he was suspended from his duties.

If this case were before us as an appeal within our mandatory jurisdiction, our clear obligation would be to vacate the decision below with instructions that the case be remanded to the District Court for proper application of the test for a preliminary injunction, including a finding on the question of the reason or reasons for petitioner's loss of employment. But the question before us is different. It is whether we should grant discretionary review, and we generally do not grant such review to decide highly

fact-specific questions. Here, although petitioner's free speech claim may ultimately implicate important constitutional issues, we cannot reach those issues until the factual question of the likely reason for the school district's conduct is resolved. For that reason, review of petitioner's free speech claim is not warranted at this time.

## II

While I thus concur in the denial of the present petition, the Ninth Circuit's understanding of the free speech rights of public school teachers is troubling and may justify review in the future.

The Ninth Circuit's opinion applies our decision in *Garcetti* v. *Ceballos*, 547 U. S. 410 (2006), to public school teachers and coaches in a highly tendentious way. According to the Ninth Circuit, public school teachers and coaches may be fired if they engage in any expression that the school does not like while they are on duty, and the Ninth Circuit appears to regard teachers and coaches as being on duty at all times from the moment they report for work to the moment they depart, provided that they are within the eyesight of students. Under this interpretation of *Garcetti*, if teachers are visible to a student while eating lunch, they can be ordered not to engage in any "demonstrative" conduct of a religious nature, such as folding their hands or bowing their heads in prayer. And a school could also regulate what teachers do during a period when they are not teaching by preventing them from reading things that might be spotted by students or saying things that might be overheard.

This Court certainly has never read *Garcetti* to go that far. While *Garcetti* permits a public employer to regulate employee speech that is part of the employee's job duties, we warned that a public employer cannot convert private speech into public speech "by creating excessively broad job descriptions." *Id.,* at 424. If the Ninth Circuit contin-

ues to apply its interpretation of *Garcetti* in future cases involving public school teachers or coaches, review by this Court may be appropriate.

What is perhaps most troubling about the Ninth Circuit's opinion is language that can be understood to mean that a coach's duty to serve as a good role model requires the coach to refrain from any manifestation of religious faith—even when the coach is plainly not on duty. I hope that this is not the message that the Ninth Circuit meant to convey, but its opinion can certainly be read that way. After emphasizing that petitioner was hired to "communicate a positive message through the example set by his own conduct," the court criticized him for "his media appearances and prayer in the BHS bleachers (while wearing BHS apparel and surrounded by others)." 869 F. 3d, at 826. This conduct, in the opinion of the Ninth Circuit, "signal[ed] his intent to send a message to students and parents about appropriate behavior and what he values as a coach." *Ibid.* But when petitioner prayed in the bleachers, he had been suspended. He was attending a game like any other fan. The suggestion that even while off duty, a teacher or coach cannot engage in any outward manifestation of religious faith is remarkable.

III

While the petition now before us is based solely on the Free Speech Clause of the First Amendment, petitioner still has live claims under the Free Exercise Clause of the First Amendment and Title VII of the Civil Rights Act of 1964. See Brief in Opposition 11, n. 1. Petitioner's decision to rely primarily on his free speech claims as opposed to these alternative claims may be due to certain decisions of this Court.

In *Employment Div., Dept. of Human Resources of Ore.* v. *Smith*, 494 U. S. 872 (1990), the Court drastically cut back on the protection provided by the Free Exercise

Clause, and in *Trans World Airlines, Inc.* v. *Hardison*, 432 U. S. 63 (1977), the Court opined that Title VII's prohibition of discrimination on the basis of religion does not require an employer to make any accommodation that imposes more than a *de minimis* burden. In this case, however, we have not been asked to revisit those decisions.

Amy Howe *Independent Contractor and Reporter*

Posted Mon, April 22nd, 2019 10:35 am

Email Amy
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# Court to take up LGBT rights in the workplace (Updated)

**[Editor's Note: This post was updated at 11:50 a.m. to include discussion of *CITGO Asphalt Refining Co. v. Frescati Shipping Co.*, *Barton v. Barr* and *Putnam Investments v. Brotherston*.]**

The Supreme Court announced today that it will weigh in next term on whether federal employment discrimination laws protect LGBT employees. After considering a trio of cases — two claiming discrimination based on sexual orientation and the third claiming discrimination based on transgender status — at 11 consecutive conferences, the justices agreed to review them. Until today, the cases slated for oral argument next term had been relatively low-profile, but this morning's announcement means that the justices will have what will almost certainly be blockbuster cases on their docket next fall, with rulings to follow during the 2020 presidential campaign.

In *Altitude Express v. Zarda*, the justices will decide whether federal laws banning employment discrimination protect gay and lesbian employees. The petition for review was filed by a New York skydiving company, now known as Altitude Express. After the company fired Donald Zarda, who worked as an instructor for the company, Zarda went to federal court, where he contended that he was terminated because he was gay – a violation of (among other things) Title VII of the Civil Rights Act of 1964, which bars discrimination "because of sex."

The trial court threw out Zarda's Title VII claim, reasoning that Title VII does not allow claims alleging discrimination based on sexual orientation. But the full U.S. Court of Appeals for the 2nd Circuit reversed that holding, concluding that Title VII does apply to discrimination based on sexual orientation because such discrimination "is a subset of sex discrimination."

Altitude Express took its case to the Supreme Court last year, asking the justices to weigh in. In 2017, the justices had denied review of a similar case, filed by a woman who alleged that she had been harassed and passed over for a promotion at her job as a hospital security officer in Georgia because she was a lesbian. However, that case came to the court in a somewhat unusual posture: Neither the hospital nor the individual employees named in the lawsuit had participated in the proceedings in the lower courts, and they had told the Supreme Court that they would continue to stay out of the case even if review were granted, which may have made the justices wary about reviewing the case on the merits.

Altitude Express' case will be consolidated for one hour of oral argument with the second case involving the rights of gay and lesbian employees: *Bostock v. Clayton County, Georgia*. The petitioner in the case, Gerald Bostock, worked as a child-welfare-services coordinator in Clayton County, Georgia. Bostock argued that after the county learned that he was gay, it falsely accused him of mismanaging public money so that it could fire him – when it was in fact firing him because he was gay.

Bostock went to federal court, arguing that his firing violated Title VII. The county urged the court to dismiss the case, arguing that Title VII does not apply to discrimination based on sexual orientation. The district court agreed, and the U.S. Court of Appeals for the 11th Circuit upheld that ruling.

In the third case granted today, *R.G. & G.R. Harris Funeral Homes v. EEOC*, the justices will consider whether Title VII's protections apply to transgender employees. The petition for review was filed by a small funeral home in Michigan, owned by Thomas Rost, who describes himself as a devout Christian. In 2007, the funeral home hired Aimee Stephens, whose employment records identified Stephens as a man. Six years later, Stephens told Rost that Stephens identified as a woman and wanted to wear women's clothing to work. Rost fired Stephens, because Rost believed both that allowing Stephens to wear women's clothes would violate the funeral home's dress code and that he would be "violating God's commands" by allowing Stephens to dress in women's clothing.

The federal Equal Employment Opportunity Commission filed a lawsuit on Stephens' behalf, and the U.S. Court of Appeals for the 6th Circuit ruled for the EEOC and Stephens. The funeral home went to the Supreme Court last summer, asking it to review the lower court's ruling. Today the justices granted the funeral home's petition for review, agreeing to consider whether Title VII bars discrimination against transgender people based on either their status as transgender or sex stereotyping under the Supreme Court's 1989 decision in *Price Waterhouse v. Hopkins*, which indicates that a company can't discriminate based on stereotypes of how a man or woman should appear or behave. The funeral home's case will be argued separately from *Bostock* and *Altitude Express*.

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# Roberts Seen As Swing Vote In High Court LGBT Rights Case

By **Vin Gurrieri**

Law360 (May 3, 2019, 10:06 PM EDT) -- Though it's anyone's guess how the U.S. Supreme Court will rule on the question of whether LGBT workers are protected by Title VII's prohibition on sex discrimination, experts say Chief Justice John Roberts will likely be the one who casts the deciding vote in what's expected to be a blockbuster 5-4 decision.

After months of delays, the high court in mid-April accepted **three closely watched cases** that center on whether Title VII of the Civil Rights Act of 1964 protects gay and transgender workers from discrimination based on their sexual orientation or gender identity. The cases are Altitude Express v. Zarda and Bostock v. Clayton County, Georgia, which will be heard together, and R.G. & G.R. Harris Funeral Homes Inc. v. EEOC.

Chief Justice John Roberts answers questions during a February appearance at Belmont University in Nashville. (AP)

While experts on both sides of the employment bar cautioned that attempting to predict the justices' conclusions is difficult, they said Justice Roberts is well-positioned to be the central figure in these cases and is the likeliest to shape their outcome.

"I think that definitely the person to watch is Justice Roberts," said Sam Schwartz-Fenwick, a labor and employment partner at Seyfarth Shaw LLP. "On this court, he definitely is the person who's standing between the liberal members of the court and the conservative members. It's very likely that whatever decision will be a 5-4 division with Justice Roberts in the majority."

Tom Spiggle of The Spiggle Law Firm, a boutique that represents workers in discrimination cases, offered a similar perspective from the plaintiffs side of the bar.

"Justice Roberts is going to be the swing vote on this because I think the other four conservative justices are almost assuredly going to come down on the side of an originalist intent that when Title

VII was passed, when they used the word 'sex' they weren't thinking of LGBTQ rights, and the more traditional liberal wing will find the opposite," Spiggle said. "I think it's going to come down to Justice Roberts."

**A Question of Language**

The key question at issue in each of the cases is whether Title VII's existing prohibition on discrimination "because of sex" encompasses bias based on either sexual orientation or gender identity.

George Rutherglen, a longtime professor at the University of Virginia School of Law who clerked for Justices William O. Douglas and John Paul Stevens early in his career, told Law360 shortly after the high court accepted the cases that they boil down to whether the Roberts court interprets Title VII's language based on the way "sex" is understood today with decades of constitutional precedent at its back, or the way Congress would have interpreted it in 1964.

"Those are the two fundamental perspectives you can take on these cases," he said, noting that Title VII's sex discrimination ban was itself a last-minute addition to the statute that was promoted in part by an opponent of the bill who saw it a poison pill that would stop its passage.

Michelle Phillips of Jackson Lewis PC, whose practice focuses on LGBT issues, told Law360 that it's "fair to say" the high court's conservative members take a "textualist" approach toward interpreting laws. That approach encourages judges to parse the precise text of a statute to figure out its meaning before turning to secondary resources.

"If they keep true to their textualist commitment, it's likely that they would rule against protection based on sexual orientation and gender identity," Phillips said, a ruling she believes would be "problematic in a number of different respects."

"If you look at the plain language of Title VII, there's nothing in [its] plain language that specifically refers to either sexual orientation or gender identity," she said. "What the language says is that you're discriminated against 'because of sex.' It's illogical to look at that language and not recognize protection based on sexual orientation or gender identity."

But Katie Eyer, a law professor at Rutgers School of Law who specializes in anti-discrimination law and has represented LGBT workers in high-profile litigation, said she doesn't believe that "there is a single justice to watch, Roberts included, since the precedent behind Title VII is itself strong enough to be 'dispositive,' even though Justice Roberts himself is one who eschews having his judicial methodology labeled in any particular way."

"There is a lot of Title VII precedent that if you follow it logically leads to the result that LGBT plaintiffs are covered," Eyer said.

"For those in particular who embrace textualism, there are very strong textualist arguments here that anti-LGBT discrimination is literally 'because of sex,'" Eyer added. "There's well-established reading of the [phrase] 'because of,' and the justices on the right of the court have consistently said that this connotes 'but-for' causation and ... each and every instance of sexual orientation or gender identity discrimination is literally but-for sex — but-for the individual's sex the [employment action taken against them] would be different."

**Religious Liberty Trapdoor**

While the Zarda, Bostock and funeral home cases are to sure have wide-reaching ramifications for LGBT workers, they are merely the latest in a line of high-profile civil rights cases that the Supreme Court has dealt with since Justice Roberts was confirmed in 2005.

The high court in its 2015 Obergefell v. Hodges decision recognized the legality of same-sex marriage, two years after the justices in U.S. v. Windsor struck down part of the Defense of Marriage Act that defined marriage for federal benefits purposes as between one man and one woman. Justice Roberts wrote dissents to both of those majority opinions.

Justice Roberts, however, landed in the majority in last year's Masterpiece Cakeshop decision, where the justices issued a narrow ruling in favor of a Christian baker who refused to bake a custom wedding cake for a same-sex couple after finding that proceedings against him before the Colorado Civil Rights Commission were tainted by anti-religious bias. The justices left open questions surrounding the First Amendment and religious objections to same-sex marriage for another day.

Schwartz-Fenwick noted that the high court could potentially issue a ruling in the Title VII cases that creates some sort of "religious liberty interest" for employers "that needs to be balanced."

That pathway could appeal to Justice Roberts, given his prior rulings, and could arise since the employer in the funeral home case had asserted a religious liberty defense under the Religious Freedom Restoration Act before the lower courts, according to Schwartz-Fenwick.

"In prior cases, Justice Roberts — and you can see it in his opinion in Masterpiece Cakeshop — is very focused on the concept of religious liberty," Schwartz-Fenwick said. "Given the court's focus in the 2010s on questions of religious rights of employers and corporations, I'd be very surprised if they didn't delve into that question."

**Existing Sex Bias Precedent on the Table**

One concern that some attorneys shared about the case as it moves forward is, if Justice Roberts sides with the conservatives on the LGBT protection question, whether the high court will use the case as an opportunity to upend decades-old precedent on sex bias in related contexts.

In 1989, the high court held that sex-based stereotyping was actionable under under Title VII in its Price Waterhouse v. Hopkins decision — a ruling that the current court specifically included in the question it accepted in the funeral home case.

While Spiggle said it's possible that Justice Roberts may see the Price Waterhouse precedent as favoring LGBT protection under Title VII, he said the issue "is so unsettled that he's going to find himself having a freer hand and will probably hew to his more conservative roots."

"For people in my line of work who represent plaintiffs ... the big concern is that not only will Title VII not be expanded to protect LGBTQ rights, they're going to take a swipe at Price Waterhouse," Spiggle said. "I don't think that Roberts would overrule that one — it's been such long-standing and pretty well-established precedent. But it's entirely possible that he could sign on to some language that can be used by lower courts if they are so inclined to limit [its] reach."

Another case the justices may opt to revisit is a unanimous 1998 decision written by Justice Antonin Scalia in Oncale v. Sundowner Offshore Services Inc. There, the high court held that same-sex sexual harassment was an actionable form of sex discrimination under Title VII.

Schwartz-Fenwick noted that the legal framework put forth by the Equal Employment Opportunity Commission as it adopted positions that both sexual orientation and gender identity are protected under Title VII borrowed language from the high court's decisions in Price Waterhouse and Oncale — meaning the justices will likely have to address those precedents in these cases.

"I think the court is going to have to address those head-on," Schwartz-Fenwick said. "In Justice Roberts' confirmation, he made a point of saying how important he viewed precedent to be. And I think that he is going to have to figure out a way to address those precedents."

But should the high court try to draw a line between sex stereotyping as outlined in Price Waterhouse and discrimination based on sexual orientation or gender identity, Phillips said it could result in a ruling that cuts against the goal of Title VII's sex discrimination provision to root out bias based on gender.

"The essence of discrimination based on sexual orientation and gender identity — it is sex stereotyping. What else is it?" Phillips said. "It's preconceived notions about how men and women are expected to act and perform in the workplace."

The cases are Altitude Express v. Zarda, case number 17-1623; Bostock v. Clayton County, Georgia,

case number 17-1618; and R.G. & G.R. Harris Funeral Homes Inc. v. EEOC et al., case number 18-107, in the U.S. Supreme Court.

--Editing by Breda Lund and Jill Coffey.

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# Title VII And LGBT Discrimination: The Path To The High Court

By **Melissa Legault** (April 30, 2019, 1:03 PM EDT)

Melissa Legault

After 11 private conferences during which the U.S. Supreme Court justices debated whether to hear the cases, the Supreme Court granted certiorari[1] in three cases involving the extent of protection — if any — provided by Title VII of the Civil Rights Act of 1964 against employment-based discrimination on the basis of sexual orientation and gender identity. The court consolidated the two sexual orientation cases, Altitude Express v. Zarda and Bostock v. Clayton County, Georgia, and allocated a total of one hour for oral argument for both cases.

In the gender identity case, R.G. & G.R. Harris Funeral Homes Inc. v. U.S. Equal Employment Opportunity Commission et al., the court limited its consideration to the question of whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) pursuant to the theory of sex stereotyping announced in Price Waterhouse v. Hopkins.[2]

The current federal stance on Title VII and LGBT discrimination is conflicting, to say the least. The court's rulings in these cases will provide employers with some much-needed clarity regarding whether federal law requires that their discrimination policies protect gay and transgender individuals.

**Background**

Under Title VII, it is illegal for an employer to discriminate against an employee "because of … sex." The statute does not on its face prohibit sexual orientation or gender identity discrimination, and circuit courts are split as to whether Title VII's protection against sex-based discrimination also prohibits sexual orientation discrimination, with the Second and Seventh Circuits of the view that Title VII prohibits sexual orientation-based discrimination and the Eleventh and Fifth Circuits reaching the opposite conclusion.

In Zarda, a male skydiving instructor whose employment was allegedly terminated because of his sexual orientation filed a Title VII claim against his employer. The U.S. Court of Appeals for the Second Circuit held that the plaintiff was wrongfully terminated from his job, stating that, "because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected."

The Second Circuit's decision was in line with the U.S. Court of Appeals for the Seventh Circuit's 2007 holding in Hively v. Ivy Tech Community College where that court held that discrimination on the basis of sexual orientation violates Title VII. A few months after Zarda was decided, the U.S. Court of Appeals for the Eleventh Circuit reached a contrary conclusion in Bostock, relying on previous circuit precedent.

The last of the trio, Harris Funeral Homes, contemplates whether Title VII implicitly prohibits gender identity discrimination. In that case, the U.S. Court of Appeals for the Sixth Circuit became the first federal circuit court of appeals to recognize transgender discrimination as a form of prohibited sex-based discrimination under Title VII, relying heavily on the reasoning in Zarda.

In addition to the trio of cases currently before the court, other circuit courts have recently grappled with the issue of whether Title VII protects against LGBT discrimination. For instance, the issue of sexual orientation discrimination is currently before the U.S. Court of Appeals for the Eighth Circuit. The court heard oral argument on April 17, 2019, in Horton v. Midwest Geriatric Management LLC, a case brought by a man who was offered a job as vice president of sales and marketing, only to have the offer rescinded after the company discovered that he is gay.

Further, on April 19, 2019, the U.S. Court of Appeals for the Fifth Circuit deepened the circuit split in Bonnie O'Daniel v. Industrial Services Solutions et al. and **held** that Title VII does not prohibit employers from terminating the employment of straight workers because of their sexuality, reaffirming the circuit's long-standing position that Title VII does not protect against sexual orientation discrimination. In that case, the plaintiff claimed that her employer terminated her employment because of her sexual orientation (heterosexual) after she made a transphobic comment on Facebook.

The Fifth Circuit rejected the plaintiff's Title VII retaliation claim, holding that, based on the circuit's "unbroken and unequivocal precedents, it is not 'reasonable' in the Fifth Circuit to infer that Title VII embraces an entirely new category of persons protected for their sexual orientation." The court also dismissed the plaintiff's claim that her former employer violated state law by suppressing her free expression on grounds that the law does not cover private employers.

This decision comes shortly after the same circuit's **decision** in Wittmer v. Phillips 66 Company. In that discrimination case involving a transgender plaintiff, the Fifth Circuit ruled in favor of the employer without addressing the question of whether Title VII protects against LGBT discrimination; however, U.S. Circuit Judge James Ho, who was nominated by President Donald Trump, wrote a lengthy and detailed concurrence analyzing the issue and concluded that Title VII does not provide such protections.

In his concurrence, Judge Ho opined that "[o]nly the Supreme Court can resolve this circuit split." With its decision to grant certiorari in this trio of cases, the Supreme Court has chosen to do just that. The court will hear arguments in these cases next term, meaning employers can expect to see a decision by June 2020. Until then, this issue will continue to be closely watched by the nation, with government agencies, Congress and employers weighing in on the debate.

**Federal Agencies Muddied the Waters**

The fall of 2018 brought a wave of federal agency activity regarding LGBT discrimination protection. For example, in October 2018, a U.S. Department of Health and Human Services memo garnered national attention for defining "sex" to exclude transgenderism.

The memo defines "sex" as "a person's status as male or female based on immutable biological traits identifiable by or before birth." In other words, HHS wants to rely on birth certificates as the main identifier of an individual's sex, a policy that would essentially abolish federal recognition and protection of transgender individuals. The memo requests that other federal agencies — including the U.S. Department of Justice, U.S. Department of Education and U.S. Department of Labor — alter their own understanding of the word "sex" to match HHS' proposed definition.

Shortly after the HHS memo became public, the DOJ, appearing before the Supreme Court on behalf of the federal government, urged the court in a brief[3] to postpone consideration of Harris Funeral Homes until it decides whether to review Zarda and Bostock because the Sixth Circuit relied heavily on Zarda in concluding that Title VII prohibits transgender discrimination.

Further, the DOJ contended, consistent with the HHS memo, that Title VII does not prohibit employers from discriminating against employees based on gender identity. Not all agencies agree with HHS' and the DOJ's interpretation of Title VII. Specifically, in response to the other agencies' proclamations on the topic, the acting chair of the EEOC, Victoria Lipnic (who was appointed by Trump in 2017), announced that the EEOC plans to continue prosecuting transgender discrimination claims in accordance with the agency's stated policies.

**The Legislative Branch Weighs In**

On March 13, 2019, the House Democrats, spearheaded by Rep. David Cicilline, an openly gay congressman from Rhode Island, reintroduced a bill to expand LBGT discrimination protections. The Equality Act, first introduced in 2015, would change existing civil rights legislation to ban discrimination against LGBT individuals in employment, housing and public accommodations, among other areas.

Further, the proposed bill would bar reliance on the Religious Freedom Restoration Act as justification of sexual orientation and transgender discrimination. The act is currently being considered in various committee hearings and a floor vote is expected in the House by early summer 2019. Although the bill has a chance to pass in the House, which has a Democratic majority, it is unlikely that it would pass in the Republican-controlled Senate.

**The American Public Shows Increasing Support of LGBT Rights**

A recent poll[4] from the Public Religion Research Institute, or PRRI, indicates that a majority of Americans in every religion, party and U.S. state supports policies that protect against gender identity and sexual orientation discrimination.

Further, nearly 200 companies — including Amazon, Apple, PepsiCo, Twitter and Uber — have decided to take the issue into their own hands and signed the Business Statement for Transgender Equality[5] opposing "any administrative and legislative efforts to erase transgender protections through reinterpretation of existing laws and regulations." Even without federal protections in place, corporate America has chosen to instill its own protections for employees, with over 80% of Fortune 500 companies prohibiting LGBT discrimination in their employment policies. Moreover, many of these companies have publicly supported the proposed Equality Act now before Congress.

On March 27, 2019, some of America's most influential companies weighed in on this issue at the state level. In a letter,[6] companies like Amazon, Google and IBM warned Texas legislators against a pair of bills that the companies deem discriminatory, explaining that they would "continue to oppose any unnecessary, discriminatory, and divisive measures that would damage Texas' reputation" including "policies that explicitly or implicitly allow for the exclusion of LGBTQ people, or anyone else."

**Conclusion**

Considering the court's current makeup and recent decisions in other employment cases, it is uncertain how the nine justices will ultimately rule on whether Title VII prohibits sexual orientation and gender identity discrimination, but pundits largely believe that the conservative majority will take a narrow view in interpreting the extent of Title VII's sex-based discrimination prohibitions. Until the court provides clarity on these questions, it is important for employers to remember that, although there are currently no express federal protections against sexual orientation or transgender discrimination, many state and local governments prohibit such discrimination.

In fact, over 20 states and Washington, D.C., have explicit laws prohibiting LGBT-related discrimination. Employers are encouraged to consult with counsel to ensure compliance with state and local laws regarding transgender and sexual orientation discrimination in the workplace. In addition, employers should continue to use best practices whenever making adverse hiring and employment decisions and should adequately document performance deficiencies or other legitimate concerns regarding applicants and employees, so they are able to establish an independent, nondiscriminatory reason for their employment decisions.

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[1] https://www.supremecourt.gov/orders/courtorders/042219zor_9olb.pdf?fbclid=IwAR1TPqYjUXA-

yGRG3P7d8W-K7kp0X7Hrw9a0P5noh2Pxq7JLcuEK1XZjWeQ

[2] Price Waterhouse v. Hopkins , 490 U.S. 228 (1989).

[3] https://www.supremecourt.gov/DocketPDF/18/18-107/67913/20181024152750333_18-107%20RG%20GR%20Harris%20Funeral%20Homes.pdf

[4] https://www.prri.org/research/americans-support-protections-lgbt-people/

[5] https://businessfortransequality.com/

[6] http://www.texaswelcomesall.com/latest-news-2/

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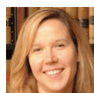

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Posted Tue, April 23rd, 2019 5:30 pm

# Argument analysis: Divided court seems ready to uphold citizenship question on 2020 census

The Supreme Court heard oral argument this morning in the dispute over the Trump administration's decision to include a question about citizenship on the 2020 census. The federal government says that the Department of Justice wants data about citizenship to better enforce federal voting rights laws. But the challengers in the case counter that asking about citizenship will lead to an inaccurate count, because households with undocumented or Hispanic residents may not respond. After roughly 80 minutes of often tense debate, the justices seemed divided along ideological lines, with the conservative justices appearing ready to uphold the use of the question.

Ross announced the decision to include the citizenship question last year. The question is not entirely new to the census: It was generally included on census forms from 1820 until 1950, while some households received forms that contained the question between 1960 and 2000.

But a group of state and local governments, along with several civil rights groups, went to federal court to challenge Ross' decision. In January, the court ruled that the decision violated the federal law governing administrative agencies and barred the government from including the question on the upcoming census. The Supreme Court agreed to take up the case right away, without waiting for a federal appeals court to weigh in, to resolve the issue once and for all by June, when the government needs to start printing millions of census questionnaires.

Arguing for the federal government today, U.S. Solicitor General Noel Francisco began by stressing that the citizenship question has been asked on the census for nearly 200 years. But he was quickly interrupted by Justice Sonia Sotomayor, who pushed back. It hasn't been included in the census sent to all households since 1950, she reminded Francisco, because every secretary of commerce and every statistician has recommended against asking it.

Solicitor General Noel G. Francisco (Art Lien)

The other liberal justices then took turns with Sotomayor peppering Francisco with questions, often diving deep into the details of the case. Some justices focused on Ross' decision to include the question even though the Census Bureau had told him that asking the question would lead to fewer responses and could make information about citizenship worse, rather than better.

Francisco responded that Ross had fully acknowledged both the advantages and disadvantages of asking the citizenship question on the 2020 census. The question before the court, he stressed, really boils down to whether Ross' decision to bring back the citizenship question was reasonable – which it was.

Sotomayor was again skeptical, telling Francisco that the government's rationale amounted to plucking out one sentence from the record and relying on it, while ignoring everything else that suggests that adding the question would reduce the accuracy of the data.

Justice Elena Kagan echoed Sotomayor's concerns. The secretary of commerce can deviate from the Census Bureau's experts, she conceded, but he needs a reason to do so. "I don't see any reasons," Kagan told Francisco. Instead, Kagan continued, it seemed more as though the Department of Justice's need for the citizenship data was "contrived"; lots of civil rights officials at the Department of Justice, Kagan observed, have never asked for this data.

Arguing on behalf of the state and local governments challenging the decision to add the citizenship question, New York Solicitor General Barbara Underwood began by complaining that Ross had decided to add the citizenship question even though the documents on which he relied to make that decision contained strong evidence that doing so would lead to an inaccurate count. All the reasons that Ross has cited to justify adding the question, Underwood asserted, are false.

New York Solicitor General Barbara D. Underwood (Art Lien)

Chief Justice John Roberts pushed back, asking Underwood whether having the citizenship data wouldn't affect enforcement of the federal Voting Rights Act. Isn't this critical data, Roberts asked?

Justice Brett Kavanaugh noted that the United Nations recommends including a citizenship question. Not only has the United States often asked the question, Kavanaugh stressed, but other countries – including Spain, Germany, Mexico, Canada and Ireland – also ask about citizenship. Does this international and historical practice affect how we look at the decision to add the question? Kavanaugh queried.

Underwood responded that the information provided by the question is "very useful for a country to have." But should it be included on the census, she countered, whose principal purpose is to count people, knowing that it will reduce response rates?

Justices Samuel Alito and Neil Gorsuch, however, pushed back against the idea that including the citizenship question, standing alone, was the root cause of a lower response rate. Citizens and noncitizens are different in a lot of ways other than whether they have citizenship, Alito observed: For example, there may be socioeconomic differences between a

household with citizens and one with noncitizens, as well as language differences. So there may be other explanations, Alito suggested, for why households with noncitizens would be less likely to return their citizenship questionnaires.

Dale E. Ho for respondents New York Immigration Coalition, et al. (Art Lien)

Gorsuch said the same thing a few minutes later to Dale Ho, who argued on behalf of the civil rights groups challenging the inclusion of the citizenship question. Some states, Gorsuch told Ho, argue that there are other explanations for the reduced response rates beyond the inclusion of the citizenship question on the surveys that have gone out to some households – for example, the questionnaires may be too long, and less affluent households may not have the time to fill them out completely. What do we do, Gorsuch asked, with the fact that we don't know?

When General Counsel of the House of Representatives Douglas Letter, who appeared as a "friend of the court" in support of the challengers, stood up to argue, he provided one of the only light moments in an otherwise strained day. Letter began by conveying the thanks of House Speaker Nancy Pelosi for allowing him to appear and argue. Roberts shot back, "Tell her she's welcome."

Letter told the justices that anything that undermines the accuracy of the census count is a problem, even if the information is wanted for another reason – such as enforcing federal voting rights laws. But he didn't seem to make much headway: Even Justice Ruth Bader Ginsburg, who seemed to be siding with the challengers for most of the case, noted that Congress had been made aware of the decision to include the citizenship question but hadn't taken any action. Kavanaugh then chimed in, asking Letter why Congress didn't prohibit the use of a question about citizenship on the census, the same way it had banned questions about religion.

Douglas N. Letter for U.S. House of Representatives (Art Lien)

The stakes in the case are high. The federal government uses the data from the census to divide up the 435 members of the U.S. House of Representatives among the 50 states. After the 2010 census, for example, Texas gained four seats in the House and Florida gained four, while New York – the lead plaintiff in today's case – and Ohio both lost two. Census data is also used to allocate federal funding for a wide variety of programs: In fiscal year 2016, the federal government distributed over $900 billion through such programs. The challengers say that, as a result, including the citizenship question could lead to fewer members of Congress and less federal funding for states with large populations of undocumented and Hispanic residents – many of which tend to skew Democratic.

A decision in the case is expected by summer.

*This post was originally published at Howe on the Court.*

Wendy Weiser and Kelly Percival*Guest*

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Posted Thu, April 4th, 2019 2:21 pm

# Symposium: There is no valid justification for the citizenship question

*Wendy Weiser is the director and Kelly Percival is counsel of the Democracy Program at the Brennan Center for Justice at NYU School of Law.*

At bottom, the citizenship-question cases rest on two principal charges: that the addition of a citizenship question to the 2020 census form sent to all households will lead to a significant undercount of the U.S. population, especially in immigrant communities and communities of color, and that Secretary of Commerce Wilbur Ross made the decision to add the question improperly, without adequately considering or testing its effects. According to the plaintiffs — and to the two lower courts that ruled in their favor — these charges compel the conclusion that Ross' hurried decision to add a citizenship question was "arbitrary and capricious" in violation of the Administrative Procedure Act. They also claim it undermines the Census Bureau's ability to fairly and accurately count the whole population in violation of the Constitution's enumeration clause.

Rather than contesting those charges, the administration focuses most of its briefing in defense of the citizenship question on procedural issues of standing and reviewability. Substantively, it offers only two justifications for its decision to add the question: that it is merely reinstating a question that had previously long been used in the census, and that it needs the question to better enforce the Voting Rights Act. Neither justification has any merit.

History of citizenship questions on the census

The administration's first defense of the citizenship question is a historical one. According to its briefs, every decennial census but one from 1820 to 1950 has included "questions about citizenship or country of birth (or both)." Far from a new innovation, the administration claims, Ross' citizenship question "represents a return to the traditional status quo." As a result, it argues, the question cannot be unconstitutional because such a ruling would "deem virtually every census questionnaire in the Nation's history unconstitutional" — an improbable and intolerable result. Similarly, it argues, "it simply cannot be arbitrary and capricious" under the APA "to reinstate to the decennial census a question whose pedigree dates back nearly 200 years."

The plaintiffs dispute the legal significance of this history. They argue that the citizenship question would dramatically undermine the accuracy of the 2020 census, regardless of what was done in the past; that there is no evidence that past citizenship questions did not similarly hurt past censuses; and that a past practice abandoned decades ago does not exempt Ross from conducting a proper analysis and following proper procedures before changing the census today. In other words, the plaintiffs claim, it is "arbitrary and capricious" to add a question to the census that hasn't been used for over half a century without properly assessing its impact on today's count. And any reasonable assessment would show that a citizenship question would cause a dramatic and disproportionate undercount of immigrant communities, in violation of Supreme Court precedent requiring census decisions to bear a "reasonable relationship to the accomplishment of an actual Enumeration" of the U.S. population.

These rebuttals should be sufficient to dispose of the administration's 200-year-history argument as a matter of law. But the administration's argument suffers from an even more fundamental flaw: Its historical account is wrong, or at least highly misleading.

First, it is simply not true that the census has previously asked for the citizenship status of everyone in the United States. According to new researchpublished by our colleagues Brianna Cea and Thomas Wolf in the Georgetown Law Review Online and an amicus brief filed by leading census historians, there is no historical precedent — before 1960 or otherwise — for a universal citizenship question on the census. Rather, in past censuses, the government has either not asked about citizenship or has asked only a subset of the population. This matters because, as survey research shows, a question asked of some people has a very different impact on the count than a question asked of everyone.

Second, to the extent the administration relies on past instances of non-universal citizenship questions to justify Ross' decision, its defense encounters another major historical problem: These questions were part of an approach to census-taking that the Census Bureau abandoned precisely because it determined that such an approach undermined the accuracy and efficiency of the count.

Before the mid-20th century, the census tried to do two things at once: enumerate the entire population and collect other information about U.S. residents (including at times the citizenship of some of those people). That approach, it turns out, did not work well. In the 1950s, the Census Bureau studied the accuracy of its count and found that its dual-purpose approach to the census, and the resulting longer questionnaire, caused millions of people to go uncounted, especially in minority communities. Accordingly, it changed its approach. Since 1960, it has used two separate questionnaires: one short, five-question form sent to everyone for enumerating the population, and one long-form questionnaire, sent to a smaller subset of the population to collect additional data.

The short-form questionnaire — the one at issue in these cases — has never included a citizenship question. And ever since the Census Bureau created a pared-down form, it has repeatedly strongly opposed any attempts to ascertain the citizenship status of everyone in the country because of the potential to jeopardize the accuracy of the decennial count.

In short, it is unreasonable to rely on census history to conclude that a citizenship question will not undermine the count.

The Voting Rights Act and citizenship data

The administration's second justification — relevant only to the APA claims — is that collecting citizenship information on the decennial census is necessary for the Justice Department to enforce certain claims under the Voting Rights Act that require the use of citizenship data. The basis for this contention is a December 2017 letter from the Justice Department requesting the change. The administration argues that Ross' decision was not "arbitrary and capricious" because he reasonably relied on this request and determined that "citizenship data provided to DOJ will be more accurate with the question than without it."

The problem with this argument is that it too is inaccurate and implausible. As a threshold matter, the lower court found that Ross did not, in fact, rely on the DOJ letter — that he had made his decision well beforehand — and that his stated rationale of gathering better data to enforce the VRA was pretextual. But even if the Supreme Court refuses to look behind his stated rationale, it is not rational to assert that a citizenship question will improve VRA enforcement.

First, ever since the Supreme Court's 1986 decision making citizenship data relevant to VRA claims, successive administrations and community advocates have successfully litigated VRA claims using citizenship data derived from other sources. Since 2005, the primary source has been the American Community Survey, a sample survey that replaced the long-form census and asks a subset of the population about their citizenship status. This data has been more than adequate for enforcing the VRA. Indeed, we are not aware of a single case in which the success of private plaintiffs in a VRA enforcement action turned on the availability of citizenship data from the decennial census. And the Justice Department has never, in the 54-year history of the VRA, cited a need for citizenship data from the decennial census.

Second, collecting citizenship information on the census would, as the lower court found "produce *less* accurate and *less* complete citizenship data" than other sources provide, thereby weakening — not strengthening — VRA enforcement efforts. What is more, according to the overwhelming consensus of census experts and the Census Bureau itself, the citizenship question will produce a significant undercount in minority communities and those with high immigrant populations. For example, the Census Bureau has estimated that a citizenship question would disproportionately depress response rates among Hispanic households. And bureau studies show that minority and immigrant households are less likely to respond to the 2020 census for fear that their responses might be used against them or their family members. The administration does not refute these estimates.

If the 2020 census reports artificially low minority population numbers as a result of the citizenship question, those communities will find it difficult to meet the preconditions required for making out a claim under the VRA using decennial census data. In other words, a citizenship question will make VRA enforcement more difficult for the very communities the statute is meant to protect.

Will it matter to the outcome of the case that there was no rational basis for Ross' decision to add the citizenship question? It should. If the Supreme Court allows the administration to proceed with the question absent any plausible substantive justification, it will substantially weaken the APA and judicial oversight of agency decision-making. That, we hope, is a step too far for the justices.

Hans von Spakovsky *Guest*
Posted Thu, April 4th, 2019 10:38 am

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# Symposium: Only in America

*Hans von Spakovsky is the manager of the Election Law Reform Initiative and a senior legal fellow at the Meese Center for Legal and Judicial Studies at the Heritage Foundation.*

Foreign observers must be shaking their heads in disbelief that adding a citizenship question to the U.S. census has proved so controversial as to result in litigation. *Department of Commerce v. New York* will be argued before the U.S. Supreme Court on April 23.

Predicting how the court will rule is always dicey. But given the broad authority of the secretary of the Department of Commerce under federal law to determine the questions on the census, and the extreme weakness of the legal arguments made by the lower-court judges to support their decisions against the government, it is highly probable that the challengers will lose and the citizenship question will appear on the census.

What is odd about the challenge by blue states and liberal advocacy organizations is that even the United Nations — an institution they often hold up as a model of progressivism that the United States should emulate — sides with the Trump administration on this issue. In its 2017 "Principles and Recommendations for Population and Housing Censuses," the U.N. recommends that member countries ask census questions identifying both an individual's country of birth and country of citizenship.

A Commerce Department memorandum on this subject dated March 26, 2018, notes that countries asking a citizenship question on their census include Australia, Canada, France, Germany, Indonesia, Ireland, Mexico, Spain and the United Kingdom.

Yet federal district courts in New York and California have enjoined the Commerce Department from reinstating a citizenship question on the census, ruling separately that to do so would violate the Administrative Procedure Act and the enumeration clause of the Constitution.

This litigation got to the Supreme Court in near-record time. On February 15, the justices granted the government's request to review the January 15 New York decision, skipping the U.S. Court of Appeals for the 2nd Circuit in a very rare move. When another federal district court in California issued a March 6 injunction in *California v. Ross*, the Supreme Court agreed to also accept arguments on the second case, similarly skipping the U.S. Court of Appeals for the 9th Circuit.

This action by the Trump administration, and specifically by Commerce Secretary Wilbur Ross, has been portrayed as somehow unprecedented and nefarious. But the first citizenship question appeared on the 1820 census after being recommended by the notoriously conservative President Thomas Jefferson. The question has been consistently on the census form ever since. In 1950, the Census Bureau switched to sending out two census forms, the short form and the long form. Most Americans received the short form, but one in six households received the long form. The long form contained a citizenship question and over 50 other questions.

After the 2000 census, the Commerce Department ended the use of the long form. But in 2005, as a substitute, it started sending out another census form — christened the American Community Survey — on a yearly basis to about 3.5 million households. The ACS has many more, and more intrusive, questions than the regular census form, including a citizenship question.

It is important to note that the Trump administration announced it was taking the ACS citizenship question and reinstating it on the regular census form. That question does not inquire about legal status; it simply asks if the respondent is a U.S. citizen.

Why transfer the ACS citizenship question back to the regular census form? The Commerce Department's March 26 memorandum cites the major reason as being the Department of Justice's need for better information to enforce the Voting Rights Act. As a former DOJ lawyer, I can confirm that citizenship population data is essential to fashioning remedies for Section 2 violations in vote-dilution cases, especially cases filed on behalf of Hispanics. According to DOJ, "the current data collected under the ACS are insufficient in scope, detail, and certainty."

The lower-court opinions spent hundreds of pages trying to justify their findings against the government, even though the legal issues here are very simple. Article I, Section 2, Clause 3 of the Constitution specifies that an "actual Enumeration" shall be done every 10 years "in such manner as [Congress] shall by Law direct." By law, 13 U.S.C. §141(a), Congress has delegated to the Commerce secretary the authority to conduct the decennial enumeration "in such form and content as he may determine" and authorizes him "to obtain such other census information as necessary." Thus, Congress gave the secretary almost unlimited authority to conduct the enumeration required by the Constitution — what we call the census.

The government in its brief argues, quite correctly, that the lower court erred in finding that the challengers even had standing to sue. The district court found standing based on four supposed injuries: diminishment of political representation, loss of government funding, harm to the accuracy of census data and diversion of resources. But all of these "injuries" would "not occur if everyone who receives the census form fully and truthfully fills it out." In other words, the injuries will happen only if "in light of the citizenship question's mere presence, significant numbers of people refuse to return the census form or falsely underreport the number of people in their households."

As the government points out, not completing a census form at all or not answering it truthfully violates federal law. And the Census Bureau regularly engages in extensive follow-up efforts with households that don't return their census forms. In other words, the alleged injuries that give the challengers standing would be "the result of the independent action of some third party not before the court" in violating federal law and "therefore insufficient to support standing" under Supreme Court precedent.

In any event, the Commerce Department pointed out that there is no empirical evidence showing that a citizenship question will have an impact on response rates. In fact, the nonresponse data on the citizenship question on the ACS shows that it was "comparable to nonresponse rates for other questions" such as educational attainment and marriage status. As the department said in its memorandum, "even if there is some impact on responses, the value of more complete and accurate data derived from surveying the entire population [instead of just a small portion as the ACS does] outweighs such concerns."

The government also argues that the secretary's decision is not subject to judicial review because under the APA's own terms, judicial review is barred for any action that "is committed to agency discretion by law." Action is committed to agency discretion when the governing "statutes are drawn in such broad terms that in a given case there is no law to apply."

In a convincing argument that the Supreme Court will have a hard time disputing, the government says that "perfectly describes this case." According to the solicitor general's brief, "The Constitution 'vests Congress with virtually unlimited discretion in conducting' the decennial census, and Congress in turn 'has delegated its constitutional authority over the census' to the Secretary," citing *Wisconsin v. City of New York*.

Thus, the government argues, Ross "possesses the same broad discretion that the Constitution confers on Congress. And neither the Constitution nor the Census Act provides any standard by which to judge the lawfulness of including (or excluding) a given question on the census form." That very same reasoning also shows why the district court's opinion in the California case that a citizenship question is unconstitutional also fails, despite the amount of verbiage the judge applied to try to justify his injunction.

The New York district court also found that the secretary's reliance on the Justice Department's need for more accurate citizenship population data was "pretextual." But the court did not identify what the supposed "real reason" was for the secretary's decision to reinstate the citizenship question.

The federal government argues that this violates "fundamental principles governing APA review of agency action." Supreme Court precedent says courts are supposed to focus only on the "contemporaneous explanation of the agency decision"; "judicial inquiries into legislative or executive motivation represent a substantial intrusion into the workings of other branches of government." Ross' decision was supported by the administrative record and "agency action does not fail APA review merely because, as is often the case, the agency decisionmaker had unstated reasons for supporting a policy decision in addition to a stated reason that is both rational and supported by the record."

The substantive issue in this case is, of course, the most important one. But a side issue before the Supreme Court is the New York district court order compelling the testimony of Wilbur Ross. The government argues that this violates the general rule, again based on Supreme Court precedent, that "the focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." There is only a narrow exception if there is a strong showing of "bad faith or improper behavior" by the agency, and there was no such showing here.

Frankly, I will be surprised if the Supreme Court does not dissolve the injunctions and find for the government. The Constitution gives Congress almost unlimited discretion to conduct the census, and Congress has delegated that authority to the secretary of Commerce. Given the long historical precedent of including a citizenship question on the census up until the present day on the ACS, it becomes hard to conceive of the court's reaching any conclusion other than that the executive branch acted fully within its authority to determine the "form and content" of the "Enumeration."

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# Justices To Hear Census Dispute Over Citizenship Question

By **Nicole Narea and Jimmy Hoover**

Law360 (February 15, 2019, 1:50 PM EST) -- The U.S. Supreme Court on Friday agreed to hear the Trump administration's appeal of a court order stopping it from including a question about citizenship status on the upcoming 2020 census, setting oral arguments for late April.

Following an eight-day trial last month, a federal judge ordered the U.S. Department of Commerce to remove a question about citizenship status on the upcoming census, agreeing with a group of states that the agency ran afoul of the Administrative Procedure Act. Opponents say the citizenship question will reduce response rates among immigrant households, favoring Republicans as the census is used to draw new congressional maps.

The Supreme Court on Friday granted the government's petition to leapfrog the Second Circuit and review the trial court's ruling before the 2020 census goes to print on June 30.

New York Attorney General Letitia James, who is leading the coalition of states that brought the suit, reiterated in a statement Friday that adding a question about citizenship to the census would "incite widespread fear" among immigrants and reduce the accuracy of population counts, resulting in diminished representation in Congress and funding for certain states.

"This would have far-reaching and long-lasting effects and is antithetical to the purpose of the Census," she said. "The District Court recognized these facts in ruling in favor of our challenge and we look forward to seeing the Trump Administration in court once again."

Kelly Laco, a spokesperson for the Department of Justice, lauded the high court's decision to take up the case in a statement Friday, giving the administration an opportunity to defend its "legal and reasonable decision" to reinstate a citizenship question on the 2020 census.

"Secretary Ross, who has authority over the census, decided to reinstate a question concerning citizenship, which has been included in the census for most of the last 200 years, in response to the Department of Justice's request for better data to protect American voters against racial discrimination," she said. "The Department of Justice looks forward to argument before the Supreme Court."

It is not the first time that the high court has weighed in on the case. Before the district court trial had even begun, the Trump administration had also skipped over the Second Circuit and petitioned the high court directly to put an emergency hold on the deposition of Commerce Secretary Wilbur Ross regarding his role in adding a citizenship question to the census. The justices granted that request, but allowed the trial to continue.

The census case is only the latest example of the Trump administration seeking fast intervention from the Supreme Court after one of its controversial policy decisions has been tied up by a trial judge's nationwide injunction. In a similar case in December involving President Donald Trump's ban on transgender service members, U.S. Solicitor General Noel Francisco called such court orders "disturbing."

Steve Vladeck, a professor at the University of Texas at Austin School of Law, tweeted Friday that it

is rare that the high court agrees to hear a case before a court of appeals has issued a ruling, saying that it is only appropriate when a case is of "such imperative public importance" as to justify a break from normal procedure. He said that the high court likely recognized that expediting the appellate process was necessary in order to finalize the census by the Department of Commerce's June deadline.

He noted, however, that the decision does not signify that the government will prevail in defending the citizenship question, only that the justices "understand the urgency."

In fact, Rick Hasen, a professor at the University of California, Irvine School of Law, tweeted that U.S. District Judge Jesse Furman's decision enjoining the citizenship question from inclusion on the census was "so strong and well-reasoned that the case should be a 9-0 affirmance" and that it "would be if the political stakes were not so high."

In a nearly 300-page opinion in January, Judge Furman emphasized that — extra-record testimony in the case aside and based solely on the administrative record before him — it was clear that Ross had **fallen short** of his duties under the APA to make evidence-based decisions and to truthfully represent his motives.

The states are represented by Letitia James, Barbara Underwood, Matthew Colangelo, Steven Wu, Judith Vale, Elena Goldstein and Scott Eisman of the New York Attorney General's Office.

The government is represented by U.S. Solicitor General Noel Francisco and Jeffrey B. Wall, Hashim M. Mooppan and Sopan Joshi of the U.S. Solicitor General's Office and Joseph H. Hunt, Mark B. Stern and Gerard J. Sinzdak of the U.S. Department of Justice's Civil Division.

The case is Department of Commerce et al. v. New York et al., case number 18-966, in the Supreme Court of the United States.

--Editing by Pamela Wilkinson.

*Update: This story has been updated with comments from the DOJ.*

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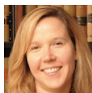
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Posted Tue, March 26th, 2019 3:45 pm

# Argument analysis: Justices divided and hard to read on partisan gerrymandering

Today the Supreme Court heard oral argument in a pair of cases that could prove to be among the most consequential of the term. The cases involve allegations that state officials engaged in unconstitutional partisan gerrymandering – that is, they went too far in taking politics into account – when they drew election maps in North Carolina and Maryland. After over two hours of debate this morning, there were clear divides among some of the justices, but it was much less clear how the court is likely to rule.

Emmet J. Bondurant II at lectern for appellees Common Cause in *Rucho v. Common Cause* (Art Lien)

The two cases arrived at the Supreme Court less than a year after the justices sidestepped a ruling on the merits in the Maryland case and another case alleging partisan gerrymandering in Wisconsin. As last year's cases reflected, the issue of partisan gerrymandering is one with which the justices are very familiar, but which has also proven very difficult. In 2004, the Supreme Court was sharply divided in a partisan-gerrymandering challenge to Pennsylvania's redistricting plan. Citing a lack of a workable standard to determine when party politics crosses a line and plays too influential a role in redistricting, the court's four more conservative justices at the time believed that courts should never have a role in reviewing claims of partisan gerrymandering. Four of the court's more liberal justices argued that courts should police partisan-gerrymandering claims, while Justice Anthony Kennedy – who has since retired – staked out a middle ground: He argued that the Supreme Court should not review the Pennsylvania case, but he left open the possibility that courts could review partisan-gerrymandering claims in the future if a manageable standard could be established.

When the justices announced in 2017 that they would review a partisan-gerrymandering challenge to the redistricting plan that Wisconsin's Republican-controlled legislature drew for the state's general assembly in 2011, it seemed like the Supreme Court might finally resolve the partisan-gerrymandering issue once and for all. Two months later, the justices added another case to their docket: a challenge by Republican voters to a single federal congressional district, drawn by Democratic officials, in Maryland.

But in June 2018, the Supreme Court sent both cases back to the lower courts – without ruling on either the merits of their claims or on the broader question of whether courts should review partisan-gerrymandering claims generally. The justices agreed unanimously that the plaintiffs in the Wisconsin case had not shown that they had a legal right, known as standing, to challenge the entire statewide map. And, in the Maryland case, they emphasized that the case came to them in the early stages of the dispute. The plaintiffs had asked the lower court to temporarily block Maryland from using the 2011 map until it could decide whether the map is constitutional, and the standard of review was therefore lenient: All that mattered was whether the lower court's ruling was unreasonable – which, the justices concluded, it was not.

The Maryland case went back to the lower court, which held a hearing last fall. The plaintiffs in that case argued that when Democratic election officials drew new district boundaries after the 2010 census, the officials only had to shift about 11,000 voters. But instead, the officials added 24,000 new Democratic voters to the district and took out 66,000 Republican voters – all, the plaintiffs say, to retaliate against them for their support of Republican candidates in the past. The lower court agreed with the plaintiffs and ordered the state to draw a new map for the 2020 election. The state appealed to the Supreme Court, which announced earlier this year that it would review both *Lamone v. Benisek*, the Maryland case, and *Rucho v. Common Cause*, the North Carolina case.

The North Carolina case is a challenge to the state's federal congressional map, which was adopted by the state's Republican-controlled legislature. In 2016, a lower court struck down the first map drawn after the 2010 census, ruling that two districts were unconstitutional racial gerrymanders. The legislature drew a new map in 2016, which is the subject of the current challenge. But in January 2018, the lower court found that the new map was the product of an unconstitutional partisan gerrymander and ordered the state to draw a new one. The state's Republican legislators appealed to the Supreme Court, which ordered the lower court to take a new look at whether the plaintiffs have standing to sue in light of the justices' decision in the Wisconsin case.

When the case went back to North Carolina, the district court again struck down the 2016 map. It agreed both that the plaintiffs have a legal right to sue and that the new map was the result of partisan gerrymandering, and it blocked the state from using the map after the 2018 election.

Arguing for the Republican legislators this morning, former U.S. solicitor general Paul Clement urged the justices to stay out of the fray. The Constitution gives responsibility for drawing congressional districts to the political branches, he emphasized: first to state legislatures, and then to Congress itself, acting as a supervisor. There is no role for the courts, particularly because plaintiffs in partisan-gerrymandering cases have repeatedly failed to identify a workable standard for courts to use in reviewing such claims.

Paul D. Clement for appellants in *Rucho v. Common Cause* (Art Lien)

Justice Neil Gorsuch seemed to agree that the problem of partisan gerrymandering is one that should be left for the political branches of government to deal with. He recalled that, in the court's previous partisan-gerrymandering arguments, lawyers for the challengers had argued that the courts are the only institution that can remedy partisan gerrymandering. But, he posited, states have in fact taken action to address the problem. Why should we wade into this, Gorsuch asked Emmet Bondurant, who argued on behalf of one group of challengers in the North Carolina case, when that alternative exists?

Justice Brett Kavanaugh echoed this concern. He told Allison Riggs, who argued for a second group of challengers in the North Carolina case, that he understood "some of your argument to be that extreme partisan gerrymandering is a problem for democracy." Referring to activity in the states and in Congress to combat partisan gerrymandering, Kavanaugh asked whether we have reached a moment when the other actors can do it.

Allison J. Riggs for appellees League of Women Voters in *Rucho v. Common Cause* (Art Lien)

Riggs responded that North Carolina, at least, is not at that moment. When Kavanaugh responded, "I'm thinking more nationally," Riggs shot back that "other options don't relieve this Court of its duty to vindicate constitutional rights."

Chief Justice John Roberts also seemed to suggest at one point that the political process could take care of partisan gerrymandering. Partisan identification, he told Bondurant, is not the only thing on which people base their votes. A vote may hinge on a specific candidate, or who is at the top of a ticket, Roberts observed. When Bondurant pushed back with references to findings by social science experts, Roberts countered that "a lot of predictions turn out to be wrong." In the 2018 election, for example, a "lot of things that were never supposed to happen, happened."

Justice Stephen Breyer searched out loud for a formula that would capture what he characterized as the "real outliers." He proposed a standard that would bar challenges to districting maps created by independent redistricting commissions, but that would deem a map an unconstitutional partisan gerrymander if a party wins a majority of the statewide vote but the other party wins more than two-thirds of the available seats.

Clement was unenthusiastic, telling Breyer that there is "so much in that that I disagree with." Citing now-retired Justice Sandra Day O'Connor, Clement referred to any problems created by partisan gerrymandering as "largely self-healing." By contrast, he warned darkly, if the Supreme Court were to rule that courts can review partisan-gerrymandering claims, partisan-gerrymandering cases will come to the Supreme Court – which will have to review them, because redistricting cases are among the narrow set of cases with an automatic right of appeal to the Supreme Court – "in large numbers." "And once you get into the political thicket," Clement continued, "you will tarnish the reputation of this Court for the other cases where it needs that reputation for independence."

Riggs offered a similar appeal, although with a very different perspective, toward the end of her argument. She stressed that, "with all due respect, Justice O'Connor was not correct. This isn't self-correcting." And although "the reputation

of the Court as an independent check is an important consideration," "the reputational risk to the Court of doing something is much, much less than the reputational risk of doing nothing, which will be read as a green light for this kind of discriminatory rhetoric and manipulation in redistricting from here on out."

In the Maryland case, Steven Sullivan, the Maryland solicitor general, argued for the state, which agrees that the Supreme Court should establish a workable standard to ferret out unconstitutional partisan gerrymandering but has nonetheless urged the justices to overturn the lower court's decision in this case.

Steven M. Sullivan, Maryland solicitor general (Art Lien)

Sullivan quickly ran into questions from Justice Elena Kagan, who told him that the partisanship in this case was "excessive" "under any measure." The shift of Republicans out of and Democrats into the district ensured that Republicans will never win this seat again and that they now have only one member in Maryland's eight-member congressional delegation, Kagan emphasized, even though they make up 35 percent of the state's population.

Kagan later tried to make the point that, if the Supreme Court were to rule for the plaintiffs in the Maryland case, it would not actually lead to a flood of redistricting lawsuits. This case is easy, she told Michael Kimberly, who argued on behalf of the plaintiffs, because of the "bragging" by state officials about how they had drawn the districts to favor Democrats. But once the court has made clear that partisan gerrymandering is unconstitutional, she continued, there wouldn't be any bragging, and it "would really raise the bar" for plaintiffs to show that the alleged gerrymandering had had "dramatic effects." And in the end, Kagan contended, lawsuits would only target the "worst of the worst" in partisan gerrymandering.

Michael B. Kimberly for appellees in *Lamone v. Benisek* (Art Lien)

Roberts appeared sympathetic to the plaintiffs' challenge, which rested on the First Amendment. It does seem, he told Sullivan, like the state is retaliating against Republicans. What's wrong with that argument?

When Sullivan responded that the plaintiffs' First Amendment retaliation theory had never been used before in this context, Roberts responded that he didn't know why it wouldn't apply here. Do you think, Roberts asked, that it's all right to retaliate against Republicans from this district because of how they voted?

Kavanaugh asked the attorneys in each case whether the Constitution requires proportional representation – that is, that a party's share of seats be proportional to the statewide vote. He was also interested in whether proportional representation might be a workable standard for reviewing partisan-gerrymandering claims. He lamented that "everyone seems to be running away" from proportional representation "even though it all seems to come back to proportional representation."

During the oral arguments in last term's partisan-gerrymandering cases, Roberts was deeply concerned about the effect on the Supreme Court's institutional reputation if it were to get involved in partisan-gerrymandering cases. Although Roberts may not have voiced those worries today, Clement clearly tried to evoke them. Even if the court's four more liberal justices are all in favor of the court's getting involved in partisan-gerrymandering cases, they would need to pick up one more vote – in all likelihood, from either Kavanaugh or Roberts – but it's not clear after today's argument whether they can enlist at least one of those justices.

*This post was originally published at Howe on the Court.*

Justin Levitt *Guest*
Posted Mon, February 11th, 2019 2:07 pm

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# Symposium: Clarity of the record should bring clarity of purpose

*Justin Levitt is a professor at Loyola Law School, Los Angeles; he runs the website "All About Redistricting."*

Partisan gerrymandering is back. There are two cases before the Supreme Court this term: a Democratic gerrymander in Maryland and a Republican gerrymander in North Carolina. The cases are different – and though neither is perfect, the basic problem of partisan political entrenchment is unlikely to be presented more cleanly. The evidentiary record in each case is firmly turned up to 11.

Last term, the Supreme Court also had two partisan-gerrymandering cases. And though the court essentially punted, its approach offers some insights relevant to the pending sequels.

One insight arises from the resolution. In *Gill v. Whitford*, the Supreme Court avoided the merits of the partisan-gerrymandering claim by focusing on standing. In a claim framed as premised on the impermissible dilution of partisan voting power, the court held that individual voters would need to show injury district by district.

It may be possible to divorce the showing of injury for standing purposes from the ultimate theory of harm on the merits. (The Supreme Court's theory of standing in gerrymandering cases is, charitably, odd. For example, when a district is both predominantly and unjustifiably drawn based on race, a voter drawn into the district based on their race has standing, but a voter drawn out of the district based on their race does not.)

But if the Supreme Court decides that it's not inclined here to separate the two, and the merits of a vote-dilution case also rise or fall district by district, that's trouble. Dilution depends on knowing what the baseline should be. You only know that a drink is diluted when you know it falls outside a normal range of what it should taste like. You only know that a district is diluted when you know it falls outside the normal range of what its composition should be.

It's intelligible to think of such a range in the context of the partisan composition of a statewide distribution of districts. A greater proportion of Republicans in one district often means a lesser proportion in the district next door, and those tradeoffs lead to a more or less normal range of partisanship in various iterations of the overall district mix. But it's a significantly harder sell to determine what the partisan composition of any individual district should be. Given the nearly infinite array of otherwise legal choices for drawing a particular district on its own, it's going to be significantly harder to convince a court that any given outcome falls outside the permissible range. The great legal scholar Adm. Ackbar correctly diagnosed this jurisprudential path.

I think an alternative insight from the cases last term has more promise, and it's not premised on thinking of the issue as a matter of vote dilution. It's an insight that lamentably never made it into either opinion, but was Justice Anthony Kennedy's focus at oral argument. It was the first question he asked in *Gill* of the state legislature's advocate, and it was the question to which he repeatedly returned — indeed, it was his last question of the argument. Nearly six months later, he returned to ask the very same question to the state's counsel in *Benisek v. Lamone*.
That's not because he was growing senile. That's because he thought the question was pivotal.

Here's the question: "If the state has a law or constitutional amendment that's saying all legitimate factors must be used in a way to favor party X or party Y, is that lawful?" Or, if you prefer its articulation in *Benisek*: "Suppose the Maryland constitution had a provision that required that partisan advantage for one party be the predominant consideration in any districting. Lawful or not?"

In each case, the advocates defending their states' gerrymanders gave the same correct answer: not OK. If redistricting for partisan advantage is the goal of the process, plain and unambiguous on the face of the statute, it's unconstitutional as a matter of federal law.

The record in the pending North Carolina case is, in effect, Kennedy's hypothetical come to life. Statewide, North Carolina was a 50-50 state in 2008, a 51-49 state in 2012, and a 52-48 state in 2016. But from the state's official adopted redistricting criteria: "The Committee shall make reasonable efforts to construct districts … to maintain the current partisan makeup[: 10 Republicans and 3 Democrats.]" From the chair of the redistricting process, in an on-the-record committee hearing: "I propose that we draw the maps to give a partisan advantage to 10 Republicans and 3 Democrats because I do not believe it's possible to draw a map with 11 Republicans and 2 Democrats." And again: "I'm making clear that our intent is to use — is to use the political data we have to our partisan advantage." And again: "I acknowledge freely that this would be a political gerrymander."

(The evidence in Maryland was more hidden from the public eye, but not more equivocal.)

Kennedy may have left the Supreme Court, but the legal answer he received hasn't changed. An explicit attempt by officials to use government power for partisan advantage, not through the appeal of policy, but by skewing state rules to punish citizens for their opposing political views, is unconstitutional. That should be a very conservative position.

Indeed, this is already unremarkable black-letter law in most contexts. In public employment, for example, aside from select policy-making positions, the state may not favor or disfavor individuals because of their partisan affiliation. The state may not even favor or disfavor individuals because of their perceived political affiliation, right or wrong.

This may already be unremarkable black-letter law in the redistricting context as well. A population variance of less than 10 percent among state legislative districts generally raises no constitutional concern. If the reason for that variance is one of hundreds of legitimate factors, there's no constitutional problem. But in *Cox v. Larios*, the Supreme Court summarily affirmed a lower court's decision that if the reason for a minor variance is deliberate partisan advantage, the plan is unconstitutional.

There have not, thus far, been five votes on the Supreme Court to answer Kennedy's question in a published opinion as candidly as the advocates did. But there has also, thus far, not been a record nearly as clear — or as publicly proud of the pursuit of maximum partisan advantage — as in North Carolina.

It's not unreasonable to speculate that the Supreme Court's hesitation may stem from fear of opening the proverbial floodgates to unwarranted claims of partisan advantage. Experience suggests that the "floodgates" concern needn't bother the justices overmuch. Since *Larios* was decided in 2004, there have been thousands of state and local legislative maps with a population variance, but the case has been cited only seven times by federal appellate courts substantively reviewing allegations of improper political motivation in the redistricting process. And despite decades of adverse employment actions against public employees, the federal courts have not been swamped by a tsunami of flawed claims asserting partisan political motive.

Still, even if the Supreme Court has concerns about the hypothetical marginal case, the clarity of the North Carolina record suggests no reason for hesitation here. There's a ready analogy from just last term. In *Lozman v. Riviera Beach*, the court addressed Fane Lozman's claim that he had been arrested in retaliation for protected speech. Lozman conceded probable cause for the arrest, which means that in a disputed factual context, the claim would turn on real proof of impermissible motive. The court expressly noted "a risk that the courts will be flooded with dubious retaliatory arrest suits." But Lozman alleged a premeditated municipal plan of retaliation susceptible to objective evidentiary proof — and for eight justices, whether or not a claim could be sustained in other circumstances, that was enough to demand relief. "[W]hen retaliation against protected speech is elevated to the level of official policy," said the court, "there is a compelling need for adequate avenues of redress."

There's been no political retaliation more objectively official than the partisan Tarheel Takedown.

It may be that a judicial decision on this record would just drive partisan gerrymandering underground. But even that would be an impact of no small value. Less obvious partisan gerrymanders are also less extreme.

Indeed, a decision to cut off obvious partisan gerrymanders, along the lines of Kennedy's hypothetical, might well work in the redistricting arena as *Batson v. Kentucky* has worked in regulating race-based peremptory challenges. Justice

Thurgood Marshall recognized that *Batson* would not stop all racism in the peremptory process. But he also knew that a process with *Batson* would stop the manifestation of racism in peremptories more effectively than a process without it.

The same is true in redistricting. North Carolina Republicans were blatant in their pursuit of partisan advantage. Maryland Democrats were less blatant but equally committed. On this record, as Guy-Uriel Charles and Luis Fuentes-Rohwer have explained, a failure to rein in renegade legislators would be not an expression of passive virtues, but an active abdication of constitutional responsibility and an open invitation to abject partisan warfare.

If this term brings another punt, or worse, legislators nationwide would learn the lesson that North Carolina legislators openly espoused: In states without the public-initiative process or robust state-court oversight, there is no meaningful consequence to using government power to punish partisan enemies. Think politics are polarized now? You ain't seen nothing yet.

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# High Court May Finally Settle Partisan Gerrymandering Issue

By **Junaid Odubeko and Mike Stephens** (April 8, 2019, 2:29 PM EDT)

On March 26, 2019, the United States Supreme Court heard oral arguments in two pivotal gerrymandering cases that could either finally open the door to political gerrymandering claims or reject the validity of such claims entirely.

Junaid Odubeko

The first case, Rucho v. Common Cause, involves the congressional map for the state of North Carolina, drawn by the Republican-controlled state legislature for the second time in the past decade. Although the previous congressional map was struck down in 2016 for racial gerrymandering, the plaintiffs have argued that this time the map is unconstitutional because the districts were drawn to give Republican candidates a distinct partisan advantage.

Indeed, Republicans obtained 10 of the 13 congressional districts, or 76.92%, in the 2016 election, while only receiving 53.22% of the statewide vote. In 2018, the U.S. District Court for the Middle District of North Carolina invalidated the map, holding that the 2016 redistricting plan violated the equal protection clause, the First Amendment and Article I of the U.S. Constitution.

Mike Stephens

In the second case, Lamone v. Benisek, a group of Republican voters argue that one Democratic drawn congressional district in Maryland is also an unconstitutionally drawn political gerrymander. Benisek focuses specifically on Maryland's sixth congressional district, where, in the 2012 redistricting process, the Democrat-controlled legislature removed roughly 66,000 Republican voters and replaced them with nearly 24,000 Democratic voters. Under the new map, the Republican incumbent lost the 2012 election by almost 21%, after having comfortably won in 2010 under the old map by nearly 28%.

To achieve this, the legislature contorted the Sixth District, which had traditionally extended across Maryland’s northern border, to reach the Washington, D.C., suburbs of Gaithersburg and Germantown. In 2018, the U.S. District Court for the District of Maryland held that the redistricting violated the First Amendment, by infringing on the plaintiffs’ representational and associational rights based on their party affiliation and voting history.

In the past, the Supreme Court has struggled with how to appropriately handle claims for partisan gerrymandering. In 1986, the court held in Davis v. Bandemer that partisan gerrymandering claims were justiciable, although only a plurality of the court stated that partisan gerrymandering violated the equal protection clause. Notably, the plurality couldn’t agree on a standard for addressing these claims.

The high court took up the issue again in the 2004 case of Vieth v. Jubelirer. Vieth involved a challenge to the post-2000 redistricting of Pennsylvania’s congressional districts. The Supreme Court split badly in Vieth. In Justice Antonin Scalia’s plurality opinion, the four conservative justices held that partisan gerrymandering was a political question that was off limits to the courts, because there are no “judicially discernible and manageable standards” for gauging when mapdrawers went too far, effectively overturning the court’s decision in Bandemer.

Four other justices disagreed. They said it was proper for courts to intervene in partisan gerrymandering cases, and proposed various tests for determining when a partisan gerrymander had occurred. Falling between the two camps, Justice Anthony Kennedy affirmed that partisan gerrymandering is an issue courts can decide, but said none of the proposed standards would suffice.

Although Kennedy concurred in the conservatives' judgment, he refused to believe that the court should foreclose all relief for political gerrymandering, famously stating that just because "a workable standard for measuring a gerrymander's burden on representational rights has not yet emerged does not mean that none will emerge in the future." Kennedy also seemed to invite future plaintiffs to bring their claims under the First Amendment, saying that it may offer "a more prudential basis for judicial intervention in political gerrymandering cases."

Last year, in Kennedy's last year on the court, the court considered the most high-profile partisan gerrymandering case since Vieth — Gill v. Whitford. In an attempt to answer Kennedy's invitation, the plaintiffs in Gill relied on a new constitutional test, the efficiency gap, to strike down Wisconsin's post-2010 state legislative redistricting plan. The efficiency gap is a standard for measuring partisan gerrymanders that counts the number of votes each party "wastes" in an election to determine whether either party enjoyed a systematic advantage in turning votes into seats.

Any vote cast for a losing candidate is considered a wasted vote, as are any votes for a winning candidate in excess of the number needed to win. Although the plaintiffs in Gill prevailed in the lower court, the Supreme Court punted on the substantive constitutional questions in Gill, and remanded the case back to the lower court on standing grounds. The court held that the plaintiffs' claim that Wisconsin Democrats as a whole had suffered a statewide injury failed to show an injury suffered by individual voters, a necessary element for standing. The court also took up the Benisek case last year, but again punted on considering the merits of the constitutional issue.

With the retirement of Kennedy from the Supreme Court, many observers believed the issue of partisan gerrymandering would not again reach the high court for several years. This belief changed when the court granted cert to hear Rucho. The North Carolina case is a test case of sorts for the lengths a legislature can go to draw maps purely for partisan advantage.

The factual record demonstrates the unabashed partisan intent of the North Carolina legislature to draw a congressional map advantaging Republicans. Indeed, the representative responsible for drawing the new maps remarked that he drew the maps to advantage Republican candidates because he thought "electing Republicans is better than electing Democrats." He also declared that the only reason he drew the plan to elect Republicans to 10 out of 13 congressional districts was because he could not draw a map that would elect Republicans to 11 out of 13 congressional districts.

At the arguments before the Supreme Court, the court's conservative bloc signaled skepticism towards judicial intervention, and probed the map's challengers for a standard that it could apply nationwide. In so doing, they repeatedly questioned the challengers about whether their remedies would usher in proportional representation, a standard rejected by former justices Sandra Day O'Connor and Kennedy in numerous opinions.

The court's liberal bloc was more supportive of intervention. Justice Brett Kavanaugh emerged as a potential swing vote on the issue, as he seemed to seriously question whether the equal protection clause mandated some type of judicial intervention. At the same time, he pondered whether the issue might be too "big of a lift" for the court, and continually challenged the litigants on whether their proposed standard would create a constitutional requirement for proportional representation.

Although much of the focus on partisan gerrymandering has revolved around congressional maps, the court's decisions in Rucho and Benisek will likely impact state legislative races in a much more meaningful fashion. Currently, 30 states allow their legislatures to draw the maps for state legislative races, meaning the legislators are able to weigh in on how their own districts will be drawn. Moreover, an effective political gerrymander by the majority party all but guarantees that the same party will be in power 10 years later for the next round of redistricting.

Both the Republican and Democratic parties have recently begun to recognize the importance of

securing a majority in state legislatures, given the level of political entrenchment that can be achieved through partisan gerrymandering. A decision from the Supreme Court prohibiting partisan gerrymandering could create an immediate impact at state capitols throughout the country. In addition, local races that hold partisan elections could also be impacted, inviting scrutiny to the redistricting process applied at the city and county level.

In the past, Kennedy's unwillingness to concede that no judicially manageable standard could ever be created appeared to be the only obstacle preventing the Supreme Court from outright rejecting partisan gerrymandering claims. Perhaps Kennedy's retirement finally paves the way for clear guidance regarding the viability of these claims. The oral arguments in Rucho and Benisek depict a court still sharply divided on the justiciability of partisan gerrymandering claims and the best constitutional test, if any, to apply to reviewing gerrymandered maps.

Will the court punt on the issue again? Will the court announce a standard that stops the most extreme partisan gerrymanders? Are Justice Roberts and Kavanaugh actually in play? The court's decision is expected at the end of its term in June.

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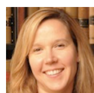
Amy Howe *Independent Contractor and Reporter*
Posted Mon, March 11th, 2019 2:26 pm

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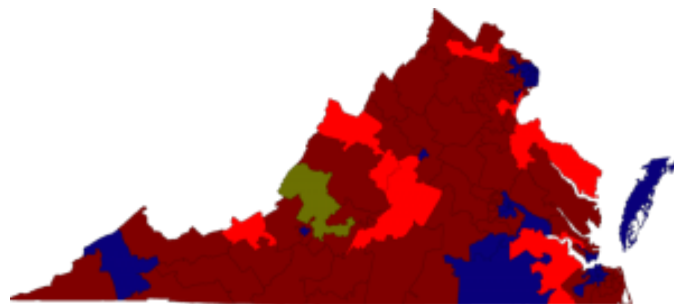
# Argument preview: Virginia racial gerrymandering case returns to Supreme Court

The issue of gerrymandering will be front and center at the Supreme Court in March. On March 26, the justices will tackle two of the highest-profile cases of the term, involving partisan gerrymandering – the idea that state officials went too far in considering politics when redistricting, by drawing maps that favor one political party at another's expense. But first, on March 18, the justices will once again tackle another thorny issue: accusations of racial gerrymandering, the idea that legislators relied too much on race during redistricting.



The events giving rise to *Virginia House of Delegates v. Bethune-Hill* began back in February 2011, when Virginia's General Assembly received new data from the 2010 census and started to draw a new map for the state's House of Delegates. The final map included 12 districts in which 55 percent of the voters were African-American.

The state legislature adopted the map, and Virginia's governor approved it. At the time, because Virginia had a history of voting problems, it was also required by federal voting laws to obtain federal approval before changing its maps – a process known as "preclearance" – which it did.

But residents of those districts went to court, arguing that the districts were the product of unconstitutional racial gerrymandering. In particular, the challengers alleged, African-American voters had been illegally packed into the districts, diluting their voting strength in nearby districts and making those districts more hospitable to Republicans.

The House of Delegates stepped in to defend the law, and a federal district court ruled against the challengers, who appealed to the Supreme Court. (Redistricting cases are among the small set of cases with an automatic right of appeal to the Supreme Court.) In 2017, the Supreme Court ruled that the district court had applied the wrong legal standard to the challengers' claims. The Supreme Court agreed that one of the 12 districts did not violate the Constitution, but it ordered the lower court to take another look, this time using the correct standard, at the other 11 districts.

When the district court reconsidered the case, the court found that race had been the main consideration used to draw each of the 11 remaining districts. Because the legislature had not shown that it needed to aim to have the same percentage of African-American adults in each of the "vastly dissimilar" 11 districts to comply with federal voting-rights laws, the district court concluded, the districts violate the Constitution. This time, the House of Delegates appealed to the Supreme Court, which agreed to hear the case last fall.

There are two main questions in the case. The first issue, which the justices asked both sides to brief, is whether the House of Delegates has a legal right to appeal – known as standing – to the Supreme Court. Because the state officials who were the defendants in the lawsuit did not appeal, the justices would not be able to decide the merits of the case if they determined that the legislature does not have standing.

Virginia Solicitor General Toby Heytens, representing the state officials, argues that the legislature does not have standing. Under state law, he tells the justices, the state's attorney general – not the legislature – is responsible for representing the state. In this case, Heytens stresses, after several years of expensive litigation, the attorney general decided that the best course of action was not to appeal, but instead to move forward and come up with a new plan that fixes the problems before the 2019 election. Although the legislators may not agree with that decision, Heytens argues, they don't have the legal power to override it.

The House of Delegates counters that the legislature both created the redistricting plan and defended it in the lower court. Indeed, the House of Delegates notes, the legislature – with the blessing of state officials – also defended the districts during the first round of litigation in the Supreme Court. For the state's attorney general to argue now, after "years of sitting on the sidelines," that only he can decide whether to appeal the lower court's decision to the Supreme Court is "gamesmanship of the worst sort."

But the challengers, along with the state officials and the federal government, push back. The fact that the legislature was allowed to defend the plan in the lower court does not mean that the legislature has a legal right to appeal to the Supreme Court. To enter the case, they argue, the legislature only needed to have an interest in the case. However, to have the right to appeal, the legislature needs to show an injury from the lower court's ruling – which it can't do.

From the House of Delegates' perspective, it clearly been injured: The district court ordered it either to draw new maps quickly or to hand over the power to draw new maps to a court-appointed expert.

The challengers reject this argument. The legislature was not injured when the lower court struck down the map and ordered it to draw a new one, they contend; that is what "courts routinely do." To the extent that the legislature is arguing that the court took over its role by having an expert draw the new map, they continue, the legislature has only itself to blame: The court gave the legislature a chance to draw a new map, but the legislature didn't act.

The second question before the justices is whether the 11 districts are indeed unconstitutional racial gerrymanders.

Defending the 11 districts, the House of Delegates explained that when it drew the map, it was operating under "extraordinary time pressure." Virginia holds its state elections in odd-numbered years, which means that the legislature only had about six weeks after the 2010 census data was released, in early 2011, to "analyze the data, receive public input, collect requests from incumbents, make countless discretionary decisions about how to conduct the map-drawing process, and then" actually draw the map – which needed to be approved by the legislature and the governor and precleared by DOJ in time for the 2011 elections.

The House of Delegates acknowledges that it considered race when it drew the districts at the heart of this case. Indeed, it notes, it had to do so, because the Voting Rights Act prohibited Virginia from changing its map unless the state could show that the new map wouldn't make it more difficult for minority voters to elect the candidate of their choice. Therefore, the legislature explains, it set a target of 55-percent African-American voters in all 11 districts to maintain similar levels in the majority-minority districts "that were already above or near that number" – allowing it to comply with both the VRA and "traditional districting criteria." Therefore, the legislature stresses, although race was a factor, it was not the primary consideration.

Even if race had been the primary consideration, however, the legislature continues, the map is still constitutional as long as the legislature had a good reason to believe that the VRA required it to consider race. This, the legislature asserts, allows it to avoid a Catch-22 scenario, in which a map is an unconstitutional racial gerrymander if it puts too many minority voters in a district, but violates the VRA if it puts too few minority voters there.

In this case, the legislature adds, there were good reasons for the legislature to think that each district should be made up of over 50 percent African-American voters, because almost all the districts already had similar populations; under the VRA, the legislature needed to avoid drawing lines that would lower that rate. And even if it arguably could have used a slightly lower target, the legislature suggests, it is enough that it believed in good faith that it was required to use that number to comply with the VRA.

The legislature launches a broader attack on the district court's decision striking down the 11 districts, calling it a "clear threat to the core sovereign function of redistricting" that "all but eliminates what little breathing room legislatures have to balance the competing demands of the VRA and the Constitution." Race will inevitably play a role in redistricting, the legislature emphasizes. The only question is "how race should be used, and who should consider it in drawing maps—popularly-elected and politically-accountable legislators or Article III courts and out-of-state special masters."

The federal government backs the challengers in arguing that the legislature should not be allowed to appeal. However, it tells the justices that if the Supreme Court does reach the merits, it should send the case back for another look because the district court "again failed to perform a holistic analysis of each individual district." For example, the government observes, the district court attributed "across-the-board significance" to the legislature's target of having 55 percent of the voters in each district be African-American, without looking at what effect that threshold actually had on a particular district's boundaries.

The challengers defend the lower court's decision striking down the 11 districts as "a straightforward application" of the Supreme Court's recent decisions. There is no dispute, they say, that the lines for the districts were drawn with an eye toward guaranteeing that at least 55 percent of each district's voters would be African-American. Getting to that target was "no easy feat," they posit; instead, the legislature was required to put aside traditional redistricting criteria and divide up the residents of cities, towns and "even a military base" by race to achieve its goal.

Because race was a primary factor motivating the maps for the 11 districts, the challengers continue, the only way to demonstrate that the legislature had good reason to believe that it was required to use race to comply with the VRA was by showing that it looked into the need to do so, based on the conditions in each district. But the district court in this case found that the legislature had not conducted any analysis at all to determine what percentage of African-American voters each district would have to contain to comply with the VRA.

More generally, the challengers dismiss the legislature's arguments as excuses, reiterating that "states cannot pass legislation for predominantly racial reasons merely because of the press of time." And the legislature cannot fail to investigate what percentage of African-American voters was appropriate to comply with the VRA, assume that all 11 districts are alike and then ask for the Supreme Court's blessing. Such a rule, the challengers say, would be exactly contrary to the Supreme Court's voting-rights cases.

Even as the Supreme Court prepares to hear oral argument on the constitutionality of the current maps next week, efforts to create a new map for the 2019 elections, with the help of a court-appointed expert, are moving forward in the lower court. In January, the Supreme Court rejected the legislators' request to put those proceedings on hold until it issues its decision – which will likely come in May or June. Meanwhile, the state is scheduled to hold its primary elections in June, with the general election to follow in November.

*This post was first published at Howe on the Court.*

# Virginia House of Delegates v. Bethune-Hill

redistricting
voting rights act
equal protection clause
standing
RACIAL GERRYMANDERING

## Issues

Does a state legislature have standing to appeal a district court's order to enact a remedial redistricting plan; and, does that state legislature violate the Equal Protection Clause when it uses race to draw legislative districts during the post-census redistricting process to comply with the Voting Rights Act?

**Oral argument:** March 18, 2019**Court below:** United States District Court for the Eastern District of VirginiaThe Virginia House of Delegates argues that it not only has the proper standing to appeal the district court's decision rejecting its redistricting plan, but also that race did not impermissibly predominate in the redistricting process. But even if race did predominate, the House further contends that its redistricting plan satisfies strict scrutiny because it must consider race to comply with the Voting Rights Act of 1965. Bethune-Hill and other Virginia voters as well as Virginia Attorney General Mark Herring respond that the House does not have standing to appeal because it does not suffer a particularized and concrete injury. Furthermore, Bethune-Hill notes that even if the House has proper standing, race predominated in the redistricting process and the redistricting was not narrowly tailored enough to survive strict scrutiny. The outcome of this case has implications on future cases in which legislative bodies may wish to intervene, as well as on racial gerrymandering challenges.

## Questions as Framed for the Court by the Parties

1. Whether the district court conducted a proper "holistic" analysis of the majority-minority Virginia House of Delegates districts under the prior decision in this case, Bethune-Hill v. Virginia State Board of Elections, even though it ignored a host of evidence, including the overwhelming majority of district lines, which were carried over unchanged from the prior map; the geographic location of population disparities, which imposed severe redistricting constraints and directly impacted which voters were moved into and out of the majority-minority districts; and the degree of constraint the House's Voting Rights Act compliance goals imposed in implementation, which was minimal;

2. Whether the Bethune-Hill "predominance" test is satisfied merely by a lengthy description of ordinary Voting Rights Act compliance measures;

3. Whether the district court erred in relying on expert analysis it previously rejected as unreliable and irrelevant and expert analysis that lacked any objective or coherent methodology;

4. Whether the district court committed clear error in ignoring the entirety of the house's evidentiary presentation under the guise of credibility determinations unsupported by the record and predicated on expert testimony that should not have been credited or even admitted;

5. Whether Virginia's choice to draw 11 "safe" majority-minority districts of around or above 55 percent black voting-age population ("BVAP") was narrowly tailored in light of the discretion the Voting Rights Act afforded covered jurisdictions to "choose to create a certain number of 'safe' districts, in which it is highly likely that minority voters will be able to elect the candidate of their choice," under Georgia v. Ashcroft, or the requirement the Voting Rights Act, as amended, imposed on covered jurisdictions "to prove the absence of racially polarized voting" to justify BVAP reductions towards or below 50 percent BVAP;

6. Whether the district court erred in ignoring the district-specific evidence before the house in 2011 justifying safe districts at or above 55 percent BVAP; and

7. Whether appellants have standing to bring this appeal.

# Facts

After receiving the 2010 census results data, the Virginia state legislature ("General Assembly") redrew the state's legislative districts. ***Golden Bethune-Hill v. Virginia State Board of Elections ("Bethune-Hill I")*, 326 F. Supp. 3d 128, 137 (E.D. Va. 2018).** This included all 100 Virginia House of Delegates ("House") districts. ***Id.*** The new, redrawn districting plan would go into effect for the 2011 election cycle. ***Id.*** Delegate Steven Christopher Jones, the then-Chairman of the House Committee on Privileges and Elections, directed the redistricting efforts and was the chief patron of the bill setting forth the new, redrawn districts. ***Id.***

In 2011, Virginia was subject to Section 5 of the Voting Rights Act of 1965, which prohibited the redistricting process from "diminish[ing] the number of districts [compared to the prior plan] in which minority groups can elect their preferred candidates of choice." ***Id.* at 138.** To comply with the "non-retrogression" requirement, Delegate Jones determined that the twelve majority-minority districts from the prior decade's legislative district plan would have at least a 55% Black voting age population ("BVAP"). ***Id.*** That is, the districts would need to be drawn in a manner such that the voting age population in the twelve majority-minority districts would be at least 55% Black. ***Id.***Delegate Jones based his BVAP determination on House District 75 ("HD75"). ***Id.***

In 2014, Golden Bethune-Hill and eleven other Virginia voters (collectively "Bethune-Hill") filed a civil action against the Virginia State Board of Elections, the Virginia Department of Elections, and election officers, alleging that the twelve majority-minority districts were racial gerrymanders in violation of the Equal Protection Clause of the Fourteenth Amendment. ***Golden Bethune-Hill v. Virginia State Board of Elections* ("*Bethune-Hill II")* (E.D. Va. Feb. 14, 2019) at 3.** In a 2015 bench trial, the United States District Court for the Eastern District of Virginia concluded that, when drawing eleven of the twelve districts, the legislature did not predominantly rely on race considerations. ***Id.* at 4.** Although the court found that HD75 had been drawn with race as its predominant concern, the court ultimately determined that the Virginia State Board of Elections' use of race to draw that district was narrowly tailored as required under strict scrutiny. ***Id.*** The Supreme Court, on appeal, reversed the lower court's decision with instructions to apply a "holistic analysis" regarding whether the Virginia State Board of Elections predominantly relied on race in the eleven districts. ***Id.***

During the second trial, which was held in 2017, the district court examined new evidence and found that the legislature in fact did improperly rely on racial considerations, in part because the legislature applied a minimum 55% BVAP requirement to the eleven districts. ***Id.*** The court concluded that the legislature moved voters to certain districts primarily on the basis of race over traditional districting criteria and thus failed to satisfy strict scrutiny. ***Id.*** Subsequently, the court ordered the General Assembly to create a remedial redistricting plan. ***Id.* at 5.**

The General Assembly did not enact a remedial plan, and so the district court appointed an expert to assist the court in redrawing the maps itself. ***Id.*** In addition, Bethune-Hill and the other voters submitted two proposals, as did the Virginia House of Delegates as intervenors. ***Id.*** Two interested non-parties—the Virginia State Conference of NAACP Branches and student groups from the College of William and Mary Marshall-Wythe School of Law—also submitted two proposals. ***Id.***The court's expert considered all seven plans and submitted several alternatives to the court as well. ***Id.* at 5–6.**

The court upon review adopted a Final Remedial Plan, which incorporated the expert's report and encompassed all 100 districts in Virginia, and the court directed the state to use that plan in the 2019 Virginia House of Delegates elections. ***Id.* at 6, 33.** In contrast, the dissent asserted that the plaintiffs had in fact proven a violation of the Equal Protection Clause, and so the court did not need to change the original redistricting plan. ***Id.* at 34.**

In 2018, the Virginia House of Delegates filed to appeal the lower court's decision as appellant-intervenors. **State Appellees' Motion to Dismiss, The Virginia State Board of Elections et al. at 8.** The Virginia State Board of Elections and others moved to dismiss the appeal on the grounds that the Virginia House of Delegates lacked standing to appeal. ***Id.* at 5.** Bethune-Hill also moved to dismiss the appeal because the lower court's holistic analysis of the legislature's use of race considerations was done correctly. **Motion to Dismiss or Affirm, Golden Bethune-Hill at 9.**

In December 2018, the Virginia House of Delegates applied for a stay pending the appeal to preserve the original redistricting plan. **Emergency Application for Stay Pending Resolution of Direct Appeal to This Court, Virginia House of Delegates et al. at 11.** The Court denied the stay in January 2019 and set the case for argument, to be heard on March 18, 2019.

# Analysis

## *STANDING TO APPEAL*

The Virginia House of Delegates ("House") asserts that it has standing to bring this appeal. **Brief for Appellants, Virginia House of Delegates et al. at 22.** The House contends that it not only has a "personal stake in the outcome" of the case, but it also suffers a distinct injury from the lower court invalidating the redistricting map it drew. ***Id.*** The invalidation inflicts a particularized and concrete injury, according to the House, because the court usurps the House's redistricting authority and forces the House's members to run for reelection in the new, court-drawn districts while simultaneously representing their current district. ***Id.* at 23–28.** The House compares this case to *Sixty-Seventh Minnesota State Senate v. Beens*, where the Supreme Court held that the Minnesota State Senate had standing to appeal after it intervened as a defendant in district reapportionment litigation, and argues for a similar outcome. ***Id.* at 25.** Additionally, the House notes that Bethune-Hill, Virginia Attorney General Mark Herring, and the district court all failed to object to the House's intervention in the original suit. ***Id.* at 23.** The House continues that it has participated in and overseen all aspects of the litigation without objection from any party until this appeal. ***Id.* at 23–24.** Although the House concedes that state attorneys general usually retain the ability to appeal such cases, the House rejects the notion that Attorney General Herring "alone has a monopoly over whether to appeal a decision." ***Id.* at 24.** And pursuant to the *Karcher v. May*Supreme Court decision and Virginia courts' decisions, the House claims that state law authorizes it to "represent the State's interest in redistricting litigation" when Attorney General Herring declined to do so. ***Id.* at 28–29.**

Bethune-Hill as well as Virginia Attorney General Mark Herring and State appellees respond that the Virginia House of Delegates lacks standing to pursue this appeal because the institution itself does not suffer a legally cognizable injury. **Brief for Appellees, Golden Bethune-Hill et al. at 12; Brief for State Appellees, Virginia Attorney General Mark Herring et al. at 14.** Bethune-Hill contends that the House conflates its intervention under Federal Rules of Civil Procedure Rule 24in the litigation with its standing under Article III of the Constitution. **Brief for Appellees at 13.** While the former requires only an interest in the litigation, the latter requires a concrete and particularized injury—which Bethune-Hill asserts does not exist. ***Id.*** Bethune-Hill further maintains that the House's "divided constituencies" theory of injury does not pass constitutional muster because that outcome happens after every decennial census, and the injury would apply to the individual delegates rather than the institution as a whole. ***Id.* at 14.** Bethune-Hill similarly rejects the House's "redistricting authority usurp[ation]" theory of injury because courts routinely strike down unlawful statutes and must draw the remedial map if the legislative body fails to do so. ***Id.* at 15.** The House's reliance on *Beens* is similarly unavailing, according to Bethune-Hill, because that case considered standing in the context of reducing the number of state senators rather than merely redrawing their districts. ***Id.*** Additionally, Herring notes that Virginia law grants him alone, in his capacity as Attorney General, with the authority to defend challenged state laws and appeal when they are invalidated. **Brief for State Appellees at**

**23–24**. Herring concludes by noting that the Supreme Court has consistently held that the federal government must "speak with one voice," and asserts that the same principle applies to the state governments. ***Id.* at 41–43.**

## *THE PREDOMINANCE ANALYSIS AND THE USE OF RACE IN REDISTRICTING*

The Virginia House of Delegates argues that Bethune-Hill and the other appellees did not satisfy their burden of proving that race predominated the drawing of the challenged districts. **Brief for Appellants at 31.** That is, the House contends, Bethune-Hill cannot demonstrate that lawmakers' "dominant and controlling rationale" was "race for its own sake and not other districting principles" when it redrew the twelve majority-minority districts. ***Id.*** Although Delegate Jones considered race in the redistricting process to comply with Section 5 of the Voting Rights Act of 1965 ("VRA"), the House maintains that Delegate Jones adhered to traditional redistricting principles and that race served as one factor among many in the lawmakers' holistic approach. ***Id.* at 33.** Furthermore, the House asserts that evidentiary record—including "the face of the plan" itself—shows that the 55% BVAP did not dominate or control the redistricting process because none of the districts violated the state's adopted criteria. ***Id.*** The House also notes that Delegate Jones only minimally changed the challenged districts from the previous map and that the individual districts retained their cores and significant proportions of their prior constituencies. ***Id.* at 33, 38–49.** Finally, the House posits that the district court erred by disregarding relevant evidence of race neutrality, dismissing the House's witnesses as not credible, and baselessly rejecting Delegate Jones's explanations for altering geography or constituencies from the previous map. ***Id.* at 34–38.**

In response, Bethune-Hill argues that even if the House has standing to appeal the district court's decision, the district court did not err in determining that race predominated the drawing of the challenged districts. **Brief for Appellees at 17.** The district court, according to Bethune-Hill, reached this conclusion by simply applying the Supreme Court's recent redistricting and gerrymandering decisions and conducting a highly fact-specific analysis based on the evidence and testimony at trial. ***Id.* at 18.** In particular, Bethune-Hill asserts that although using a BVAP requirement when drawing a district does not by itself suggest that race predominated, Delegate Jones's inflexible application of a 55% BVAP floor for all twelve challenged districts suggests that he deviated from traditional districting criteria. ***Id.* at 18–19.** Bethune-Hill points to instances of "stark racial sorting" by Delegate Jones to meet the strict 55% BVAP floor, which included dividing a military base along racial lines into two separate districts. ***Id.* at 19.** Furthermore, Bethune-Hill maintains that Delegate Jones redistricted black voters into the challenged districts at higher rates than other voters. ***Id.*** And even though the challenged districts "did not uniformly converge on 55%," Bethune-Hill argues, Delegate Jones's use of a racial target without compromise strongly suggests that race predominated. ***Id.* at 21.** Bethune-Hill also contends that district core and constituency retention do not inoculate racial predominance; in fact, the district that the Supreme Court struck down two terms ago retained more of its core than nearly every other challenged district. ***Id.* at 22.** Finally, Bethune-Hill concludes that the House's disagreement with the district court's weighing of the evidence, credibility assessments, and dissatisfaction with the law do not constitute legal error in assessing predominance. ***Id.* at 23.**

## *APPLYING STRICT SCRUTINY TO THE CHALLENGED LEGISLATIVE DISTRICTS*

The Virginia House of Delegates argues that even if race predominated the drawing of the challenged districts, the challenged districts still satisfy strict scrutiny. **Brief for Appellants at 49.**The Supreme Court, according to the House, has consistently recognized that complying with the VRA and avoiding retrogression under Section 5 satisfies the compelling interest prong of the strict scrutiny analysis. ***Id.* at 50.** Concerning the narrow tailoring prong of the strict scrutiny analysis, the House asserts that lawmakers need show only that they had "good reasons" for using racial considerations in

their effort to comply with the VRA. ***Id.* at 50–51.** The House contends that lawmakers utilized the 55% BVAP target to avoid retrogression in the twelve minority-majority districts while also accounting for population changes and adhering to traditional districting criteria. ***Id.* at 51.** The House posits that Delegate Jones settled on the 55% BVAP target only after conducting a functional analysis by considering the available data and consulting with the incumbent delegates representing majority-minority districts—one of whom suggested that the BVAP needed to exceed 50%. ***Id.* at 52.** The Supreme Court, the House maintains, approved of this kind of approach when it considered one of the districts two terms ago and ultimately concluded that lawmakers need not determine the precise percentage required by the VRA. ***Id.* at 53, 57.** Demanding that lawmakers calculate surgically precise BVAP targets, the House concludes, "ask[s] too much" of lawmakers who use race in good faith to comply with the "onerous demands" of the VRA. ***Id.* at 57, 60.**

Bethune-Hill responds that the district court did not err in determining that the design process of the challenged districts failed the strict scrutiny analysis. **Brief for Appellees at 47.** Bethune-Hill concedes that there is a compelling state interest in complying with Section 5 of the VRA, but asserts that the design process was not narrowly tailored. ***Id.* at 48.** Delegate Jones, Bethune-Hill contends, devised the 55% BVAP floor by considering only one of the twelve challenged districts. ***Id.* at 49.** Bethune-Hill argues that Delegate Jones's subsequent strict adherence to that 55% BVAP floor in every challenged district without considering each of the individual challenged districts reveals a clear lack of narrow tailoring. ***Id.*** Indeed, according to Bethune-Hill, this one-size-fits-all approach demonstrates that Delegate Jones and the House can establish neither a "strong basis in evidence in support of the race-based choice" nor that they "conduct[ed] a meaningful legislative inquiry." ***Id.* at 48–49.** Therefore, Bethune-Hill claims, the House cannot show that the district court committed clear error in finding that the district design process, based in the unique conditions of a single district, was not narrowly tailored. ***Id.* at 50.** Bethune-Hill adds that the House's "excuses" for its failure to narrowly tailor the process—including time constrains, lack of relevant data, and difficulty in complying with the VRA—are incorrect, unavailing, or both. ***Id.* at 52–55.** Finally, Bethune-Hill concludes that requiring lawmakers to have a "good reason to believe its use of race was justified" and to develop a corresponding evidentiary foundation does not "ask too much" of lawmakers. ***Id.* at 55.**

# Discussion

## *INTERESTS OF STATE LEGISLATORS IN RECEIVING STANDING*

A group of state and federal legislators from Michigan and North Carolina writing in support of the Virginia House of Delegates contend that intervening legislators have Article III standing to appeal such cases because legislators have unique interests at stake. **Brief of Amicus Curiae Lee Chatfield et al., in support of Plaintiffs at 7.** Federal and state representatives, the Michigan and North Carolina legislators assert, are mandated by state and federal constitutions to participate in redistricting. ***Id.* at 8.** Consequently, the legislators argue, representatives must necessarily be a part of any remedies or cases stemming from redistricting; therefore, they must receive standing. ***Id.* at 9–10.** Similarly, the Criminal Justice Legal Foundation, in support of the Virginia House of Delegates, argues that legislators should have Article III standing under a doctrine of broad standing because legislators have a specific institutional interest in challenging orders that affect their obligations to their constituents. **Brief of Amicus Curiae Criminal Justice Legal Foundation, in support of Plaintiffs at 13.**

The United States, in support of neither party, claims that the House in fact lacks standing to appeal the lower court's decision because the House has not demonstrated that it represents the state of Virginia's interests, nor has it demonstrated a cognizable institutional interest in defending the district lines. **Brief of Amicus Curiae United States, in support of Neither Party at 11, 14.**The United States claims that, although government officials may represent their state's interests, Virginia's law

does not state that a legislator can represent the state. ***Id.* at 11.** Although state courts have allowed the House to intervene in state law issues, the United States acknowledges, this does not mean that the House can represent Virginia itself. ***Id.* at 12.** Moreover, the United States argues, a state legislature that enacts a law—in contrast to enforcing a law—does not have an institutional interest. ***Id.* at 14.** If the Court were to allow standing, the United States contends, state and federal legislators would be able to bring all kinds of lawsuits. ***Id.* at 15.** This would potentially increase the amount of litigation in the courts, as well as allow a legislative body to sue whenever it believed its powers were being diluted. ***Id.***

## *RACIAL CONSIDERATIONS AND REDISTRICTING PLANS*

The Virginia House of Delegates asserts that their two-part test—for when race-conscious districting is subject to and satisfies strict scrutiny—ensures that legislatures are allowed to consider race when they need to balance competing liabilities under the Equal Protection Clauseand Section 5 of the Voting Rights Act. **Brief for Appellants, Virginia House of Delegates at 51.** Permitting the narrowly tailored consideration of race, the House contends, allows legislatures to avoid placing too many or two few minority voters in a district and thus to comply with requirements under both the Equal Protection Clause and the Voting Rights Act. ***Id.***

In contrast, the United States alleges that the lower court did not thoroughly analyze whether racial predominance was used in every district; rather, the lower court extrapolated its finding of race-based motives for certain boundaries without considering the presence of other motivations for district drawing. **Brief of Amicus Curiae United States at 32–33.** The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee"), in support of Bethune-Hill, agrees that merely considering race in a redistricting plan does not trigger strict scrutiny. **Brief of Amicus Curiae Lawyers' Committee For Civil Rights Under Law, in support of Respondents at 5.** However, the Lawyers' Committee asserts that strict scrutiny ought to be applied here because there is ample evidence that Virginia's legislature illegitimately prioritized racial considerations over traditional districting principles when drawing the challenged districts. ***Id.* at 8.** The Lawyers' Committee states that expert testimony, as well as the fact that the challenged districts used non-contiguous shapes and divided certain neighborhoods, prove that racial gerrymandering took place. ***Id.* at 8, 11.**

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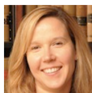
# Acknowledgments

# Additional Resources

- Alex Lemieux, *Federal Court Ruling Alters Virginia House of Delegates Map Ahead of 2019 Elections*, Republican Standard (Feb. 15, 2019).
- *U.S. Supreme Court Agrees to Hear Appeal in Virginia House of Delegates Redistricting Case*, WTKR (Nov. 13, 2018).
- Gregory S. Schneider & Robert Barnes, *U.S. Supreme Court to Take Up Virginia Redistricting Case on Racial Gerrymandering*, Washington Post (Nov. 13, 2018).



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# Argument analysis: Justices divided in Virginia racial-gerrymandering case

The Supreme Court heard oral argument today in a challenge to the map drawn in 2011 for Virginia's House of Delegates. A group of African-American voters allege that the state legislature engaged in racial gerrymandering – that is, it relied too much on race when it drew 11 of the state's districts, which would violate the Constitution. But the state legislators defending the map argue that, although race was one of the factors that the legislature considered, it wasn't the only one. After roughly an hour of debate today, it seemed quite possible, although not certain, that the justices would reject the racial-gerrymandering challenge and uphold the map.

Morgan L. Ratner, assistant to the U.S. solicitor general (Art Lien)

The lawsuit before the Supreme Court today was filed in 2014 by Virginia residents who live in 12 different districts in the state. When the legislature adopted the map in 2011, 55 percent of the voters in each of the 12 districts were African-American. The challengers contended that the legislature had illegally packed African-American voters into these districts, diluting their strength in neighboring districts and giving Republicans an advantage there.

A federal district court ruled for the state legislature, which had stepped in to defend the law. The challengers went to the Supreme Court, which agreed that one of the districts was not the product of racial gerrymandering. The justices sent the case back to the lower court for it to take another look at the remaining 11 districts.

When the case went back to the district court, the court threw out the map. It ruled that race had been the main factor motivating the design of each of the 11 districts. Moreover, the court found, the legislature had not shown that each district needed to have a voting-age population that was 55 percent African-American. The legislature appealed to the Supreme Court, which announced last fall that it would hear the case.

Much of today's oral argument was devoted to a threshold question: whether the legislature has a legal right, known as "standing," to appeal the district court's decision to the Supreme Court in the first place. Arguing for the House of Delegates, attorney Paul Clement had several different arrows in his quiver. First, he argued, the House of Delegates

and its day-to-day operations were themselves affected by the district court's ruling striking down the 2011 map. The districts are not simply about elections, Clement insisted; legislators are also identified by where they come from – for example, the "gentle lady from Norfolk."

Paul D. Clement for appellants (Art Lien)

Justice Ruth Bader Ginsburg was skeptical. Changes in district maps are frequent occurrences, she pointed out. In fact, they happen every time there is a new census.

Justice Sonia Sotomayor was also dubious. She worried aloud that if the House of Delegates were allowed to appeal the district court's decision in this case, it would mean that its counterparts in other state legislatures would be able to do the same in the future – even if, perhaps, the state's attorney general might have a different position. And could individual members of the state legislature also appeal? Sotomayor asked Clement. It would be a "radical new step," Sotomayor concluded.

Clement offered an alternative theory: The House of Delegates also has a right to appeal the decision on behalf of Virginia, even though the state's attorney general insists that only he has the authority to do so. Clement stressed that the House of Delegates – with the blessing of state officials – had defended the map during the case's first trip to the Supreme Court. Indeed, he observed, the justices even used the phrase "the state" to refer to the legislature then, because the House of Delegates was the only defender appearing in the Supreme Court.

Justice Samuel Alito suggested to Clement that he would be "very uncomfortable" trying to decide whether, under Virginia law, the House of Delegates can represent the state in court proceedings, or whether that is a role reserved for the state's attorney general. Alito proposed that the justices should instead ask the Virginia Supreme Court to weigh in on this question of state law, but his colleagues did not show much enthusiasm for that option.

Justice Elena Kagan asked Clement whether, even if he is correct (and Kagan acknowledged that he seems to be) that Virginia's attorney general previously was happy to have the House of Delegates "do the work" and represent the state in defending the districts, that means that the attorney general has permanently delegated the authority to represent the state to the legislature.

"Yes," Clement responded.

Sotomayor criticized Clement's response as a "pretty extreme statement," but Clement held firm, calling it a consequence of the state attorney general's choice.

Toby J. Heytens for appellees, Virginia Board of Elections (Art Lien)

Justice Stephen Breyer was concerned that, if the House of Delegates were not allowed to appeal in a case like this one, partisan divisions in government might lead to inertia in redistricting challenges. Here, for example, the Republican-controlled legislature drew the challenged map, but the state's Democratic attorney general decided not to appeal the district court's decision striking it down. If you have a Democratic legislature and a Republican governor, or vice versa, Breyer posited, "nobody's going to be able to attack it." "It's the House's plan," Breyer emphasized, and the governor won't attack it "because he likes it politically."

The justices spent less time on the merits of the racial-gerrymandering challenge, but they were equally divided when they did discuss it. Justice Brett Kavanaugh echoed the legislature's argument that, when it drew the new map back in 2011, it was caught between a rock and a hard place. He told Marc Elias, who argued for the challengers, that the legislature would be "hammered" if it had aimed to have 52 percent, rather than 55 percent, of the voters in each district be African-American, because that number would be considered too low. How can the state comply with both the Voting Rights Act and the Constitution's equal protection clause in this "narrow band between 51 and 55" percent? Kavanaugh queried.

Marc E. Elias for appellees, Golden Bethune-Hill, et al. (Art Lien)

Sotomayor took a very different view. It's hard to imagine that race wasn't a primary factor driving the redistricting, she told Clement, when one of the lines dividing two districts was drawn "in the middle of the street with black houses on one side and white houses on another side."

Roberts had an entirely separate concern, which he labeled the "elephant in the room": the idea that the legal standard for determining whether race was a primary consideration in redistricting "depends heavily" on whether the trial court believes that witnesses are credible. In this case, Roberts noted, Delegate Chris Jones, who led the effort to draw the 2011 map, was regarded as credible at the first trial, but at the second trial – with a new judge – he was not regarded as credible, while expert witnesses were. If the case had come out the other way, Roberts emphasized, then the Supreme Court would have to defer to "questions of credibility that go the other way" instead. "Our review sort of depends on whoever gets here last," Roberts concluded.

Clement agreed, telling the chief justice that when determinations about a witness's credibility are "diametrically opposed," the district court should be required to explain the change. Indeed, he argued, when a court "has gone out of its way to say that it's particularly important to credit the good faith of the legislatures engaged in a very difficult task" like redistricting, there should be a higher standard "before you dismiss their testimony across the board."

Breyer was less convinced. He reminded Clement that there are "hundreds of thousands, if not millions" of trials. If some of them are reversed on appeal, what rule should trial courts apply when cases return to them? One possibility, Breyer suggested, would be to "forget about the first trial" and just look at the credibility of the witnesses in the second trial in the abstract.

Justice Neil Gorsuch asked only one question today, while Justice Clarence Thomas was silent. Even if Gorsuch might normally be expected to be more sympathetic to the legislature than to the challengers, the challengers can take some comfort in the fact that earlier this year the Supreme Court rejected the legislators' request to put efforts in the lower court to draw a new map on hold until the justices decide this case. And with the 2020 census looming, no matter what happens in this case, there will almost certainly be yet another map on the horizon.

*This post was also published at Howe on the Court.*

# Bethune-Hill v. Virginia Board of Elections

April 15, 2019

**Case Background**

A group of Virginia voters are asking the U.S. Supreme Court to decide whether Virginia lawmakers impermissibly used race in creating state legislative districts in 2011.

In 2014, residents of all 12 legislative districts contested the 2011 state house map drawn by Republican political leaders, arguing that the Virginia General Assembly violated the Equal Protection Clause when lawmakers purposefully drew each legislative district with a predetermined racial target of a 55% black voting age population and did so without a Voting Rights Act justification, unconstitutionally packing African-Americans into districts. The state defendants contended that their use of a racial quota was necessary to preserve minority communities' ability to elect their candidates of choice. The defendants also argued that the plaintiffs' claims failed because they did not submit an alternative map that showed that the General Assembly could have achieved its neutral goals with a greater racial balance.

A federal three-judge panel agreed with the defendants, and held that race was not a primary consideration in the configuration of 11 of the 12 challenged districts, despite the legislature's use of 55% black voting age population floor for those districts. The panel ruled that race was a predominant factor in the drawing of one of the state's African-American districts, but the General Assembly had a compelling interest in using race in order to comply with the Voting Rights Act and did so in a narrowly tailored way. The plaintiffs appealed the court's decision to the Supreme Court, which held oral argument this past December.

On March 1, 2017, the Supreme Court ruled in a 6-2 decision that the three-judge panel had applied the wrong legal standard to reach its conclusion that race had not predominated in the drawing of the 11 challenged districts. The Court held that the panel had improperly required plaintiffs to show, as a precondition, that a challenged district was inconsistent with traditional redistricting principles. Rather, the Court said plaintiffs in racial gerrymandering cases could establish the predominance through a variety of direct and circumstantial evidence and that, even if a district otherwise complied with traditional redistricting principles, it could still be found unconstitutional if evidence established that race was the primary factor in its creation.

The Court remanded the case to the trial court to re-evaluate the districts under the correct standard.

The three-judge panel held an evidentiary hearing on October 10-12 to consider the parties' claims on remand. Post-trial briefing concluded on November 22.

On June 26, the court ruled in a 2-1 decision that the eleven challenged state house districts were racially gerrymandered. The court ordered the General Assembly to create a remedial map by October 30.

The defendant-intervenors appealed the court's decision to the Supreme Court on July 6. On January 8, 2019, the Supreme Court declined the defendants' request to halt the remedial map-drawing process pending the appeal. Oral argument took place on March 18, 2019.

On October 18, 2018, the three-judge panel appointed a special master to assist with the remedial map drawing process. On February 14, 2019, the court ordered that the special master's plan go into effect in time for the 2019 elections. The defendants appealed the decision on February 25, 2019.