2018

Section 7: Civil Rights

Institute of Bill of Rights Law at the William & Mary Law School

Repository Citation

VII. Civil Rights

In this Section:

Topic: Sexual Orientation and Title VII

“Court: Law doesn’t bar sex-orientation discrimination on job”
Kate Brumback................................................................. 448

“7th Circ. Uphold Grocery Store Worker’s Title VII Win”
Danielle Nichole Smith........................................................ 450

“Ags Tell 8th Circ. Title VII Doesn’t Cover Sex Orientation”
Danielle Nichole Smith........................................................ 452

“Appeals Court Rules Anti-Gay Employment Discrimination is Already Illegal Under Federal Law”
Mark Joseph Stern............................................................. 455

“Scotus Asked to Ignore Circuit Split on Sexual Orientation Discrimination”
R. Robin McDonald .......................................................... 458

“EEOC Backs Gay Employee in Latest Appellate Battle Over Workplace Rights”
Alison Frankel................................................................. 460

“EEOC Argues That Sexual Orientation Discrimination by a Heterosexual Person Can Constitute a Protected Activity”
Seyfarth Shaw LLP .......................................................... 462

“Ending Sexual Orientation Discrimination in Employment”
Gay Crosthwait Grunfeld and Marc J. Shinn-Krantz.................. 464

“Justice Department Says Rights Law Doesn’t Protect Gays”
Alan Feuer........................................................................ 468

“Post-Kennedy Court Likely to Take Narrow View of Title VII”
Braden Campbell.............................................................. 471
“JUSTICE KENNEDY’S MASTERPIECE RULING”
Garrett Epps................................................................. 474

“BAKER CLAIMS RELIGIOUS PERSECUTION AGAIN—THIS TIME AFTER DENYING CAKE FOR TRANSGENDER WOMAN”
Amy B. Wang.................................................................. 478

Topic: Transgender Rights

“FEDERAL LAW ON TRANSGENDER, SEXUAL ORIENTATION BIAS A MIXED BAG”
Jon Steingart .................................................................. 481

“TRANSGENDER WORKERS GAIN NEW PROTECTION UNDER COURT RULING”
Robert Pear.................................................................. 484

“U.S. ANTI-BIAS LAW DOES NOT PROTECT TRANSGENDER WORKERS: JUSTICE DEPT”
Daniel Wiessner and Sarah N. Lynch ................................................................. 487

“TITLE VII IN TRANSITION? TEXAS FEDERAL COURT RULES THAT ANTI-DISCRIMINATION STATUTE PROTECTS TRANSGENDER INDIVIDUALS”
Stephen Fox and Jonathan Clark................................................................. 489

“TRANSGENDER STUDENT IN BATHROOM DISPUTE WINS COURT RULING”
Matt Stevens.................................................................. 491

“THE TRUMP ADMINISTRATION MAY HAVE DOOMED GAVIN GRIMM’S CASE”
Emma Green.................................................................. 494

“JUDGE SIDES WITH GLOUCESTER TRANSGENDER STUDENT ON BATHROOM ACCESS ISSUE”
Peter Dujardin .................................................................. 496

“6TH CIRC. REVIVES EEOC’S FUNERAL HOME TRANS BIAS SUIT”
Braden Campbell................................................................. 499

“TRUMP SAYS TRANSGENDER PEOPLE WILL NOT BE ALLOWED IN THE MILITARY”
Julie Hirschfeld Davis and Helene Cooper .......................................................... 502
"TRUMP CUT FROM TRANSGENDER MILITARY SUIT AGAINST GOV’T"
Daniel Wilson....................................................................................................................... 506

**Topic: Abortion**

"LAWSUIT CHALLENGES TEXAS ABORTION CURBS"
Jonathan Stempel............................................................................................................... 510

"7TH CIRC. BACKS IND. ABORTION LAW STAY DURING LEGAL CHALLENGE"
Bonnie Eslinger .................................................................................................................. 512

"PENCE’S ANTI-ABORTION LAW COULD UPEND ROE V. WADE"
Jennifer Haberkorn ........................................................................................................... 515

"WHAT HAPPENS IF ROE V. WADE GETS OVERTURNED?"
Kimberly Leonard............................................................................................................. 518

"NEW SUPREME COURT JUSTICE COULD WEIGH IN ON ABORTION QUICKLY"
Jennifer Haberkorn ........................................................................................................... 524

"SUPREME COURT WIPES OUT APPEALS COURT RULING IN IMMIGRANT ABORTION CASE"
Josh Gerstein and Renuka Rayasam.................................................................................. 538

"AGS URGE DC CIRC. TO OK BLOCK ON DETAINEE ABORTION RULES"
Tiffany Hu.......................................................................................................................... 540

"GOV. THREATEN LEGAL ACTION IF TITLE X CHANGES BECOME LAW"
Shayna Possess................................................................................................................. 542

**Topic: Affirmative Action**

"AS AFFIRMATIVE ACTION IS TARGETED, HIGHER ED MUST RESPOND"
Sarah Moore ....................................................................................................................... 545
“BRETT KAVANAUGH ONCE PREDICTED ‘ONE RACE’ IN THE EYES OF GOVERNMENT. WOULD HE END AFFIRMATIVE ACTION?”
Ann E. Marimow and Robert Barnes ............................................................... 548

“ASIAN-AMERICANS SUING HARVARD SAY ADMISSIONS FILES SHOW DISCRIMINATION”
Anemona Hartocollis.......................................................................................... 552

“HARVARD RATED ASIAN-AMERICAN APPLICANTS LOWER ON PERSONALITY TRAITS, SUIT SAYS”
Anemona Hartocollis.......................................................................................... 555

“ASIAN-AMERICAN GROUPS TAKE OPPOSING SIDES IN HARVARD AFFIRMATIVE ACTION CASE”
Chris Fuchs......................................................................................................... 558

“U.S. SAYS IT MIGHT ENTER HARVARD AFFIRMATIVE ACTION COURT BATTLE”
Nate Raymond................................................................................................... 561

“TRUMP OFFICIALS REVERSE OBAMA’S POLICY ON AFFIRMATIVE ACTION IN SCHOOLS”
Erica L. Green, Matt Apuzzo, and Katie Benner ............................................... 563
Sexual Orientation
A federal appeals court in Atlanta this week reaffirmed its decision that workers aren't protected against workplace discrimination based on sexual orientation, though two of the 11 judges strongly disagreed.

Gerald Lynn Bostock asserted in a lawsuit originally filed in May 2016 that he was fired from his job as a court child welfare services coordinator in Clayton County, just south of Atlanta, because he's gay.

A federal judge last year dismissed his case, and a three-judge panel of the 11th U.S. Circuit Court of Appeals in May upheld that ruling. The panel said binding court precedent set by a 1979 decision says Title VII of the Civil Rights Act of 1964 law doesn't prohibit employers from discriminating against workers based on sexual orientation. The full court on Wednesday declined to reconsider that decision.

Circuit Judge Robin Rosenbaum, joined by Judge Jill Pryor, dissented from this week's decision.

"I continue to firmly believe that Title VII prohibits discrimination against gay and lesbian individuals because they fail to conform to their employers' views when it comes to whom they should love," Rosenbaum wrote.

The binding precedent cited in the court's May decision includes no analysis of the issue, concluding simply that "Discharge for homosexuality is not prohibited by Title VII," she wrote, adding that a 1989 U.S. Supreme Court ruling suggests that courts should reach the opposite conclusion.

Rather than clinging to a decades-old precedent, the full appeals court should consider the arguments and offer "a reasoned and principled explanation for our position on this issue," Rosenbaum wrote.

"I cannot explain why a majority of our Court is content to rely on the precedential equivalent of an Edsel with a missing engine, when it comes to an issue that affects so many people," she wrote.

Bostock's attorneys had already appealed the May ruling to the U.S. Supreme Court, and that petition is pending.

"The issue of whether Title VII protects gay and lesbian employees is extraordinarily important not only for Mr. Bostock, but for all the gay and lesbian people working to earn
a living in this country," attorney Brian Sutherland said in an email Friday.

The Supreme Court punted on the issue in December when it declined to take up another Georgia case. Jameka Evans had sued Georgia Regional Hospital in Savannah, saying she faced discrimination and was effectively forced out of her security guard job because she's a lesbian.

As in Bostock's case, an 11th Circuit panel had ruled in March 2017 that Evans wasn't protected from workplace discrimination based on sexual orientation, and the full court declined reconsideration.

In April 2017, the full 7th U.S. Circuit Court of Appeals in Chicago reached the opposite conclusion in a case filed by a former part-time instructor who said an Indiana community college didn't hire her full time because she is a lesbian. The court stated decisively that the civil rights law's protections apply to gay and lesbian workers just as they prohibit discrimination based on race, religion or national origin.

In January, the full 2nd U.S. Circuit Court of Appeals in New York reached a similar conclusion, ruling in favor of a gay skydiving instructor who said he was fired because he was gay. The opinion said that while that court and others had previously found that Title VII didn't cover sexual orientation, "legal doctrine evolves."

The 2nd Circuit decision has also been appealed to the Supreme Court. The conflicting opinions of the 2nd and 11th circuits could prompt the high court to weigh in and settle the question.

Bostock worked in the Juvenile Court of Clayton County. He'd worked for the county since January 2003 and had received good performance evaluations, his lawsuit says.

He joined a gay softball league in January 2013. His participation in that league and his sexual orientation were openly criticized by one or more people with decision-making power at his job, the lawsuit says.

He was told in April 2013 that an audit was being conducted on program funds he managed. Bostock contends the audit was meant to provide a pretext to discriminate against him "based on his sexual orientation and failure to conform to a gender stereotype."

He was fired June 3, 2013, "for Conduct Unbecoming of a Clayton County Employee."

Lawyers for the county argued in a response to his lawsuit that Title VII "was not designed or written to include protections for sexual orientation." Bostock also fails to identify any characteristic that distinguishes him from a "typical male," undercutting his gender stereotyping claim, they wrote.
The Seventh Circuit has affirmed a jury verdict favoring a grocery store worker who alleged he was subjected to unwanted sexual touching and taunting by his male co-workers, holding that his Title VII claim was valid since he presented evidence that female workers didn't receive the same treatment.

A three-judge panel on Thursday rejected Rosebud Farm Inc.'s contention that the district court should have granted it summary judgment on Robert Smith's sexual harassment claims, finding that though the grocery store correctly asserted that Title VII didn't automatically provide relief for unwanted sexual behavior, Smith offered evidence that the conduct in question was discriminatory based on his sex.

"Ample testimony — from both Smith and other witnesses — established that only men were groped, taunted, and otherwise tormented," U.S. Circuit Judge Amy C. Barrett wrote in the panel's published opinion. "Witnesses recounted the numerous times they saw men grabbing the genitals and buttocks of other men. No witness recalled seeing female Rosebud employees subjected to the same treatment."

The panel was unconvinced by Rosebud's argument that Smith worked in an all-male environment because no women worked behind the meat counter where he was stationed and thus comparisons between men's and women's treatment were inappropriate. Even if the meat counter was separate from the rest of the store, it wasn't the only place harassment was alleged to have occurred, the panel said.

Rosebud had appealed the lower court's denial of its request for an amendment of the findings and a new trial on Smith's claims after a jury awarded him $2.4 million in compensatory and punitive damages. The lower court did reduce the award to $477,500.

The grocery store argued that while Smith presented evidence of "sexual horseplay and juvenile behavior," he didn't provide evidence that the conduct was sex-based. Smith didn't show that the male co-workers in question were gay, that there was hostility toward men in the store or that the activity was related to sexual gratification to support his claim, Rosebud said.

Rosebud also asserted in its appeal that the lower court should have ruled in its favor on Smith's retaliation claim since there wasn't evidence that his co-workers even knew he had filed a charge at the Equal Employment
Opportunity Commission for sexual harassment and racial discrimination. And the store contended that a new trial on Smith's claims was warranted because of incendiary statements made by Smith's counsel during closing arguments that drew comparisons between the defendant's conduct and recent terror attacks in the Middle East.

But the Seventh Circuit rejected those contentions as well, holding that the grocery store forfeited the arguments since they hadn't been brought up at the lower court.

Though Rosebud did raise two objections to Smith's counsel's reference to terrorism, it didn't argue that the statements were prejudicial, the panel said.

"If anything, the counsel's comments hurt Smith more than they hurt Rosebud," Judge Barrett said. "The district court observed a number of jurors grimacing in reaction to the bizarre terrorism analogy. These references would certainly not have been reason for the district court to set aside the jury's verdict and start over."

Smith originally sued Rosebud in 2011, alleging that his co-workers and supervisors touched his buttocks and genitalia and made inappropriate racial comments to him. When he filed a charge at the EEOC over the alleged conduct, his coworkers retaliated against him by freezing him out and damaging his property, among other things, the complaint said.

Smith said in his complaint that he ultimately had to quit because of the intolerable work conditions.

Rosebud moved for summary judgment on the sexual and racial harassment and retaliation claims in June 2014, arguing that the alleged "horse play" didn't amount to sexual harassment under Title VII and that Smith's decision to quit wasn't a constructive discharge. But the lower court sent the claims to trial.

Joseph Anthony Longo, counsel for Smith, told Law360 on Friday that workers shouldn't have to subject their bodies to harassment when they go to do their jobs and that he hoped that the ruling would have significance throughout the country in demonstrating that abuse at work must be stopped.

Counsel and representatives for Rosebud didn't respond Friday to requests for comment.


Smith is represented by Joseph Anthony Longo of Longo & Associates Ltd.

Rosebud is represented by William D. Dallas and Steven M. Dallas of Regas Frezados & Dallas LLP.

The case is Robert Smith v. Rosebud Farm Inc., case number 17-2626, in the U.S. Court of Appeals for the Seventh Circuit.
A coalition of state attorneys general has told the Eighth Circuit that it should not join two other appellate courts in interpreting Title VII to bar sexual orientation discrimination, arguing that such an application was contrary to earlier legal and legislative understanding of the law.

The states noted that until the Seventh Circuit and Second Circuit expanded Title VII to include protections for sexual orientation in April 2017 and February, respectively, federal appellate courts had been united in finding that Title VII’s scope did not include sexual orientation.

And though Congress had numerous chances to amend the statute to include sexual orientation, it had chosen not to do so, the states argued.

The states also said that even if the Eighth Circuit were not bound by its precedent, Horton’s arguments for sexual orientation protections in Title VII were unconvincing. He wrongly argued that sexual orientation discrimination would be "associational discrimination," or founded on a sex-based stereotype, the states said.

Additionally, Horton misapplied the “but for” test for determining if sex discrimination was the real reason behind an employer’s action, which would require keeping everything consistent except for a single factor, the states said. In the scenario Horton described, whether a male employee would be treated differently from a female employee for having a relationship with a
man, both the sex and sexual orientation were shifted, the states argued.

“It is my duty to protect the separation of powers written in the Constitution,” Arkansas Attorney General Leslie Rutledge said in a statement Wednesday. “Judges should apply the law as written by the people’s representatives in Congress and should not add to or ‘creatively apply’ the law because they believe a different law should have been written and applied.”

Louisiana, Missouri, Oklahoma, Texas, Michigan, Nebraska, and South Dakota participated in the amicus brief with Arkansas.

The Eight Circuit also received input Tuesday from the Becket Fund for Religious Liberty, a nonprofit law firm that defends religious beliefs. The organization threw its support behind Midwest Geriatric Management, criticizing Horton's appeal of a lower court’s dismissal of his bias suit.

“Sometimes a wolf comes as a wolf. This appeal is an open effort to enlist this court as a combatant in the culture wars over LGBT rights and religion, with the eventual goal of creating a vehicle for [U.S] Supreme Court review,” the Becket Fund said. “Happily, this court need not sign up for this duty.”

The Becket Fund argued in its amicus brief that Horton could not make a religious discrimination claim based only on his belief that the owners of Midwest Geriatric Management were Jewish and that their Judaism was important to their professional lives, calling his argument “itself discriminatory.” Horton pled no other factual allegations for his religious claim, and further, he failed to show that he was discriminated against for his own religious beliefs, the organization said.

The organization also echoed the states’ arguments that Title VII legal and legislative history demonstrated that it did not include protections for sexual orientation.

Gregory R. Nevins, counsel for Horton, told Law360 on Thursday that the attorneys general asserted nothing that had not already been raised in the case. Nevins said that though the Becket Fund did bring new arguments, he did not think they were applicable to the case or accounted for the full scope of the law.

Horton originally sued Midwest Geriatric Management in Missouri federal court in August, alleging that the company illegally discriminated against him by rescinding a job offer after discovering he had a husband. The lower court ruled in December that Horton’s claims failed because Title VII did not forbid discrimination based on sexual orientation. Horton appealed the decision in January.

The Eighth Circuit has received amicus briefs supporting Horton from nearly 50 business, the U.S. Equal Employment Opportunity Commission, and 18 states and Washington, D.C.

Horton is represented by Gregory R. Nevins, Omar Gonzalez-Pagan and Sharon McGowan of Lambda Legal Defense and Education Fund Inc. and Mark S. Schuver
and Natalie T. Lorenz of Mathis Marifian & Richter Ltd.

Midwest Geriatric Management LLC is represented by Michael L. Jente, Neal F. Perryman and Philip J. Mackey of Lewis Rice LLC.

The amici states are represented by Arkansas Attorney General Leslie Rutledge, Lee Rudofsky, Nicholas J. Bronni and Dylan L. Jacobs.

The Becket Fund for Religious Liberty is represented by Eric C. Rassbach and Nicholas R. Reaves of the Becket Fund For Religious Liberty.

The case is Mark Horton v. Midwest Geriatric Management, case number 18-1104, in the U.S. Circuit Court of Appeals for the Eighth Circuit.
“Appeals Court Rules Anti-Gay Employment Discrimination is Already Illegal Under Federal Law”

Slate

Mark Joseph Stern

February 26, 2018

On Monday, the 2nd U.S. Circuit Court of Appeals ruled that federal law already prohibits anti-gay employment discrimination. Its 10–3 decision in Zarda v. Altitude Express is a landmark victory for gay rights, affirming the growing judicial consensus that sexual orientation discrimination constitutes discrimination “because of sex.”

In his opinion for the court, Chief Judge Robert Katzmann provided three reasons why Title VII of the Civil Rights Act of 1964—which prohibits sex discrimination in the workplace—protects gay employees. First, Katzmann explained that “sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination.” To “identify the sexual orientation of a particular person,” an employer must “know the sex of the person and that of the people to whom he or she is attracted.” He continued:

Because one cannot fully define a person’s sexual orientation without identifying his or her sex, sexual orientation is a function of sex. Indeed sexual orientation is doubly delineated by sex because it is a function of both a person’s sex and the sex of those to whom he or she is attracted. Logically, 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.

To bolster his conclusion, Katzmann deployed the “comparative test,” which asks “whether an employee’s treatment would have been different but for that person’s sex.” Here, the plaintiff, Donald Zarda, was allegedly fired after he revealed his sexual orientation—that is, his attraction to other men. If Zarda were a woman, he presumably could have kept his job. But because he was a man, his sexual attraction led to his termination. Thus, but for his sex, he would not have suffered discrimination.

Katzmann then turned to a second justification for his decision: the “sex stereotype” theory. The Supreme Court has held that Title VII bars employers from punishing workers for their failure to conform to gender norms. For instance, a manager cannot reprimand a female employee because he deems her insufficiently “feminine” in her demeanor.
and mannerisms. Homosexuality, Katzmann noted, “represents the ultimate case of failure to conform to gender stereotypes”—the expectation that men only date women, and women only date men. In this framing, discrimination against a gay employee on the basis of his sexual orientation constitutes “sex stereotyping,” a prohibited practice under Title VII.

Finally, Katzmann explored perhaps the most persuasive theory of the case, the Loving principle. In Loving v. Virginia, the Supreme Court held that interracial marriage bans discriminated on the basis of race in part by punishing individuals for intimately associating with members of another race. Since then, the courts have extended this theory to the employment context—holding, for example, that a supervisor who fires a white employee for marrying a black person has engaged in unlawful racial discrimination.

Discrimination on the basis of race and sex are equally forbidden under Title VII. So, Katzmann wrote, this principle of “associational discrimination” should apply to both traits, and an employee who suffers discrimination because of his associations with a partner of the same-sex has experienced illegal sex discrimination. “If a male employee married to a man is terminated because his employer disapproves of same-sex marriage,” Katzmann explained, “the employee has suffered associational discrimination based on his own sex.” Why? Because “the fact that the employee is a man instead of a woman motivated the employer’s discrimination against him.”

In all, ten judges—including two Republican appointees—agreed with Katzmann that Title VII forbids sexual orientation discrimination. Only three disagreed. Judge José Cabranes found the case so easy that he wrote his own one-page decision concurring in the judgment. His reasoning constitutes one brief paragraph:

This is a straightforward case of statutory construction. Title VII of the Civil Rights Act of 1964 prohibits discrimination “because of … sex.” Zarda’s sexual orientation is a function of his sex. Discrimination against Zarda because of his sexual orientation therefore is discrimination because of his sex, and is prohibited by Title VII.

That should be the end of the analysis.

With its Zarda decision, the 2nd Circuit has aligned itself with the 7th U.S. Circuit Court of Appeals and the Equal Employment Opportunity Commission, both of which assert that Title VII bars anti-gay workplace discrimination. (So have dozens of lower courts.) Zarda vigorously rejects the position put forth by the Trump administration that Title VII does not protect all gay employees. (The 11th U.S. Circuit Court of Appeals has also adopted that position.) Attorney General Jeff Sessions’ Department of Justice took the unusual step of filing an unsolicited brief in Zarda against gay rights, then arguing against gay employees in court. Given Monday’s lopsided outcome, the DOJ might as well have saved its breath.

Eventually, the Supreme Court will have to resolve the scope of Title VII’s protections
for LGBTQ employees. But it is in no hurry to do so, and the defendants in Zarda have indicated that they won’t appeal Monday’s decision. For the foreseeable future, then, the ruling will remain the law of the land within the 2nd Circuit, which covers New York, Connecticut, and Vermont. And gay employees elsewhere can cite Zarda to demonstrate that, no matter what the Trump administration says, Title VII protects their right to work free from homophobia.
An attorney defending Clayton County, Georgia, in a discrimination lawsuit filed by a gay employee asked the U.S. Supreme Court Friday to let stand an appellate ruling that federal laws do not prohibit discrimination on the basis of sexual orientation.

Freeman Mathis & Gary attorneys Jack Hancock and William Buechner Jr. defended the May 10 ruling by the U.S. Court of Appeals for the Eleventh Circuit in Atlanta in their response to a petition for a writ of certiorari filed by Gerald Lynn Bostock on May 25.

Bostock is represented by Brian Sutherland and Thomas Mew IV of Atlanta’s Buckley Beal.

Bostock was assigned to Clayton County’s juvenile court as a child welfare services coordinator in 2013 when he began playing in a gay recreational softball league that he would later claim generated criticism and led to an internal audit of county funds he managed.

Bostock was subsequently fired for conduct unbecoming a county employee, prompting the lawsuit. The county claimed the firing was legitimate, nondiscriminatory and unrelated to Bostock’s sexual orientation.

Magistrate Walter Johnson and Senior District Judge Orinda Evans dismissed the case after determining Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on race, color, religion or sex, does not bar discrimination based on sexual orientation.

The Eleventh Circuit agreed and noted in an unpublished opinion issued in May that “Discharge for homosexuality is not prohibited by Title VII.” The Atlanta-based appellate court rejected Bostock’s petition to hear the case en banc. In July, the court rejected an unusual motion from its own bench for an en banc hearing—despite dissents by Judges Robin Rosenbaum and Jill Pryor.

In asking the Supreme Court to take up the case, Bostock points out federal appellate courts in the Second and Seventh Circuits have split from the Eleventh in holding that Title VII does prohibit discrimination on the basis of sexual orientation.

But Freeman Mathis lawyers argued the Supreme Court has turned down cases when circuits have been split on the underlying
legal issues before. Last year, the high court denied certiorari in another Georgia employment discrimination case that the lawyers said “presented the identical issue that [Bostock] seeks to present to the Court in this case.”
President Donald Trump has nominated two Republicans to serve on the Equal Employment Opportunity Commission alongside a Trump-appointed acting chair, and two holdover Democrats from the Obama administration. (One of them has been re-nominated by Trump.) At their Senate confirmation hearing in September, the Republican EEOC nominees pointedly refused to commit to the commission’s position that Title VII of the Civil Right Act protects gay and lesbian employees against workplace discrimination based on their sexual orientation. My Reuters colleague Robert Iafolla, who covered the hearing, described the Trump nominees’ position on gay employees’ rights as “murky.”

The Senate has not yet voted on Trump’s EEOC nominees, so, at the moment, the EEOC is composed just of acting chair Victoria Lipnic, a Republican, and two Democratic appointees, Chai Feldblum and Charlotte Burrows. And there’s nothing at all murky about this commission’s stance on Title VII and gay rights. Last week, the EEOC filed an amicus brief in the 8th U.S. Circuit Court of Appeals, backing Mark Horton, a gay man who claims Midwest Geriatric withdrew a job offer when he mentioned his same-sex partner in an email to the company’s co-director. The 8th Circuit will be the fourth federal appellate court in the last year and a half to consider whether Title VII’s protection against sex discrimination encompasses discrimination based on sexual orientation. This foment follows a pathbreaking 2015 EEOC decision in Baldwin v. Foxx, in which the EEOC interpreted U.S. Supreme Court precedent – most notably on sex stereotyping, same-sex harassment and interracial marriage – to bar discrimination against gay and lesbian employees under the umbrella of the law’s prohibition on gender-based discrimination. In March 2017, the 11th Circuit rejected that reasoning in Evans v. Georgia Regional Hospital, but the following month, the en banc 7th Circuit held in Hively v. Ivy Tech Community College that Title VII protects gay and lesbian employees. Just last month, the en banc 2nd Circuit sided with the 7th Circuit in Zarda v. Altitude Express, deepening a circuit split that won’t go away regardless of what the 8th Circuit decides in the Horton case.

Now that the EEOC is on the record in support of Horton at the 8th Circuit, the big
question is whether the Justice Department will file an amicus brief backing Horton’s would-be employer, a chain of nursing home and assisted living facilities. You may remember that DOJ caused a stir in the en banc Zarda case at the 2nd Circuit when it disavowed the EEOC’s amicus brief backing gay employees. In a rare instance of two executive-branch agencies publicly espousing contrary positions in litigation, DOJ argued that discrimination against gay and lesbian employees isn’t the same as sex discrimination and isn’t prohibited under Title VII. (DOJ and the EEOC both enforce Title VII and neither, apparently, is entitled to Chevron deference in interpreting the statute.)

Both the Justice Department and the EEOC declined my request for comment on DOJ plans for the Horton case. I also emailed Midwest Geriatric lawyers Philip Mackey and Michael Jente of Lewis Rice but didn’t hear back.

I’ve previously discussed how the 2nd Circuit majority in Zarda disposed of one of the Justice Department’s key arguments against extending Title VII protection to gay and lesbian employees. DOJ contended that the test for sex discrimination is to compare workers who are the same in every way except for their gender. So under DOJ’s theory, to figure out if sex discrimination encompasses prejudice against gays and lesbians, you have to look at whether an employer treats gays and lesbians the same – not whether lesbian workers are treated differently than straight women or gay men experience discrimination straight men are not subjected to. Unless the employer is more inclined to discriminate against gay men than lesbians (or vice-versa), DOJ argued, it’s not engaged in sex discrimination.

The 2nd Circuit said the Justice Department is pushing the wrong comparison test. Based on the Supreme Court’s 1978 decision in City of Los Angeles v. Manhart, which struck down a city water department rule requiring female employees to contribute more than men to the employee pension fund because women live longer, the 2nd Circuit said the Title VII analysis should focus on sexual orientation as a function of sex, like life expectancy or “ladylike” behavior. Using the test DOJ advocated “would not illustrate whether a particular stereotype is sex dependent but only whether the employer discriminates against gender non-conformity in only one gender,” the 2nd Circuit said.

Of course, Justice can still present its comparison test argument to the 8th Circuit, along with other arguments for why Title VII doesn’t protect gay and lesbian workers, including decades of Congress failing to amend the statute and pre-2015 precedent from the federal appellate courts, including the 8th Circuit. My guess is that the Justice Department will opt to file an amicus brief in Midwest Geriatric, given the EEOC’s brief probably does not reflect the views of the Trump administration.

Presumably, this issue will end up at the Supreme Court, although the justices declined to grant review last December of the 11th Circuit’s Evans decision. By then, Trump’s EEOC nominees will probably have been confirmed – too late, however, to undo
the commission’s support for gay and lesbian rights at the 2nd and 8th Circuit

“EEOC Argues that Sexual Orientation Discrimination by a Heterosexual Person can Constitue a Protected Activity”

Lexology

Seyfarth Shaw LLP

June 14, 2018

The EEOC argues that O’Daniel need only “reasonably believe[]” the opposed conduct was unlawful and that O’Daniel’s belief was reasonable when viewed in the context of recent decisions reached by the Southern District of Texas, Second Circuit, Seventh Circuit, and the EEOC. The EEOC also cites the ongoing national debate regarding sexual orientation issues as another reason O’Daniel’s belief was reasonable.

Defendants responded to the lawsuit with a motion to dismiss and argued that O’Daniel’s retaliation claim failed in part because she did not “plead any protected activity … under Title VII.” By consent of the parties, a magistrate judge heard Defendants’ motion to dismiss. The magistrate judge ultimately agreed with Defendants and dismissed O’Daniel’s retaliation claim because it was “unreasonable for [O’Daniel] to believe that discrimination based on sexual orientation constitutes protected activity” and cited the Fifth Circuit’s 1979 holding in Blum v. Gulf Oil Corp. to support its holding. The trial court noted that while Title VII may protect gender-non-conformity, O’Daniel did not allege discrimination on this basis. O’Daniel appealed the magistrate judge’s decision to the Fifth Circuit.

On May 2, 2018, the Equal Employment Opportunity Commission filed an amicus curiae brief with the court, taking issue with the trial court’s finding that it was “unreasonable” for O’Daniel to believe that opposition to discrimination based on sexual orientation was a protected activity. In arguing this, the EEOC pointed out that the

Plaintiff Bonnie O’Daniel filed suit against her employer, Plant-N-Power, and its parent company (Defendants) in the Middle District of Louisiana alleging, amongst other things, retaliation on the basis of her sexual orientation—heterosexual. O’Daniel alleged that Defendants terminated her employment because of one of her Facebook posts. In the post, she included a photograph of a man wearing a dress at a Target store and expressed discontent with his ability to use the women’s restroom and/or dressing rooms. O’Daniel alleged that this offended the President of Plant-N-Power, a member of the LGBT community, and that the president subsequently suggested O’Daniel’s termination.

462
employee need only “reasonably believe[] the opposed conduct was unlawful.” The EEOC maintains that, “given recent appellate decisions …, the EEOC’s view that Title VII prohibits sexual orientation discrimination, and the rapidly changing legal landscape,” O’Daniel had a reasonable belief that discrimination based on sexual orientation was impermissible.

The EEOC pointed to a number of decisions in the Southern District of Texas, the Second and Seventh Circuits, as well as holdings from the commission itself, to demonstrate that the “law on sexual orientation discrimination” had evolved and that at least some courts prohibit sexual orientation discrimination in employment. In addition, the EEOC noted the ongoing national debate regarding sexual orientation issues and the Supreme Court’s landmark decisions endorsing the right of gay and lesbian individuals to be free from discrimination in Obergefell v. Hodges and United States v. Windsor. Given this context, O’Daniel—“a layperson without legal expertise”—could “reasonably conclude that Title VII’s prohibition against sex discrimination encompasses discriminatory conduct based on sexual orientation.” This would extend, in the EEOC’s view, to discrimination on the basis that an employee is heterosexual.

The EEOC similarly noted that Fifth Circuit precedent did not preclude an individual from harboring a reasonable belief that sexual orientation is unlawful. To argue this, the EEOC distinguished Blum, in which the Court held that “[d]ischarge for homosexuality is not prohibited by Title VII.” The EEOC argued that Blum was decided on the issue of pretext and not on whether Title VII protected against discrimination on the basis of sexual orientation. Moreover, according to the EEOC, there were post-Blum decisions that recognize that Title VII prohibits discrimination based on sex stereotyping, to include Price Waterhouse v. Hopkins and EEOC v. Boh Brothers Construction, Co. Thus, O’Daniel could have relied on these post-Blum holdings to arrive at a reasonable conclusion that Title VII protected against discrimination on the basis of sexual orientation.

Defendants have not yet filed their appellate brief.
“Ending Sexual Orientation Discrimination in Employment”

_Law.com_

Gay Crosthwait Grunfeld and Marc J. Shinn-Krantz

February 16, 2018

Twenty-two states, including California, and the District of Columbia, Guam, and Puerto Rico, protect both public and private employees from discrimination on the basis of their sexual orientation. But in more than half the country, a gay person can get married legally on Saturday, and for doing so be fired legally on Monday, so far as state and local law are concerned. For gay employees in 28 states, Title VII of the Civil Rights Act of 1964 is the only possible protection. Indeed, the U.S. Equal Employment Opportunity Commission (EEOC) received 1,762 LGBT-based sex discrimination charges in FY 2017, up from 1,100 in FY 2014.

Prior to 2017, every federal circuit to consider the question of whether Title VII’s prohibition of discrimination based on sex includes sexual orientation answered negatively. But since the U.S. Supreme Court’s holding in _Obergefell v. Hodges_, 135 S. Ct. 2584 (2015) that same-sex marriage is a constitutionally protected fundamental right, the EEOC began asserting that sexual orientation discrimination is inherently sex discrimination under Title VII. Courts, the EEOC and the U.S. Department of Justice (DOJ) are grappling with the issue.

There is a circuit split over whether Title VII makes it illegal for employers to discriminate based on sexual orientation. Last year, the U.S. Court of Appeals for the Seventh Circuit held _en banc_ by a vote of 8 to 3 that it does, _Hively v. Ivy Tech Community College of Indiana_, 853 F.3d 339 (7th Cir. 2017), while panels of the Second and Eleventh circuits held to the contrary. The Eleventh Circuit denied _en banc_ rehearing, and in December 2017, the Supreme Court denied certiorari. The Second Circuit reheard arguments _en banc_ in September—a decision is pending. Supreme Court review of the question is inevitable.

The plaintiff in the Seventh Circuit _Hively_ case was a female lesbian part-time adjunct professor who alleged sexual orientation discrimination. The court held that two separate analyses—a comparator analysis, which analyzes the variable of sex by comparing the plaintiff to an otherwise identically situated person, and an associational analysis—each led to the conclusion that sexual orientation discrimination is sex discrimination under Title VII.
Citing *Hively*, a First Circuit panel recently noted “the tide may be turning” on this issue. *Franchina v. City of Providence*, No. 16-2401, 2018 WL 550511, at *13 n.19 (1st Cir. Jan. 25, 2018). *Franchina’s* procedural posture precluded considering sexual orientation as a standalone claim; nevertheless, the panel upheld a jury verdict awarding emotional and front pay damages to a female firefighter claiming sexual orientation as a “plus-factor” under Title VII.

Under *Hively’s* comparator analysis, a plaintiff successfully claims sex discrimination if she alleges a set of facts whereby changing only her sex would lead to different treatment. The court noted it is critical to the comparator analysis that the only variable be the plaintiff’s gender. The court noted that a policy could constitute sex discrimination even if it did not discriminate against *every* member of a gender. A policy discriminating against the subset of women like *Hively*—just like a policy discriminating against the subset of women not wearing high heels—is sex discrimination. In *Hively’s* case—that of a woman attracted to women—the plaintiff could allege sex discrimination by claiming she would have been treated differently if she were a man attracted to women. The court also noted that, viewing this case through the lens of *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (establishing the gender nonconformity theory of liability), there is no distinction between a gender nonconformity claim and a sexual orientation claim; *Hively’s* homosexuality was itself nonconformance with the gender stereotype of female heterosexuality.

In its associational analysis, the *Hively* court drew on a line of cases beginning with the Supreme Court’s holding in *Loving v. Virginia*, 388 U.S. 1 (1967), that a prohibition on interracial marriage violates the Constitution. Subsequent circuit court cases held that discrimination based on a plaintiff’s interracial associations constitutes discrimination because of the plaintiff’s *own* race. The *Hively* court held it follows that discrimination against *Hively* because of the sex of a person she associates with is discrimination based on her *own* sex.

Judge Richard Posner concurred in *Hively*, powerfully applying a third and more straightforward analytical approach to conclude that Title VII prohibits sexual orientation discrimination. He considered that Title VII’s original meaning may not have prohibited such discrimination. He asserted that the courts should not act as “obedient servants” of the 88th Congress, which passed the Civil Rights Act of 1964. Instead, courts should take advantage of over a half century of evolving views on homosexuality—and consider what the country has become—to interpret the statutory language for today’s era and culture.

In sharp contrast to the Seventh Circuit, a divided Eleventh Circuit panel held that Title VII does not protect sexual orientation. *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017) involved a female lesbian former security officer alleging discrimination based on her sexual orientation. The panel decided it was bound by precedent to hold that, although gender nonconformity claims are actionable
under Title VII, sexual orientation claims are not. This holding drew a dissent from Judge Robin S. Rosenbaum, who asserted that the Supreme Court’s 1989 gender stereotyping decision in *Price Waterhouse*, “eviscerated” the majority’s main precedent, *Blum v. Gulf Oil*, 597 F.2d 936 (5th Cir. 1979) (predivision of the Fifth and Eleventh circuits in 1981). Judge Rosenbaum reasoned that a woman alleging sexual orientation discrimination necessarily fails to conform with the gender stereotype that women should only be sexually attracted to men.

Two Second Circuit panels held that they are bound by circuit precedent to hold that Title VII does not encompass sexual orientation. *Zarda v. Altitude Express*, 855 F.3d 76 (2d Cir. 2017); *Christiansen v. Omnicom Group*, 852 F.3d 195 (2d Cir. 2017). The Second Circuit granted rehearing *en banc* of *Zarda*, a case about a male gay former skydiving instructor asserting sexual orientation discrimination. In an unusual executive branch split, both the EEOC and the DOJ filed conflicting amicus briefs and appeared at argument in September 2017.

As one district court within the Second Circuit observed, “the law with respect to this legal question is clearly in a state of flux, and the Second Circuit, or perhaps the Supreme Court, may return to this question soon,” *Philpott v. New York*, 252 F. Supp. 3d 313, 316 (S.D.N.Y. 2017) (finding sexual orientation claim cognizable). The Second Circuit’s *en banc* decision in *Zarda* is pending.

Despite the variegated decisions and opinions of judges in different circuits, the dueling positions of the DOJ and the EEOC, and congressional inability to clarify the law, the trend in public opinion is clear. In 1996, when Gallup first polled the issue, only 27 percent of respondents indicated support for same-sex marriage. By 2017, 64 percent of respondents thought same-sex marriage should be legal and 72 percent supported same-sex relations. Increasing enactment or enforcement of state and local laws prohibiting workplace discrimination based on sexual orientation reflect this trend. It behooves employers throughout the country to begin acting now as though such discrimination is illegal as well as unwise.

Even employers in states lacking antidiscrimination statutes have no business reason to permit discrimination. As Apple CEO Tim Cook wrote in support of federal legislation to prohibit sexual orientation discrimination, “embracing people’s individuality is a matter of basic human dignity and civil rights. It also turns out to be great for the creativity that drives our business.” Given the increasing legal risks of permitting sexual orientation discrimination, the lack of any business reason for doing so, and this country’s evolving consensus in support of equal rights, employers should not wait for the remaining states and federal circuits to catch up to *Hively*. Employers throughout the country should adopt policies and practices that protect their employees from employment discrimination based on sexual orientation. Certainly for national employers, this is the only sensible approach; it will reduce possible administrative burdens and risks of getting it wrong as to some
employees who may move within the company from state to state, with unexpected legal cost, and it will enhance consistency and fairness within the enterprise. All employers that follow Hively’s holding will benefit from reduced liability, increased equality, and a more competitive workforce.
The Justice Department has filed court papers arguing that a major federal civil rights law does not protect employees from discrimination based on sexual orientation, taking a stand against a decision reached under President Barack Obama.

The department’s move to insert itself into a federal case in New York was an unusual example of top officials in Washington intervening in court in what is an important but essentially private dispute between a worker and his boss over gay rights issues.

“The sole question here is whether, as a matter of law, Title VII reaches sexual orientation discrimination,” the Justice Department said in a friend-of-the-court brief, citing the 1964 Civil Rights Act, which bars discrimination in the workplace based on “race, color, religion, sex or national origin.” “It does not, as has been settled for decades. Any efforts to amend Title VII’s scope should be directed to Congress rather than the courts.”

The department filed its brief on Wednesday, the same day President Trump announced on Twitter that transgender people would be banned from serving in the military, raising concerns among civil rights activists that the Trump administration was trying to undermine lesbian, gay, bisexual and transgender rights won under previous administrations.

The filing came in a discrimination case before the United States Court of Appeals for the Second Circuit involving Donald Zarda, a skydiving instructor. In 2010, Mr. Zarda was fired by his employer, a Long Island company called Altitude Express. Before taking a female client on a tandem dive, Mr. Zarda told the woman he was gay to assuage any awkwardness that might arise from his being tightly strapped to her during the jump. The woman’s husband complained to the company, which subsequently fired Mr. Zarda. Mr. Zarda then sued Altitude Express, claiming it had violated Title VII.

Under Attorney General Jeff Sessions, the Justice Department has now stepped into the fray. In its brief, the department noted that every Congress since 1974 has declined to add a sexual-orientation provision to Title VII, despite what it called “notable changes in societal and cultural attitudes.” The brief also said that the federal government, as the largest employer in the country, had a “substantial and unique interest” in the proper interpretation of Title VII.

In 2015, the Equal Employment Opportunity Commission, under Mr. Obama, issued a
contrary ruling, deciding on a vote of three Democrats to two Republicans that discrimination on the basis of sexual orientation was illegal. That ruling, which was reviewed by the Obama administration’s Justice Department, did not formally bind the federal courts, although courts often defer to federal agencies when they interpret laws that come under their jurisdiction.

In its brief, the Trump administration’s Justice Department said the E.E.O.C., which had also filed court papers supporting Mr. Zarda, was “not speaking for the United States.”

In 2014, Eric Holder, Mr. Obama’s attorney general, issued a memo stating that in any litigation that came before it, the Justice Department would take the position that the protections afforded by Title VII would be extended to include a person’s gender identity, including transgender status. The future of that memo under Mr. Trump remains unclear.

Mr. Holder noted the Trump administration’s moves on Twitter on Thursday.

While the Obama administration’s legal approach to gay rights evolved over time, it never declared that bans on sex discrimination applied to sexual orientation alone, absent some evidence that the discrimination targeted a person based on gender stereotypes. Rather, it adopted a wait-and-see attitude as the law continued to develop.

Against that backdrop, the Trump Justice Department’s decision to file the brief strongly declaring that sex discrimination does not encompass bias based only on sexual orientation was a striking shift in tone.

It was unclear why the Justice Department filed the brief when it did and whether it was a stand-alone effort or part of a larger ideological push.

In 2015, a lower court on Long Island first considered Mr. Zarda’s case and ruled against him, deciding, despite the E.E.O.C. ruling, that sexual orientation was not included in the civil rights law’s prohibition against discrimination based on “sex.” In April, the Second Circuit in New York upheld that court’s decision, even though it noted “a longstanding tension in Title VII case law.”

Federal appeals courts have issued contradictory rulings on the matter. In 2000, while considering the case of a Long Island postal worker, Dwayne Simonton, who was abused at work for being gay, the Second Circuit ruled that the language of Title VII did not bar discrimination based on sexual orientation. The ruling also noted that Congress had repeatedly declined to include such a provision in the law.

“There can be no doubt that the conduct allegedly engaged in by Simonton’s co-workers is morally reprehensible,” the court wrote in 2000. It added, however, that “the law is well-settled in this circuit.”

Shortly after the new brief was filed, civil rights activists attacked it. In a statement on Wednesday, Vanita Gupta, who ran the Justice Department’s civil rights division
under Mr. Obama, said the Trump administration’s court filing “contravenes recent court decisions and guidance issued by the Equal Employment Opportunity Commission.”

On Twitter on Wednesday night, Ms. Gupta, who is the president of the Leadership Conference on Civil and Human Rights, noted that only political appointees, not career employees, from her former office at the Justice Department had signed the brief.

The American Civil Liberties Union called the brief a “gratuitous and extraordinary attack on L.G.B.T. people’s civil rights.” In a statement, James Esseks, the director of the organization’s L.G.B.T. and H.I.V. Project, added, “The Sessions-led Justice Department and the Trump administration are actively working to expose people to discrimination.”

In his own statement, Devin O’Malley, a Justice Department spokesman, said the brief was “consistent with the Justice Department’s longstanding position and the holdings of 10 different courts of appeals.” Mr. O’Malley added that the filing “reaffirms the department’s fundamental belief that the courts cannot expand the law beyond what Congress has provided.”

Some states like New York have their own laws banning bias in the workplace based on sexual orientation, but several states do not. “Without a federal standard,” said Douglas Wigdor, a prominent New York City employment lawyer, “many people could be exposed to discrimination at work just because they’re gay.”

Mr. Zarda brought claims against his employer under both federal and state law, according to his lawyer, Gregory Antollino. But the state case failed in October 2015 because state law requires a higher burden of proof than federal law to show discrimination, and because by the time it went to trial, Mr. Zarda had died, Mr. Antollino said.
A circuit split on whether Title VII's ban on workplace sex discrimination includes bias based on sexual orientation had civil rights advocates hoping the U.S. Supreme Court would declare that federal law protects gay workers, but Justice Anthony Kennedy's retirement means that's a long shot, experts say.

Justice Kennedy’s reputation as a swing voter derived largely from his siding with the high court’s liberal wing on gay rights, most notably casting the deciding vote and authoring the opinion in Obergefell v. Hodges, which made same-sex marriage legal nationwide.

But attorneys say his successor may be more willing to toe the conservative line on gay rights should the post-Kennedy court take up one of two pending petitions for certiorari on the question of Title VII’s reach.

“[Justice Kennedy’s] legacy is in this area … this is what he stood for, as being kind of the deciding vote in all these different cases,” said Michelle Phillips, a Jackson Lewis PC attorney whose practice focuses on LGBT issues. “I think whoever is vetting the potential candidates, they’re going to be careful to ensure a conservative position is maintained on the court.”

Kennedy’s retirement comes amid debate among federal courts about how to interpret Title VII’s ban on discrimination on the “basis of … sex.”

For the first half-century after Congress passed the Civil Rights Act of 1964, every appeals court to consider whether its ban on workplace discrimination covers sexual orientation said it doesn’t. But in the last few years, that blanket of precedent has frayed.

The Seventh Circuit became the first to break from its sister courts in April 2017, ruling in an en banc opinion that it’s “impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex.” And the en banc Second Circuit deepened the split in February, abandoning nearly 20-year-old precedent and reviving gay skydiving instructor Donald Zarda’s bias suit against Altitude Express Inc., his former employer. Zarda died in 2014, and his family has pursued the suit.

But not every court has followed this trend. The Eleventh Circuit last July declined to reconsider en banc hospital security guard Jameka Evans’ allegations she was fired because she is a lesbian, and last month denied Georgia municipal worker Gerald
Bostock’s bid for a rehearing on claims he was a victim of anti-gay bias.

Bostock and Altitude Express appealed their losses to the Supreme Court over a five-day span last month. If either petition is accepted, Kennedy’s departure means its authors will argue before a very different bench than the one they appealed to.

Though Kennedy was appointed by Ronald Reagan and sided with the court’s conservatives in many matters, he frequently voted with the liberal wing on LGBT issues. In his three decades on the bench, Kennedy penned opinions that blocked states from proscribing laws making sexual orientation a protected class, struck down state laws against sodomy, and gave same-sex couples the right to marry.

Given his track record, Kennedy’s retirement has LGBT advocates worried.

“There are no guarantees, nor do we count on any one particular justice, but [Justice Kennedy] is somebody who had shown to be, at least in the realm of LGBT rights, an ally,” said Lambda Legal attorney Omar Gonzalez-Pagan, who is involved in Zarda and other recent cases. “So we do have some concern.”

If Kennedy’s loss weren’t enough, it’s likely he’ll be replaced by someone hand-picked for his or her conservative views on social issues, attorneys say. President Donald Trump is reportedly choosing from a list of a few dozen people, any one of whom would likely be to Kennedy’s right on gay rights.

“Everybody feels this is where we’re going to see the most change,” said Collin O’Connor Udell, a Supreme Court litigator at Jackson Lewis PC. “President Trump has said he wants to nominate people that want to overturn Roe v. Wade … I imagine that with respect to gay rights, it’ll be like that as well.”

But it’s not a foregone conclusion that Justice Kennedy’s successor will be a conservative hard-liner, Littler Mendelson PC attorney Stephen Melnick said.

With Republicans holding just a 51-seat majority in the Senate, the president may have to nominate someone in the middle to stock the court quickly, he said.

“It’s possible that the president would want to appoint someone who is a moderate in LGBT issues, to tamp down any strong dissent to the appointment,” Melnick said. “If not … it is likely that a more solidly conservative court would interpret Title VII narrowly.”

The dispute is one of statutory construction at its heart, so there’s some hope for gay rights advocates at the post-Kennedy court.

While a ruling in Zarda or Bostock would expand or shrink gay rights, the underlying legal question is semantic: Does the word “sex” in Title VII’s ban on discriminating against workers on the “basis of … sex” encompass sexual orientation? Judges have so far answered that question in a variety of ways.
“If you read all the varying decisions in the Zarda case, the concurrences and the dissents, there’s not disagreement on whether it’s a good policy to protect people from sexual orientation discrimination,” Abrams Fensterman employment practice head Sharon Stiller said. “But there is substantial disagreement on what Title VII means.”

Gay rights advocates have three main arguments against the narrower interpretation: it treats men who date men differently than it does women who date men, it treats workers differently based on the sex of those they date and it punishes gay workers for failing to meet the stereotype of dating members of the opposite sex.

Though conservative appointees are viewed as predisposed to rule against gay rights, the Seventh and Second Circuits ruled for workers “by lopsided margins” that don’t align with the courts’ political makeups, Gonzalez-Pagan said.

“Of those arguments, different judges of different persuasions have adopted and endorsed different ones,” Gonzalez-Pagan said. “It’s a full menu of possibilities.”
When the Supreme Court opened its October term last year, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*—the “gay wedding cake” case—loomed as a blockbuster, a major step toward resolving conflicts between religious freedom and anti-discrimination laws protecting LGBT people in general and same-sex married couples in particular.

But someone left the cakeshop in the rain.

On Monday, the Supreme Court produced the melted remnant. By a contentious majority of 7–2, the Court held for the religious baker, Jack Phillips, who had refused to sell a cake to a same-sex couple, Charlie Craig and Dave Mullins, for a post-hoc celebration of their out-of-state wedding. It used a rationale applicable only to this case, which sheds no light on the larger civil-rights issues.

It was obvious at oral argument in December that the case had what Supreme Court insiders call “vehicle problems”—meaning that the facts and the record did not clearly tee up the issue the parties were seeking to resolve. (Some years ago, *The New York Times* ’ Adam Liptak cogently explained the concept of a “clean vehicle.”)

On Monday, a majority opinion by Justice Anthony Kennedy listed the reasons why this case turned out to be a lemon. First, is what the couple asked for—a cake for a private celebration—really “speech” or “free exercise of religion” at all? Second, the record was unclear whether Phillips refused only to bake a cake with a “wedding” message or refused to provide any cake at all for Craig and Mullins’s celebration. Third, the events occurred before the Court’s decision, in *Obergefell v. Hodges*, that same-sex couples have a right to marry. Thus, Phillips in part based his denial on the fact that, at the time, Colorado did not permit same-sex marriage—that “the potential customers ‘were doing something illegal.’” Fourth, as Justice Kennedy pointed out at oral argument, the record was muddled by anti-religious statements made by state officials who considered the case below.

And finally, though the Court did not discuss this aspect, Phillips’s attorneys (from the religious-right legal powerhouse Alliance Defending Freedom) and the Trump administration made extravagant claims. They suggested that the Court skip the religious-freedom issue altogether and decide the case on pure free-speech grounds. Had it done so, a decision for Phillips would have given constitutional protection to an
unknown number of discriminations against LGBT people and couples, and indeed—by the government’s own concession—called into question laws protecting women and racial minorities.

All told, the Court would have done well to do to *Cakeshop* what it had done the week before to an obscure case with a muddled record called *City of Hays, Kansas v. Vogt*—dismissed the writ of certiorari as “improvidently granted.” A better case—with a clean record, decided after *Obergefell*, and perhaps with more careful briefing—would be sure to come along.

Instead, the Court decided the case, but on the narrowest grounds imaginable—that the Colorado Civil Rights Commission during its consideration of the case had shown anti-religious bias. The result was a decision that provides almost no guidance for lower courts facing similar cases. “In this case,” Kennedy wrote, “the adjudication concerned a context that may well be different going forward.” Thus, “the outcome of cases like this in other circumstances must await further elaboration in the courts.”

The action in the *Cakeshop* opinions, in fact, involved jockeying for position in those future cases between the moderate liberals, led in this case by Justice Elena Kagan, and the hard-right conservatives, led here by Justice Neil Gorsuch.

Kennedy’s opinion began by setting out his vision of the conflict of two constitutional principles. “The first is the authority of a state … to protect the rights and dignity of gay persons who are, or wish to be, married”; the second is “the right of all persons to exercise fundamental freedoms under the First Amendment.” Jack Phillips claimed the commission’s order violated his rights of free speech and free exercise; Kennedy found him half right. The opinion was written entirely in terms of “free exercise” of religion—a narrower ground than the free-speech argument.

Kennedy found no problem with civil-rights statutes protecting gays and lesbians; the opinion repeated long-established religion that religious scruples do not necessarily overcome civil-rights laws. (Kennedy even cited *Newman v. Piggie Park Enterprises*, a 1968 case that rejected a claim for religious exemption for a barbecue joint whose owner asserted that serving black people offended his religion.) Instead, Kennedy said, the Colorado Civil Rights Commission, in its hearing, did not afford Phillips “neutral and respectful consideration of his claims” for religious exemption.

As evidence, Kennedy cited statements by commissioners “that religious beliefs cannot legitimately be carried into the public sphere or commercial domain.” He coupled those with another statement in which a member said “freedom of religion and religion has been used to justify all kinds of discrimination through history, whether it be slavery, whether it be the Holocaust.” That kind of claim, the commissioner said, “is one of the most despicable pieces of rhetoric that people can use to … hurt others.”
Kennedy saw this as anti-religious bias in “at least two distinct ways: by describing [religion] as merely rhetorical” and by comparing it to “defenses of slavery and the Holocaust.” These statements infected the judgment below with hostility to religion, he said.

In addition, Kennedy said, the commission had earlier dismissed complaints brought against three other bakers by a conservative Christian named William Jack. Jack asked them to create cakes depicting gay couples with a cross-out mark, and Bible verses denouncing homosexuality. As Kennedy read the record, the commission had dismissed Jack’s complaint because it found the messages “offensive.” The decision, thus, was based on “the government’s own assessment of offensiveness,” which the First Amendment forbids.

The latter part of the opinion seems fairly dubious to me. I don’t read the commission’s language as he does; I read it as saying that the bakers refused the message because they found it offensive. Under a proper civil-rights law, businesses cannot discriminate against a customer because of his or her race, or religion, or sexual orientation; businesses, however, aren’t bound by the First Amendment and can reject messages—as long as they would reject the same message from any customer.

The commission below found that Masterpiece had denied a wedding cake to Craig and Mullins because they are gay. The bakeries in the Jack cases had refused only a very specific cake—and not because Jack was a Christian but because the specific message offended them. Civil-rights laws protect individuals, not messages.

This part of Kennedy’s opinion set off the battle of the concurrences. Kagan, joined by Justice Stephen Breyer, warned lower courts that discrimination against messages is not religious discrimination. Phillips denied service to Craig and Mullins because they are gay. The other bakers would not bake an anti-gay cake for anyone of any race, creed, color, or sexual orientation, she said. Thus, “the bakers did not single out Jack because of his religion, but instead treated him in the same way they would have treated anyone else.”

Gorsuch, joined by Alito, argued that this was a distinction without a difference. He cited first the bakers’ statements that they would not make anti-gay cakes for anyone, then a statement by Phillips that he “would have refused to create a cake celebrating a same-sex marriage for any customer, regardless of his or her sexual orientation.” Thus, Gorsuch wrote, “the two cases share all legally salient features.” A lot will ride on which of these arguments future courts find most persuasive.

Justice Clarence Thomas wrote separately to say that the case should have been decided on free-speech grounds. Gorsuch joined this opinion as well, signaling his openness to this broader claim.

Justice Ruth Bader Ginsburg, joined by Justice Sonia Sotomayor, dissented. In her view, the commission’s decision was entirely proper. First, “Phillips submitted no evidence showing that an objective observer
understands a wedding cake to convey a message, much less that the observer understands the message to be the baker’s.” Second, the Jack case and Masterpiece are quite different, she argued: “While Jack requested cakes with particular text inscribed, Craig and Mullins were refused the sale of any wedding cake at all. They were turned away before any specific cake design could be discussed.”

So after prolonged labor, on Monday the Court brought forth what can only generously be called a mouse. The issue should have been saved for a better case. That it wasn’t, I suspect, results from Kennedy’s interest in this particular set of facts. Twenty-six years ago, in Church of the Lukumi Babalu Aye v. City of Hialeah, he wrote a major opinion on religious animus that relied in part on public statements of local officials. He may not have been able to resist returning to, and reaffirming, that opinion in the autumn of his career.
“Baker claims religious persecution again—this time after denying cake for transgender woman”

Washington Post

Amy B. Wang

August 15, 2018

Add another layer to the legal drama surrounding the Colorado baker who refused to make a wedding cake for a same-sex couple — and took his case all the way to the Supreme Court.

Jack Phillips, owner of Masterpiece Cakeshop in Lakewood, Colo., on Tuesday filed a federal lawsuit against the state alleging religious discrimination.

This time, the cake at the center of the controversy was not for a wedding. In June 2017, Colorado lawyer Autumn Scardina called Masterpiece Cakeshop to request a custom cake that was blue on the outside and pink on the inside.

The occasion, Scardina told the bakery’s employees, was to celebrate her birthday, as well as the seventh anniversary of the day she had come out as transgender.

Masterpiece Cakeshop ultimately refused Scardina’s order on religious grounds.

“Phillips declined to create the cake with the blue-and-pink design because it would have celebrated messages contrary to his religious belief that sex — the status of being male or female — is given by God, is biologically determined, is not determined by perceptions or feelings, and cannot be chosen or changed,” the complaint stated.

More than a year later, on June 28, the Colorado Civil Rights Commission ruled that there was probable cause that Phillips had discriminated against Scardina on the basis of gender identity.

In refusing to make a cake for the transgender woman, Phillips had “denied her equal enjoyment of a place of public accommodation,” Aubrey Elenis, director of the Colorado Civil Rights Division, wrote in her ruling.

The commission’s latest decision came two weeks after the Supreme Court ruled narrowly in favor of Phillips in Masterpiece Cakeshop v. Colorado Civil Rights Commission, a case that had originated when Phillips refused to bake a wedding cake for a same-sex couple in 2012.

As The Washington Post’s Robert Barnes reported, the 7-to-2 Supreme Court decision was in favor of Phillips — but focused on his treatment by the Colorado Civil Rights Commission and did not necessarily set a standard for future similar cases:
“The neutral and respectful consideration to which Phillips was entitled was compromised here,” Justice Anthony M. Kennedy wrote, adding that the commission’s decision that the baker violated the state’s anti-discrimination law must be set aside.

But Kennedy acknowledged that the decision was more of a start than a conclusion to the court’s consideration of the rights of those with religious objections to same-sex marriage and the rights of gay people, who “cannot be treated as social outcasts or as inferior in dignity and worth.”

Future cases that raise those issues “must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market,” he wrote.

The Alliance Defending Freedom, a Christian legal nonprofit that funded Phillips’s previous case, said Colorado officials were “doubling down on their anti-religious hostility” in their treatment of the baker, according to a statement regarding this new lawsuit, Masterpiece Cakeshop v. Elenis.

“You would think that a clear Supreme Court decision against their first effort would give them pause,” the group stated. “But it seems like some in the state government are hellbent on punishing Jack for living according to his faith. If that isn’t hostility, what is?”

The group pointed out that Scardina’s request for a blue-and-pink cake came on the same day — June 26, 2017 — that the Supreme Court announced that it would hear Masterpiece Cakeshop v. Colorado Civil Rights Commission, indicating Phillips had been “targeted” by some Colorado citizens.

“The first time around, it looked like Colorado was biased against people of faith,” the group stated. “Now it just looks like the state is biased against people named ‘Jack Phillips.’ In moving ahead on this new case, the government is yet again confirming that it applies its law in an arbitrary and unequal way, which the Supreme Court has already said it cannot do.”

A representative for the Colorado Civil Rights Commission said that the commission could not comment on pending or active litigation and, by law, could not verify or disclose the existence of charges detailed by Phillips.
Transgender Rights
Some workers and employers are uncertain about what’s prohibited under a federal law against sex discrimination in the workplace in light of a patchwork of legal interpretations.

“For large national employers, regardless of how Title VII is interpreted, you have some number of states, cities, or federal contractors who have explicit laws that clearly protect employees from discrimination based on sexual orientation or gender identity,” Mike Eastman, managing counsel at NT Lakis, told Bloomberg Law. NT Lakis helps large employers comply with workplace obligations.

Several federal appeals courts in recent years have reached different conclusions about whether Title VII of the 1964 Civil Rights Act prohibits discrimination based on sexual orientation or transgender status. The Seventh Circuit in April 2017 became the first to rule that sexual orientation discrimination is a form of sex discrimination. The Second Circuit joined it in February 2018. The Eleventh Circuit, meanwhile, reached the opposite conclusion in March 2017. The circuit split has fueled speculation that the U.S. Supreme Court will take up the question.

The Tenth Circuit in September 2007 said Title VII doesn’t cover transgender discrimination. However, the Sixth Circuit in August 2004 said Title VII prohibits it as a form of unlawful sex stereotyping.

Several cases rely on precedent in which the U.S. Supreme Court established “sex stereotyping” as a prohibited form of sex discrimination. The court ruled that a woman could prove a discrimination case because she didn’t carry herself the way stereotypes about how women behave suggest she should.

The Eleventh Circuit compared discriminating against a transgender person to stereotyping on the basis of “gender-based behavioral norms” in a 2011 ruling. The Sixth Circuit earlier this year expanded its interpretation of Title VII and said a worker can bring a sex discrimination claim based on transgender identity alone, without having to go into stereotyping. In the ruling, the Sixth Circuit also rejected the employer’s argument that its action was protected under the Religious Freedom Restoration Act.

Differing views have been voiced within the executive branch. The Equal Employment Opportunity Commission, which investigates charges of discrimination under Title VII and
enforces it in private sector and federal workplaces, holds the expansive view of the law’s scope on sexual orientation and transgender status. The Justice Department, which enforces Title VII in state and local public sector workplaces, takes the narrower view with respect to sexual orientation and transgender status.

Employers are trying to deal with “real practical challenges” rather than the question of “is it covered or not?” Eastman told Bloomberg Law. As examples, he listed questions employers with transgender employees ask: “What’s the best way to deal with a transitioning employee? What are the sort of things we have to think through? What kind of plans are we going to make? How can we be helpful?”

Employers ask these questions because they’re concerned with doing what’s right, not with doing the minimum that the law says, he said. “There’s good reason to go beyond what the law requires,” he said. “They rarely say they’re going to have an anti-harassment policy that just barely satisfies Title VII.”

Fifth Circuit May Be Next

One circuit that hasn’t ruled on sexual orientation or transgender discrimination under Title VII is the Fifth Circuit. It covers federal courts in Texas, Louisiana, and Mississippi.

Phillips 66, a downstream energy company, prevailed April 4 in a Title VII transgender discrimination lawsuit. Nicole Wittmer said the company rescinded a job offer after learning she was transgender. She said the company used a discrepancy in her employment history to conceal its discriminatory intent.

Recent rulings in other circuits were persuasive for concluding that Title VII covers transgender status, Judge Lee H. Rosenthal of the U.S. District Court for the Southern District of Texas said. She ruled against Wittmer because the evidence showed Phillips 66 rescinded her job offer for reasons unrelated to her sex. “The record shows no evidence that Phillips knew about Wittmer’s status as a transgender woman until after it had decided to rescind the offer,” she wrote.

Even though Rosenthal ruled against Wittmer, her lawyer was encouraged that Rosenthal took a more expansive view of Title VII.

“While we are certainly disappointed that the judge didn’t see this particular set of facts in a way to allow Ms. Wittmer to get to a jury, what she did say is if you’re transgender, you’re allowed to get protections under law,” Alfonso Kennard with Kennard Law, P.C. in Houston, told Bloomberg Law.

Kennard “can’t say at this time” whether Wittmer will appeal to the Fifth Circuit. But even if Rosenthal’s ruling is the last word in Wittmer’s case, it will be persuasive for other Title VII transgender discrimination cases, he said. “Anyone looking to make sense of the current status of law on this topic in the Fifth
Circuit needs look no further than this order by Judge Rosenthal,” he said.

A ruling against a transgender worker that embraces an expansive view of Title VII isn’t a complete loss, Shawn Meerkamper, a staff attorney with Transgender Law Center in Oakland, Calif., said. “The plaintiff won on the law but lost on the facts,” Meerkamper told Bloomberg Law. A ruling like this lays the groundwork for more rulings in favor of broad Title VII coverage, they said.

Proceeding with a patchwork of Title VII interpretations at the trial and appeals court levels isn’t ideal, said Greg Nevins, employment fairness project director for Lambda Legal, an LGBT civil rights advocacy group. Lambda Legal and Transgender Law Center are and have been involved in cases urging a more expansive interpretation, either by directly representing workers or filing amicus briefs.

“That is at least an issue by proceeding with judicial rulings rather than statute that it can leave an issue where people’s rights are less clearly understood by employers and workers and judges and lawyers,” the Atlanta-based Nevins told Bloomberg Law. “Even though I adamantly believe that Congress already passed a law that protects the LGBT community from discrimination in employment, it wouldn’t be a bad idea if they passed one that makes it explicit.”
Employers are moving to adopt or strengthen policies to prevent bias against transgender people after the latest in a series of court rulings that have extended protections for an increasingly diverse work force.

A federal appeals court, rejecting the position of the Trump administration, ruled this month that transgender people are protected by a civil rights law that bans workplace discrimination based on sex.

Lawyers who specialize in employment cases said that the decision, by the United States Court of Appeals for the Sixth Circuit, in Cincinnati, was highly significant. The court held that job discrimination on the basis of transgender status was inherently sex discrimination, and that the employer in this case could not claim an exemption from the law because of his religious beliefs.

The case was brought by the Equal Employment Opportunity Commission, an independent federal agency, on behalf of a funeral director who had been fired by a Michigan funeral home after informing the owner that she intended to transition from male to female and would dress as a woman while at work.

Job discrimination based on a person’s transgender status violates Title VII of the Civil Rights Act of 1964, the court ruled. Under the law, it said, “gender must be irrelevant to employment decisions.”

The court’s conclusion is at odds with a position taken by Attorney General Jeff Sessions in October. In a memorandum to Justice Department lawyers, he said that “Title VII’s prohibition on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity per se, including transgender status.”

The funeral home maintained that it did not violate federal law by requiring the employee to comply with a sex-specific dress code. Moreover, the owner of the home, Thomas Rost, who has been a Christian for more than 65 years, said that forcing him to employ the transgender worker would impose a substantial burden on his sincerely held religious beliefs and would therefore violate another law, the Religious Freedom Restoration Act of 1993.

The court disagreed, saying that employees may not be discriminated against because they fail to conform to “stereotypical gender norms” — in this case, an employer’s notion of “how biologically male persons should dress, appear, behave and identify.”
Discrimination based on transgender status is a form of sex discrimination, said the decision, written by Judge Karen Nelson Moore for a unanimous three-judge panel, because “an employer cannot discriminate against an employee for being transgender without considering that employee’s biological sex.”

Scott Rabe, an expert on employment law at the firm Seyfarth Shaw, said that the ruling was important because “it addresses two hot-button topics in employment law: the scope of the definition of ‘sex discrimination’ under Title VII and the impact of laws protecting the free exercise of religion in the workplace.”

“The ruling is a big win for the Equal Employment Opportunity Commission and for transgender people,” Mr. Rabe said. “The court sent a strong message that the Religious Freedom Restoration Act has minimal impact on the E.E.O.C.’s authority to enforce the anti-discrimination laws under Title VII of the Civil Rights Act.”

In an interview, the employee at the center of the case, Aimee Stephens, 57, said she had been shocked by her dismissal.

“I had a hard time believing that a company or a person could get away with firing me because I was transgender,” Ms. Stephens said. “It didn’t seem right.” But, she said, she has since learned that “it’s a pretty common occurrence for transgender people to be fired because they are transgender or don’t meet the expectations of what another individual thinks they should be.”

In court papers, Mr. Rost said he wanted to run his business in keeping with his religious belief that “a person’s sex (whether male or female) is an immutable God-given gift and that people should not deny or attempt to change their sex.”

The court decision is binding in states covered by the Sixth Circuit: Kentucky, Michigan, Ohio and Tennessee. But its reasoning could have influence elsewhere.

As it embraced a broad view of protections under Title VII, the court also rejected an expansive interpretation of the Religious Freedom Restoration Act.

That law figured prominently in dozens of court cases in which employers challenged an Obama-era rule that required them to provide insurance coverage for contraception under the Affordable Care Act. The Trump administration has proposed to roll back that requirement by offering an exemption to any employer that objects to covering birth control on the basis of religious beliefs.

Doron M. Kalir, a law professor at Cleveland State University in Ohio, said the court ruling showed how judges were “extending the protection of Title VII of the Civil Rights Act to a more diverse work force of gays, lesbians and transgender people.”

The funeral home has not said whether it will appeal the ruling. Mr. Kalir said that at least several Supreme Court justices, if presented with the issue, would probably vote to overturn the ruling on the ground that Congress was not thinking about transgender people when it passed the Civil Rights Act of 1964. (Mr. Kalir wrote a friend-of-the-court
brief for a civil rights group, Equality Ohio, that was quoted by the appeals court.)

In a separate case last year, Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit, in Chicago, said the meaning of the civil rights law and the word “sex” had changed over the years.

“It is well-nigh certain that homosexuality, male or female, did not figure in the minds of the legislators who enacted Title VII,” wrote Judge Posner, who retired from the federal bench in September. But, he said, the law “invites an interpretation that will update it to the present,” and the word “sex” in Title VII can now, after more than a half-century, be “understood to include homosexuality.”
The U.S. Department of Justice has reversed course on whether federal law banning sex discrimination in the workplace provides protections for transgender employees, saying in a memo that it does not.

The memo sent to U.S. Attorneys’ offices on Wednesday by Attorney General Jeff Sessions says Title VII of the Civil Rights Act of 1964 only prohibits discrimination on the basis of a worker’s biological sex, and not their gender identity.

Sessions rescinded a Justice Department memo from 2014 that said Title VII does protect transgender people, a position also taken by several federal appeals courts in recent years.

It was the Trump administration’s latest move to roll back Obama administration policies on LGBT issues. In August, President Donald Trump signed a memo directing the U.S. military not to accept transgender men and women as recruits, reversing a policy that allowed transgender people to serve openly.

And last month, the Justice Department appeared before a federal appeals court in Manhattan to argue that Title VII does not provide protections to gay and lesbian workers.

The Democratic National Committee criticized Wednesday’s memo in a statement, and urged Congress to pass a law explicitly protecting LGBT workers from discrimination.

Department of Justice spokesman Devin O’Malley said in a statement on Thursday that the government could not expand the law beyond what Congress had intended.

“Unfortunately, the last administration abandoned that fundamental principle, which necessitated today’s action,” he said.

But Sharon McGowan of LGBT group Lambda Legal, who worked at the Justice Department during the Obama administration, said the memo “blatantly ignores” a growing body of court decisions that said discrimination against transgender people is a type of sex bias.

“We are confident that the courts will see this flip in position for what it is - an anti-LGBT political pronouncement that finds no support in the law,” she said.
All three federal appeals courts to consider the issue over the last two decades have said discrimination against transgender workers is unlawful.

Most recently, an appeals court in Atlanta in 2011 said the Georgia state legislature unlawfully fired a transgender woman after she told her supervisor she planned to transition from male to female.
“Title VII In Transition? Texas Federal Court Rules That Anti-Discrimination Statute Protects Transgender Individuals”

Lexology

Stephen Fox and Jonathan Clark

April 19, 2018

In a landmark ruling, a federal court judge in Texas issued an opinion holding—unequivocally—that Title VII protects transgender individuals from discrimination based on their gender identity. Wittmer v. Phillips 66 Company, No., 4:2017-cv-02188 (S.D.Tex, April 4, 2018). The ruling is the first of its kind in Texas and will likely have a major impact in Texas workplaces. Indeed, recent studies have shown that approximately 430,000 workers in Texas identify either lesbian, gay, bisexual, or transgender (LGBT). Of that number, 79% of transgender workers in Texas have reported—either formally or informally—some kind of discrimination in the workplace, including harassment, discriminatory hiring practices, and promotion denials. Texas employers should take note of the recently-issued decision.

Wittmer v. Phillips 66 Company Background & Holding

Nicole Wittmer, a transgender woman, sued Phillips 66 Company for sex discrimination, claiming her job offer from Phillips was rescinded after the company learned she was transgender. Phillips claimed the offer was withdrawn because Wittmer lied during the interview/application process. Phillips believed that Wittmer had falsely claimed she was still working for her former employer at the time of the interview when, in fact, she had been terminated days prior to the interview. Wittmer claimed that this justification was pretextual because, in her view, Phillips’ actually withdrew the offer because she is a transgender woman.

On April 4, 2018, Judge Lee Rosenthal, the Chief Judge for the Southern District of Texas, rejected Phillips’ argument that Wittmer’s transgender status was not protected under federal law, holding unequivocally that Title VII protects transgender individuals from sex discrimination. Ironically, after issuing this monumental determination, Judge Rosenthal tossed Wittmer’s lawsuit, ruling that Wittmer had failed to make a prima facie case of sex discrimination and, even if she had, Phillips had put forth a legitimate, nondiscriminatory and non-pretextual reason for rescinding the employment offer.

A Shifting Legal Consensus

This opinion joins a chorus of recent decisions by various federal circuit and district courts expanding Title VII to transgender and homosexual individuals. In
her decision, Judge Rosenthal relied heavily on the Supreme Court’s seminal 1989 case of *Price Waterhouse v. Hopkins* in concluding Title VII covers transgender-based sex discrimination. In *Hopkins*, the nation’s high court held Title VII protects individuals from discrimination based on their perceived failure to conform to gender stereotypes. As Judge Rosenthal noted, the *Hopkins* holding has recently been expanded by several federal courts to include protection of both transgender and homosexual persons. In particular, both the Sixth and Second circuits, relying on *Price Waterhouse*, ruled this year that Title VII covers gender-identity and sexual-orientation based discrimination claims.[1] These opinions correspond with the Seventh Circuit’s 2017 decision in *Hively v. Ivy Tech Cmt. Coll. of Ind.*, which held discrimination based upon an individual’s sexual orientation was a “paradigmatic sex discrimination” claim, squarely within Title VII’s ambit. Judge Rosenthal found the reasoning from these recent decisions persuasive.

**Future Conflict**

The recent national judicial trendline is clear—Title VII coverage is expanding throughout the federal courts to protect individuals from discrimination based on their gender identity and sexual orientation. But the story is not over. First, Texas-based employers in particular should note that the usually-conservative Fifth Circuit Court of Appeals has not weighed in on the issue. And to the extent it does (a question of ‘when’ and not ‘if’), there are no guarantees it will fall in line with this movement. Indeed, Fifth Circuit precedent still holds that a discharge based solely on homosexuality is not prohibited by Title VII. *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979). And as recently as last year, the Eleventh Circuit, citing *Blum*, held that a plaintiff-employee could not state a claim under Title VII for workplace discrimination based on sexual orientation. *Evans v. Georgia Reg’l. Hosp.*, 850 F.3d 1248 (11th Cir. 2017).

Second, regardless of trendlines or predictions, one thing is abundantly clear: the Trump Department of Justice believes, unambiguously, that Title VII “does not encompass discrimination based on gender identity [and] transgender status.” Specifically, in October 2017, Attorney General Jeff Sessions issued a memorandum and amicus brief arguing for a narrow interpretation, contending the statute bars only discrimination between men and women. The memorandum retracts a position established during the Obama administration and, further, remains at odds with the EEOC. Accordingly, the not-too-distant future will likely involve a battle before the Supreme Court to settle Title VII’s scope in the context of sexual orientation and gender identity once and for all.
A federal judge in Virginia has found in favor of a transgender student whose efforts to use the boys’ bathrooms at his high school reached the Supreme Court and thrust him into the middle of a national debate about the rights of transgender students.

In an order handed down on Tuesday, Judge Arenda L. Wright Allen of the United States District Court for the Eastern District of Virginia denied a motion by the Gloucester County school board to dismiss the lawsuit brought by the student, Gavin Grimm.

The school board had maintained that Mr. Grimm’s “biological gender” was female and had prohibited administrators from allowing him to use the boys’ restrooms. He sued the school board in July 2015, alleging that its policy violated Title IX as well as the equal protection clause of the Constitution.

The board had argued in essence that its policy was valid because Title IX allows for claims only on the basis of sex, rather than gender identity, and that its policy did not violate the equal protection clause.

But Judge Wright Allen disagreed, writing that Mr. Grimm’s transgender status constituted a claim of sex discrimination and that the bathroom policy had “subjected him to sex stereotyping,” violations of the law.

“There were many other ways to protect privacy interests in a nondiscriminatory and more effective manner than barring Mr. Grimm from using the boys’ restrooms,” she continued. “The Board’s argument that the policy did not discriminate against any one class of students is resoundingly unpersuasive.”

In Tuesday’s order, the judge directed lawyers for both parties to schedule a settlement conference within 30 days.

“I feel an incredible sense of relief,” Mr. Grimm, now 19 and headed to college in the fall, said in a statement after the ruling. “After fighting this policy since I was 15 years old, I finally have a court decision saying that what the Gloucester County School Board did to me was wrong and it was against the law. I was determined not to give up because I didn’t want any other student to have to suffer the same experience that I had to go through.”

In a statement issued late Tuesday, the Gloucester County school board said it was “aware of the District Court’s decision.” It
was not clear whether the board planned to appeal.

A spokeswoman for the Justice Department declined to comment on Judge Wright Allen’s ruling on Tuesday.

One of Mr. Grimm’s lawyers said Tuesday that he had moved to Berkeley, Calif., and would attend college in the Bay Area. The lawyer, Josh Block, said they were seeking nominal damages and a declaratory judgment that the bathroom policy violated Mr. Grimm’s rights under Title IX.

“Title IX protects trans people, and that’s what courts have been saying for years,” said Mr. Block, a senior staff attorney with the A.C.L.U. who was the lead lawyer on Mr. Grimm’s case. “Even though this administration wants to try to roll back protections, they can’t change what the law says.”

At issue in Mr. Grimm’s case is whether Title IX, a provision in a 1972 law that bans discrimination “on the basis of sex” in schools that receive federal money, also bans discrimination based on gender identity. President Barack Obama concluded that it did.

But in February 2017, President Trump rejected the Obama administration’s position and rescinded protections for transgender students that had allowed them to use bathrooms corresponding with their gender identity.

The practical effect of the Trump administration’s change in position was limited, however, as a federal court had previously issued a nationwide injunction barring enforcement of the Obama administration’s guidance.

Then, the next month, the Supreme Court announced that it would not decide whether Mr. Grimm could use the boys’ bathroom at his high school. Although the court decided not to take his case at the time, some predicted that it would almost certainly return there eventually.

The March 2017 decision was a setback for transgender rights advocates, who had hoped the Supreme Court would aid their cause in much the same way it had helped same-sex marriage advocates two years before.

Instead, in a one-sentence order, the Supreme Court vacated an appeals court decision in favor of Mr. Grimm, and sent the case back to the federal appeals court in Virginia for further consideration in light of the new guidance from the Trump administration. The case was later returned to the District Court to consider whether the school district’s policy had violated Mr. Grimm’s rights.

Mr. Grimm’s case is just one of several on transgender rights that have been litigated in lower courts or been the subject of federal civil rights investigations in recent years. In her order, Judge Wright Allen cited several cases with arguments similar to Mr. Grimm’s. Even with Tuesday’s federal order, there remains a thicket of conflicting state laws and local school policies on bathroom use.

Mr. Grimm’s journey into the spotlight began in 2014, when he was 15 and
starting his sophomore year. At that time his family told his school, Gloucester High School, that he was transgender. Administrators were supportive at first and allowed him to use the boys’ bathroom.

But amid an uproar from some parents and students, the school board barred Mr. Grimm from using the boys’ bathrooms and adopted a policy requiring students to use the bathrooms and locker rooms for their “corresponding biological genders.” The board added that “students with gender identity issues” would be allowed to use private bathrooms.

The A.C.L.U. argued that requiring Mr. Grimm to use a private bathroom had been humiliating and had, quoting him, “turned him into ‘a public spectacle’ before the entire community, ‘like a walking freak show.’”

In its statement, the school board said that it “continues to believe that its resolution of this complex matter fully considered the interests of all students and parents in the Gloucester County school system.”
“The Trump Administration May Have Doomed Gavin Grimm’s Case”

The Atlantic

Emma Green

March 6, 2017

The Supreme Court sent an important case concerning a transgender student in Virginia back down to the Fourth Circuit Court of Appeals on Monday, in part because of the Trump administration’s new position on the issues involved in the case.

In *Gloucester County School Board v. G.G.*, Gavin Grimm sued his school district for the right to use the boys’ bathroom, which corresponds with his gender identity. Under the Obama administration, it looked like Grimm might have a strong chance of success at the country’s highest court, potentially setting a precedent for school districts across the country. Now, that’s looking less likely.

The Trump administration has rolled back Obama’s former policies, meaning that transgender students like Grimm may have to follow policies on bathroom use and other accommodations set by individual school districts.

Grimm’s case has been winding its way through the court system for nearly two years. In the summer of 2015, a federal district court dismissed Grimm’s claims. The judges’ decision turned on their interpretation of Title IX of the Education Amendments of 1972, which prohibits sex discrimination in schools that get federal funds. Courts have disagreed about the meaning of sex discrimination: Some have held that it covers gender identity, meaning that it prohibits discrimination against transgender people like Grimm. Others, like the district court in Grimm’s case, have disagreed. The Obama administration supported the inclusive interpretation, instructing schools to accommodate transgender students.

Last April, the Fourth Circuit Court of Appeals handed down a decision in Grimm’s favor: They held that the courts should defer to the administration’s interpretation of Title IX, meaning in effect that Gloucester County should have to let Grimm use the bathroom of his choice. The Supreme Court stayed the opinion and the school district appealed. In October, the Supreme Court agreed to hear the case. Arguments were set for late March.

But in February, the Trump administration withdrew the Obama administration’s guidance, arguing that “there must be due regard for the primary role of the States and local school districts in establishing educational policy.” This was a clear sign that Trump is backing away from the Obama administration’s inclusive...
interpretation of Title IX, favoring the previous status quo in which individual school districts decided how to deal with transgender students according to state and local laws.

While Grimm’s attorneys encouraged the Supreme Court to move forward with the case despite the Trump administration’s new letter, the justices declined to do so on Monday, remanding the case back to the Fourth Circuit for further consideration “in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017.”

The Supreme Court’s decision not to hear the case at this point is a sign that this issue is likely to remain unresolved, at least for the near future. The courts have long been conflicted about the meaning of Title IX and other civil-rights statutes that deal with sex discrimination, in part because the law is arguably unclear about what sex discrimination means.

In wrestling with cases like Grimm’s, they have consistently looked to the executive and legislative branches for guidance. So far, Congress hasn’t passed a law that clearly and incontrovertibly prohibits gender-identity discrimination in the context of education, employment, or other arenas. In practice, that has meant the White House and other agencies have had an outsized influence in determining how cases like Grimm’s should be handled.

With its guidance letter to schools, the Obama administration set up transgender kids for success in making anti-discrimination claims in court. That’s largely why Grimm was victorious at the Fourth Circuit. Now, the Trump administration has reversed their fortunes, making it less likely that students like Grimm will prevail. When Gloucester County is argued before the Fourth Circuit for a second time, Grimm will be missing much of the support that helped him win the first time—including the support of the White House.
A federal judge on Tuesday sided with a Gloucester transgender student on whether he should have been able to use the bathroom of his choice in the public schools — with the judge rejecting the Gloucester County School Board’s bid to dismiss the case.

U.S. District Judge Arenda L. Wright Allen sided with the student, Gavin Grimm, who contends in a federal lawsuit that a School Board policy requiring him to use a separate bathroom — rather than the boys’ rooms — stigmatized him and turned him into an outcast at Gloucester High School.

Wright Allen, who sits in Norfolk, did not rule on the case’s overall merits Tuesday. But she denied a motion from lawyers with the Gloucester School Board to toss the case, and she ordered that Grimm’s lawyers and the attorneys for the board contact the court within 30 days to schedule a settlement conference to resolve the issue.

“The Board’s argument that the policy did not discriminate against any one class of students is resoundingly unpersuasive,” Wright Allen concluded in her 31-page order.

But the judge’s ruling, while significant, is unlikely to be the last word in the case — with the ultimate outcome expected to be determined by higher courts. The case still has the potential to set a legal precedent — one way or the other — in the heated social debate over transgender issues.

David P. Corrigan, the lead attorney representing the Gloucester School Board, did not return a phone call Tuesday seeking comment on what the board plans to now do. Gloucester School Board chairwoman Anita Parker did not immediately return a phone call, while vice chairman William Lee also could not immediately be reached.

“The School Board is aware of the District Court’s decision denying the motion to dismiss (Grimm’s) Amended Complaint,” the board said in a statement released late Tuesday. “The School Board continues to believe that its resolution of this complex matter fully considered the interests of all students and parents in the Gloucester County school system.”

Grimm, now 18, was born a female but later told his parents — and then the school system — that he identified as a male, and he later underwent hormone therapy. He graduated from Gloucester High in June 2017, with the school board having argued unsuccessfully
that the case was now moot in light of his graduation.

Grimm said Tuesday that Wright Allen’s ruling brought him “an incredible sense of relief.”

“After fighting this policy since I was 15 years old, I finally have a court decision saying that what the Gloucester County School Board did to me was wrong and it was against the law,” he said in a statement released by the ACLU of Virginia, which has represented Grimm in the lawsuit. “I was determined not to give up because I didn’t want any other student to have to suffer the same experience that I had to go through.”

According to Wright Allen’s ruling, Grimm and his mother initially approached Gloucester High School administrators in August 2014, saying that he is transgender and “would be attending school as a boy.”

Though Grimm initially requested to use a restroom in the nurse’s office, that was located in a remote part of the school, “and left Mr. Grimm feeling stigmatized and isolated,” his lawsuit said. The location caused him to be late for class because it was so far from his classrooms, the suit added.

That was when Grimm sought permission from the principal to use the boys’ room. He got that permission, and began using the boys’ room in October 2014, using it “without incident” for about seven weeks. Grimm would later say that he experienced “no problems from students” during that time.

It was only after “several adults in the community” learned of Grimm’s use of the boys’ room, Wright Allen’s ruling said, that the matter began to become an issue. The school initially planned to rectify those concerns by increasing partitions between urinals, adding privacy strips on stalls and designating certain single-stall restrooms for use by all students.

But speakers at a School Board meeting in December 2014 overwhelmingly said those ideas fell short.

At that meeting, the board passed a new policy, by a 6-1 vote, that said that the use of restrooms and locker rooms in the schools “shall be limited to the corresponding biological genders,” and that “students with gender identity issues shall be provided an alternative private facility.”

The rules were immediately put into effect. Grimm asserted that he not only felt excluded by those rules, but that they made him often refrain from using any restroom at all — leading him to be unable to concentrate in class and developing a urinary tract infection.

The case has taken a long route through several courts.

In late 2015, Senior U.S. District Judge Robert G. Doumar ruled in favor of the Gloucester School Board, saying in part that the privacy rights of other male students trump Grimm’s desire to use the boys’ room. The ACLU appealed that ruling to the 4th U.S. Circuit Court of Appeals, which reversed Doumar’s decision. In part, the appeals court cited a U.S. Department of Education guidance under former President
Barack Obama that said that transgender students should be allowed to use the restrooms of their choice.

The Gloucester County School Board appealed the 4th Circuit’s decision to the U.S. Supreme Court — and the Supreme Court initially agreed to hear the case.

But then the Trump administration, to include Attorney General Jeff Sessions and Education Secretary Betsy DeVos, reversed the Justice Department’s and Department of Education’s guidance on the issue. That led the Supreme Court to decide not to hear the case after all. Instead, in March 2017 the high court sent the case back to the lower courts for more proceedings.

But instead of Doumar — an old-school federal judge who is now 87 years old — the case went to Wright Allen, one of the younger judges on the Norfolk federal bench. A former federal public defender, Wright Allen is often seen as a more liberal-leaning judge. She made a big ruling in the same-sex marriage debate a few years ago, saying that gays and lesbians have the constitutional right to marry in Virginia.

It couldn’t be determined Tuesday why Doumar didn’t get the case the second time, given that cases traditionally are sent back to the same judge who heard them the first time. But Tuesday’s ruling makes clear that Wright Allen views the merits of the case very differently than did Doumar.

“Preventing Mr. Grimm from using the boys’ restrooms did nothing to protect the privacy rights of other students, but certainly singled out and stigmatized Mr. Grimm,” Wright Allen wrote. She said there were “many other ways to protect privacy interests in a non-discriminatory and more effective manner than barring Mr. Grimm from using the boys’ restrooms.”

“It’s obviously a strong ruling in favor of Gavin Grimm,” said Carl Tobias, a law professor at the University of Richmond. “I haven’t read it all, but she rejects the argument made by the School Board. I think (Grimm) can claim that this is a victory.”

Tobias said he thought the Gloucester School Board would appeal the case. “My sense is that the School Board has been fighting it pretty vigorously, so why would they stop now?” he said. “They have fought it all the way along.”

Joshua Block, an ACLU attorney handling the case, agreed — saying the Gloucester School Board “has been fighting tooth and nail on this issue.”

There are very few facts in dispute in the litigation, Block said, with the two sides sparring exclusively over varying interpretations of the law on the issue. Block said he thought that the school board’s lawyers might ask to be allowed to file “an early appeal” based on Wright Allen’s ruling, “or ask that a final judgment be entered” so that the court’s final decision can be more quickly appealed.

“But for this case, I stopped making predictions long ago,” Block said.
The Sixth Circuit issued a published decision Wednesday reviving a U.S. Equal Employment Opportunity Commission suit accusing a Michigan funeral home operator of violating federal anti-discrimination law by firing its funeral director after she said she would transition from male to female, holding that the company wasn't protected by the Religious Freedom Restoration Act.

R.G. & G.R. Harris Funeral Homes Inc. violated Title VII by discriminating against Aimee Stephens and wasn't entitled to a defense under RFRA when it did so, the Sixth Circuit panel said in the unanimous opinion, handing a win to trans rights advocates.

RFRA blocks the government from enforcing a “religiously neutral” law that “substantially burdens” people’s “religious exercise,” unless that law is the “least restrictive way to further a compelling government interest.” The company’s owner, Thomas Rost, had argued it went against his Christian beliefs to employ Stephens, who was born biologically male, if she dressed and acted like a woman.

“RFRA provides the funeral home with no relief because continuing to employ Stephens would not, as a matter of law, substantially burden [owner Thomas] Rost’s religious exercise, and even if it did, the EEOC has shown that enforcing Title VII here is the least restrictive means of furthering its compelling interest in combating and eradicating sex discrimination,” wrote Circuit Judge Karen Nelson Moore in overturning a lower court ruling that said the funeral home was protected by RFRA.

The opinion overturns U.S. District Judge Sean F. Cox’s August 2016 ruling that employing Stephens burdened Rost’s beliefs and that Title VII’s bar on discrimination based on sex, which the EEOC had argued let Stephens act and dress like a woman, was not the least restrictive means of protecting her rights.

But far from being too restrictive of his rights, Title VII’s requirement that Rost tolerate Stephens’ gender identity didn’t “substantially” burden his religious beliefs, the panel said Wednesday.

Rost had argued that letting Stephens wear women’s clothing would “create distractions” for the funeral home’s customers “and thereby hinder their healing process,” and that making him tolerate her
transition would push him to leave the funeral industry and “end his ministry to grieving people.” However, neither alleged burden is “substantial,” the panel said.

“A religious claimant cannot rely on customers’ presumed biases to establish a substantial burden under RFRA,” Judge Moore wrote, adding that “tolerating Stephens’ understanding of her sex and gender identity is not tantamount to supporting it.”

Though Judge Cox had found Rost violated Title VII under a so-called sex stereotyping theory, which is one based on allegations a business mistreated a worker because they didn’t act in accordance with their sex, he said transgender status is not protected in itself. Here, too, he was wrong, the panel said Wednesday.

“It is analytically impossible to fire an employee based on that employee’s status as a transgender person without being motivated, at least in part, by the employee’s sex,” Judge Moore wrote.

The panel likened firing Stephens based on her gender identity to firing a gay worker based on their sexual orientation, citing the Seventh Circuit’s landmark Hively v. Ivy Tech decision, which was the country’s first appellate ruling that discriminating against gay workers violates Title VII’s ban on sex discrimination.

Gregory Nevins, director of the employment fairness project at LGBT legal advocacy group Lambda Legal, told Law360 the ruling was an “emphatic clarification that transgender workers are covered under Title VII.” He also praised the court for finding Rost was not shielded by the RFRA.

“[The opinion] really said, in very common sense fashion, that you could have religious beliefs and [the government has to] respect it, but there are also legal requirements for dealing with your employees,” said Nevins, who filed an amicus brief backing Stephens. “One is not a violation of the other.”

Alliance Defending Freedom attorney Gary McCaleb, who represented the funeral home, was less pleased, saying the opinion “radically rewrites Title VII far beyond the plain meaning of sex being either male or female.” McCaleb said the decision “revolves around a severe misreading of the Price Waterhouse case” that established the sex stereotyping theory.

“The court … has taken the term sex, which means male and female, and written into that the concept of gender,” he said. “Gender is a continuum of self-perceived gender as ranging from very masculine to very feminine. It’s actually contrary to understanding sex as being male or female, as written in the law.”

He added the group is considering its “options for further appeal.”

Representatives for the EEOC and attorneys for Stephens did not immediately respond Wednesday to requests for comment.

Judges Moore, Helene White and Bernice Donald sat on the panel for the Sixth Circuit.

The EEOC is represented by Anne Noel Occhialino.
The funeral home is represented by Douglas Wardlow and Gary McCaleb of the Alliance Defending Freedom.

Stephens is represented by John Knight of the American Civil Liberties Union Foundation.

The case is EEOC v. R.G. & G.R. Harris Funeral Homes Inc., case number 16-2424, in the U.S. Court of Appeals for the Sixth Circuit.
“Trump Says Transgender People Will Not Be Allowed in the Military”

*New York Times*

Julie Hirschfeld Davis and Helene Cooper

July 26, 2017

President Trump abruptly announced a ban on transgender people serving in the military on Wednesday, blindsiding his defense secretary and Republican congressional leaders with a snap decision that reversed a year-old policy reviled by social conservatives.

Mr. Trump made the declaration on Twitter, saying that American forces could not afford the “tremendous medical costs and disruption” of transgender service members. He said he had consulted generals and military experts, but Jim Mattis, the defense secretary, was given only a day’s notice about the decision.

Mr. Trump elected to announce the ban in order to resolve a quietly brewing fight on Capitol Hill over whether taxpayer money should pay for gender transition and hormone therapy for transgender service members. The dispute had threatened to kill a $790 billion defense and security spending package scheduled for a vote this week.

But rather than addressing that narrow issue, Mr. Trump opted to upend the entire policy on transgender service members.

His decision was announced with such haste that the White House could not answer basic inquiries about how it would be carried out, including what would happen to openly transgender people on active duty. Of eight defense officials interviewed, none could say.

“That’s something that the Department of Defense and the White House will have to work together as implementation takes place and is done so lawfully,” Sarah Huckabee Sanders, the White House press secretary, said.

Still, the announcement pleased elements of Mr. Trump’s base who have been dismayed to see the president break so bitterly in recent days with Attorney General Jeff Sessions, a hard-line conservative.

Civil rights and transgender advocacy groups denounced the policy, with some vowing to challenge it in court. Pentagon officials expressed dismay that the president’s tweets could open them to lawsuits.

The ban would reverse the gradual transformation of the military under President Barack Obama, whose administration announced last year that transgender people could serve openly in the
military. Mr. Obama’s defense secretary, Ashton B. Carter, also opened all combat roles to women and appointed the first openly gay Army secretary.

And it represented a stark turnabout for Mr. Trump, who billed himself during the campaign as an ally of gay, lesbian, bisexual and transgender people.

The president, Ms. Sanders said, had concluded that allowing transgender people to serve openly “erodes military readiness and unit cohesion, and made the decision based on that.”

Mr. Mattis, who was on vacation, was silent on the new policy. People close to the defense secretary said he was appalled that Mr. Trump chose to unveil his decision in tweets, in part because of the message they sent to transgender active-duty service members, including those deployed overseas, that they were suddenly no longer welcome.

The policy would affect only a small portion of the approximately 1.3 million active-duty members of the military. Some 2,000 to 11,000 active-duty troops are transgender, according to a 2016 RAND Corporation study commissioned by the Pentagon, though estimates of the number of transgender service members have varied widely, and are sometimes as high as 15,000.

The study found that allowing transgender people to serve openly in the military would “have minimal impact on readiness and health care costs” for the Pentagon. It estimated that health care costs would rise $2.4 million to $8.4 million a year, representing an infinitesimal 0.04 to 0.13 percent increase in spending. Citing research into other countries that allow transgender people to serve, the study projected “little or no impact on unit cohesion, operational effectiveness or readiness” in the United States.

Lt. Commander Blake Dremann, a Navy supply corps officer who is transgender, said he found out his job was in danger when he turned on CNN on Wednesday morning. Commander Dremann came out as transgender to his commanders in 2015, and said they had been supportive of him.

He refused to criticize Mr. Trump — “we don’t criticize our commander in chief,” he said — but said the policy shift “is singling out a specific population in the military, who had been assured we were doing everything appropriate to continue our honorable service.”

He added: “And I will continue to do so, until the military tells me to hang up my boots.”

The announcement came amid the debate on Capitol Hill over the Obama-era practice of requiring the Pentagon to pay for medical treatment related to gender transition. Representative Vicky Hartzler, Republican of Missouri, has proposed an amendment to the spending bill that would bar the Pentagon from spending money on transition surgery or related hormone therapy, and other Republicans have pressed for similar provisions.

Mr. Mattis had worked behind the scenes to keep such language out of legislation, quietly lobbying Republican lawmakers not to attach
the prohibitions, according to congressional and defense officials.

But Mr. Trump was concerned that the transgender medical care issue could imperil the security spending measure, which also contains $1.6 billion for the border wall that he has championed, and wanted to resolve the dispute cleanly and straightforwardly, according to a person familiar with his thinking, who insisted on anonymity to describe it. That prompted his ban.

Republican congressional leaders were aware Mr. Trump was looking into whether taxpayer money should be spent on medical procedures for transgender service members, but had not expected him to go so far as to bar transgender people from serving altogether.

Mr. Trump and Republican lawmakers had come under pressure from Tony Perkins, the president of the Family Research Council, a leading Christian conservative group, and an ally of Mr. Trump’s. Mr. Perkins opposed the bill over spending on transgender medical costs and lobbied lawmakers to do the same.

“Grant repentance to President Trump and Secretary Mattis for even considering to keep this wicked policy in place,” the Family Research Council said in one of its daily prayers last week. “Grant them understanding, courage and willpower to stand up to the forces of darkness that gave birth to it and wholly to repeal it.”

Opponents of allowing openly transgender service members had raised a number of concerns, including what they said was the questionable psychological fitness of those troops. They said the military was being used for social experimentation at the expense of national security.

“This was Ash Carter on his way out the door pulling the pin on a cultural grenade,” Mr. Perkins said on Wednesday. “Our military leaders are saying this doesn’t help make us a better fighting force; it’s a distraction; it’s taking up limited resources.”

Mr. Carter objected to the decision, for its effect on the military and on those considering joining.

“To choose service members on other grounds than military qualifications is social policy and has no place in our military,” he said in a statement. “There are already transgender individuals who are serving capably and honorably. This action would also send the wrong signal to a younger generation thinking about military service.”

While some conservative lawmakers, including Ms. Hartzler, praised Mr. Trump, the president drew bipartisan condemnation on Capitol Hill and outrage from civil rights and transgender advocacy groups.

“There is no reason to force service members who are able to fight, train and deploy to leave the military — regardless of their gender identity,” said Senator John McCain, Republican of Arizona and the chairman of the Senate Armed Services Committee.

He called Mr. Trump’s move “yet another example of why major policy announcements should not be made via Twitter.”

Senator Jack Reed, Democrat of Rhode Island and the ranking member of the Armed
Services Committee, noted the irony of Mr. Trump’s announcing the ban on the anniversary of President Harry Truman’s order to desegregate the military. “President Trump is choosing to retreat in the march toward equality,” he said.

In June, the administration delayed by six months a decision on whether to allow transgender recruits to join the military. At the time, Mr. Mattis said the delay would give military leaders a chance to review the shift’s potential impact. Mr. Mattis’s decision was seen as a pause to “finesse” the issue, one official said, not a prelude to an outright ban.

The delay on recruits “was largely based on a disagreement on the science of how mental health care and hormone therapy for transgender individuals would help solve the medical issues that are associated with gender dysphoria,” Gen. Paul Selva, the vice chairman of the Joint Chiefs of Staff, said during his reconfirmation hearing last week.

“I am an advocate of every qualified person who can meet the physical standards to serve in our uniformed services to be able to do so,” he said.

Mr. Mattis, a retired Marine, has not been a major proponent of allowing transgender people to serve in the military, in part because medical accommodations, including hormone injections, could open the Defense Department to claims from other people not allowed to serve, like Type 1 diabetics, who also need regular injections.

But Mr. Mattis and the Pentagon’s military leadership all seemed to have accepted that transgender people already serving in the military would be allowed to remain. A senior adviser to Mr. Mattis, Sally Donnelly, represented the Palm Center, an organization that advocated on behalf of the L.G.B.T. community in the military during the debate that led up to the Obama administration’s decision to allow transgender people to serve, defense officials said.

Mr. Trump’s abrupt decision is likely to end up in court; OutServe-SLDN, a nonprofit group that represents gay, lesbian, bisexual and transgender people in the military, immediately vowed to sue.

“We have transgender individuals who serve in elite SEAL teams, who are working in a time of war to defend our country, and now you’re going to kick them out?” Matthew F. Thorn, executive director of OutServe, said in an interview.
“Trump Cut From Transgender Military Suit Against Gov’t”

Law360

Daniel Wilson

August 6, 2018

A Washington, D.C., federal judge on Monday cut President Donald Trump from a suit challenging his administration’s policy banning many transgender people from military service in order to avoid “unnecessary constitutional confrontations,” but refused to dismiss the suit outright, saying a change to the policy had not eliminated the basis for the challenge.

U.S. District Judge Colleen Kollar-Kotelly granted the government’s bid for partial summary judgment in the challenge to the government’s “transgender ban,” dismissing claims against Trump and dissolving a related preliminary injunction as applied against the president. As a result, a move for a protective order blocking discovery against the president was effectively moot, she ruled.

“Because no relief will be granted directly against the president in this case, the court will dismiss him as a party to avoid unnecessary constitutional confrontations,” Judge Kollar-Kotelly said, pointing to a line of decisions finding that courts cannot impose injunctions or declaratory judgments on the president.

But in a separate order, she refused to dismiss the suit outright or dissolve the preliminary injunction as applied to the government more broadly after it had argued that the transgender ban policy as challenged by the plaintiffs — both current and aspiring servicemembers who are transgender — was no longer in existence, meaning their suit is effectively moot.

The original transgender ban policy, issued in August in the form of a presidential memorandum, would have outright banned any open military service by transgender people, but Trump issued an updated policy in March.

The updated policy allows transgender people to join or serve in the military, but only if they don’t have gender dysphoria — a disconnect between biological sex and perceived gender — that causes them distress or functional impairment, and have not already transitioned between genders, with a narrow “grandfathered” exception for some current troops.

This was effectively a new policy, the government argued. But the plaintiffs still would be harmed if the updated policy is allowed to take effect, and despite the
government’s arguments, it is not “meaningfully distinct” enough from the original transgender ban to moot their claims, Judge Kollar-Kotelly ruled.

“Instead, at a fundamental level, the [U.S. Department of Defense] implementation plan is just that — a plan that implements the president’s directive that transgender people be excluded from the military,” she said. “For largely the same reasons, the rationale for the court’s preliminary injunction maintaining the status quo ante until the final resolution of this case remains intact.”

The judge further noted that tossing direct claims against the president didn’t mean that the court lacks the ability to review the legality of the president’s actions, and the challengers can still obtain all the relief they’re looking for if those actions are found to be unconstitutional.

Judge Kollar-Kotelly also said that the challengers can continue to pursue discovery related to the president, with rulings on claimed deliberative process or presidential communication privilege to come later.

This will likely come after a similar dispute is addressed on appeal in another case challenging the transgender ban, Karnoski v. Trump, a dispute noted by the judge in a related footnote. In that case, the district court recently ordered the government to cough up purportedly privileged documents.

Jennifer Levi, the transgender rights project director at GLBTQ Legal Advocates & Defenders, which represents the plaintiffs, said in a statement Monday that Judge Kollar-Kotelly’s decision was evidence that the judge “isn’t buying” the administration’s arguments, which she claimed were “full of sweeping generalizations and false stereotypes about transgender people.”

“Anyone who meets the standards should be able to serve,” Levi said. “There is no reason to subject transgender people to unconstitutional and discriminatory treatment, unlike the way the military treats any other group.”

The DOJ does not typically comment on pending litigation.

The dispute is one of four cases around the country challenging aspects of the transgender ban, including the Karnoski case. In the most recent development in that dispute, the government urged the Ninth Circuit in a brief Friday to expedite argument in the case, saying the district court’s recent discovery order had “imposed extraordinary discovery obligations on the president and the military.”

The servicemembers are represented by Paul R.Q. Wolfson, Kevin M. Lamb, Alan E. Schoenfeld, Christopher R. Looney, Harriet Hoder, Adam M. Cambier and Nancy Lynn Schroeder of WilmerHale, Jennifer Levi and Mary L. Bonauto of GLTBQ Legal Advocates and Defenders, Shannon P. Minter, Amy Whelan and Christopher F. Stoll of the National Center for Lesbian Rights and Claire Laporte, Matthew E. Miller, Daniel L. McFadden, Kathleen M. Brill, Michael J. Licker, Rachel C. Hutchinson, Lauren Godles Milgroom and Theresa M. Roosevelt of Foley Hoag LLP.
The government is represented by Chad A. Readler, Brett A. Shumate, Brinton Lucas, John R. Griffiths, Anthony J. Coppolino and Andrew E. Carmichael of the U.S. Department of Justice.

The case is Doe 2 et al. v. Trump et al., case number 1:17-cv-01597, in the U.S. District Court for the District of Columbia.
Abortion
“Lawsuit challenges Texas abortion curbs”

Reuters

Jonathan Stempel

June 14, 2018

An abortion provider that in 2016 persuaded the U.S. Supreme Court to void parts of a restrictive Texas law on Thursday filed a new lawsuit challenging dozens of that state’s other curbs on the procedure as unconstitutional.

Whole Woman’s Health Alliance and six nonprofits providing abortion-related services said Texas’ licensing, parental notification, waiting period, ultrasound and other requirements violated women’s due process rights.

They said the requirements impose an undue burden on women’s ability to abort nonviable fetuses, with a disproportionate impact on the poor, minorities and immigrants.

The complaint was filed in the federal court in Austin, Texas against state officials including Attorney General Ken Paxton and health services Commissioner John Hellerstedt, and seeks to block enforcement of the challenged laws.

Marc Rylander, a spokesman for Paxton, called the challenged requirements “common-sense measures” that protect women’s lives and reproductive health, and said the Supreme Court has upheld many similar requirements in the past.

“It is ridiculous that these activists are so dedicated to their radical pro-abortion agenda that they would sacrifice the health or lives of Texas women to further it,” he said.

In June 2016, the Supreme Court by a 5-3 vote struck down Texas’ requirements that doctors who perform abortions have admitting privileges at nearby hospitals, and that abortion clinics have costly hospital-grade facilities. Critics said the requirements could have forced many Texas clinics to close, especially outside major metropolitan areas.

The majority decision in Whole Woman’s Health v Hellerstedt was the court’s strongest endorsement of abortion rights since its 1992 reaffirmation of the constitutional right to abortion.

“It set a new standard of scrutiny, that states cannot pass restrictions without proof of medical evidence and scientific facts to justify them,” Amy Hagstrom Miller, chief executive of Whole Woman’s Health, said in
an interview on Thursday. “The decision gave us leverage to look at other restrictions that Texas has long been enforcing. We call it the ‘big fix.’”

Many U.S. states, like Texas often led or dominated by Republicans, have imposed new abortion limits in recent years.

There has long been speculation that Supreme Court Justice Anthony Kennedy, 81, who joined the majority in the 2016 abortion case, may retire soon, giving President Donald Trump a chance to make the court more friendly to abortion opponents.

“The Supreme Court is always something we watch,” Miller said. “We don’t have a magic 8-ball to predict its makeup, but women are being affected by these laws every single day.”

The case is Whole Woman’s Health Alliance et al v Paxton et al, U.S. District Court, Western District of Texas, No. 18-00500.
“7th Circ. Backs Ind. Abortion Law Stay During Legal Challenge”

Law360

Bonnie Eslinger

July 25, 2018

The Seventh Circuit on Wednesday affirmed a lower court decision granting Planned Parenthood’s request to stay an Indiana law requiring women to have an ultrasound at least 18 hours before an abortion, finding there’s a likelihood the organization will prevail on its claim the law is unconstitutional.

“We agree with the well-reasoned conclusions of the district court opinion,” U.S. Circuit Judge Ilana Diamond Rovner wrote in Wednesday's opinion.

The panel noted that it began its review by looking at the 1992 landmark U.S. Supreme Courtcase Planned Parenthood v. Casey.

“The basic premise from which we must begin our review of the district court opinion is that the Supreme Court has recognized and affirmed ‘the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State … [without] the imposition of a substantial obstacle to the woman’s effective right to elect the procedure’,” the opinion said.

The district court properly weighed the evidence regarding the burdens and benefits created by the new ultrasound law, the panel said.

The burden created by the new law stems from the lengthy distances women would be required to travel for an ultrasound appointment at least eighteen hours prior to an abortion — and then to return a day later for the procedure, the Seventh Circuit noted.

“We The State asserts that its reason for this new eighteen hour ultrasound requirement is to persuade women not to have an abortion. There is no doubt that this is a legitimate position for a state to take,” the panel said in its ruling. “But it is also true that women have the right to choose to have an abortion, albeit with some limitations.”

Planned Parenthood of Indiana and Kentucky filed suit against the commissioner of the Indiana State Department of Health and the prosecutors of several counties in July 2016, claiming the state’s new law unconstitutionally burdens a woman’s right to choose to have an abortion. The organization also asked for a preliminary injunction blocking the implementation of the law during the pendency of the litigation.

The district court judge granted the temporary hold in March 2017.

“The basic premise from which we must begin our review of the district court opinion is that the Supreme Court has recognized and affirmed ‘the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State … [without] the imposition of a substantial obstacle to the woman’s effective right to elect the procedure’,” the opinion said.

The district court properly weighed the evidence regarding the burdens and benefits created by the new ultrasound law, the panel said.

The burden created by the new law stems from the lengthy distances women would be required to travel for an ultrasound appointment at least eighteen hours prior to an abortion — and then to return a day later for the procedure, the Seventh Circuit noted.
Current state law requires an ultrasound but allows it to take place the day of the abortion. Planned Parenthood has only six facilities in the state with ultrasound equipment.

The law also creates a financial strain with the need for an overnight stay, employment problems with the need to take time off and child care issues, among other concerns, the Seventh Circuit noted.

A Planned Parenthood expert confirmed that many low-income women “do not have employment that pays them when they miss a day of work or they may have precarious job situations in which they could be fired for excessive absences,” the panel said. "A second lengthy trip for an ultrasound appointment likely requires a second missed day of work.”

In addition, with women having to make two appointments at the Planned Parenthood facilities with ultrasound equipment, appointment slots became more scarce and women had to wait longer to have an abortion, the opinion noted.

“This precluded the option of medication abortions for some women and any abortion choices for others,” the panel added.

The state’s strongest evidence that the 18-hour requirement is beneficial came from the testimony of a board-certified OB-GYN who said she had a patient who had an abortion but regretted it later. She told the doctor that she felt that an ultrasound waiting period would have given her more time to consider her decision and change her mind, the court noted.

This evidence was compelling because it focused on the 18-hour delay, rather than just the benefit of the ultrasound, which is already required, the panel said.

“The State’s argument that the additional eighteen hours gives women time for deeper reflection and to absorb information, actually does address the question at issue in the case, but its argument is unsupported by anything other than ... one anecdote,” the judge wrote in the opinion.

In conclusion, Judge Rovner wrote, with U.S. Circuit Judge William J. Bauer concurring, that the requirement that women have the ultrasound 18 hours prior to the abortion wasn’t supported by evidence that it serves the goal of persuading women to carry a pregnancy to term.

“Instead, it appears that its only effect is to place barriers between a woman who wishes to exercise her right to an abortion and her ability to do so,” the judge wrote.

In a separate concurring opinion, U.S. Circuit Judge Michael S. Kanne added that he was persuaded by the travel burden and because the state “offered little evidence to show that an 18-hour wait following an ultrasound would persuade those seeking an abortion to preserve fetal life.”

Representatives for the parties could not immediately be reached for comment late Wednesday.

In April, the Seventh Circuit ruled that another portion of Indiana’s 2016 abortion law — banning abortions based on a fetus’
race, sex or disability — was unconstitutional.

The panel found that certain provisions within the 2016 law, signed by then-Gov. Mike Pence, “clearly violate” the Supreme Court’s landmark 1973 decision in Roe v. Wade, which established that a woman is within her rights to terminate her pregnancy prior to viability, “and that the state may not prohibit a woman from exercising that right for any reason,” U.S. Circuit Judge William J. Bauer wrote for the majority.

U.S. Circuit Judges William J. Bauer, Michael S. Kanne and Ilana Diamond Rovner sat on the panel.

Planned Parenthood of Indiana and Kentucky is represented by Kenneth J. Falk of the ACLU of Indiana.

The commissioner of the Indiana State Department of Health is represented by Thomas M. Fisher of the state attorney general’s office.

The case is Planned Parenthood of Indiana and Kentucky v. Commissioner of the Indiana State Department of Health et al., case number 17-1883, in the U.S. Court of Appeals for the Seventh Circuit.
An anti-abortion law Vice President Mike Pence signed as governor of Indiana could become the case that lets the Supreme Court reshape abortion rights as soon as next year.

The Indiana law — which prohibited abortion because of the gender, race or disability of the fetus, such as Down syndrome — was blocked by lower courts and is one of three significant anti-abortion state statutes that are sitting one level below the Supreme Court. If Indiana appeals this fall, and the justices accept the case, it could be the opening for a broader ruling on Roe v. Wade that could redefine abortion rights nationwide.

Pence could then take double credit for the anti-abortion movement’s ascendance: The politician whose evangelical credentials helped carry conservative religious voters to President Donald Trump also helped deliver the high court case that could scale back access to abortion 45 years after Roe.

Throwing Roe into the “ash heap of history,” as Pence put it, has been his defining mission, the core of a political career that took him from Congress to the governor’s mansion to the vice presidency.

The Indiana legislation “is a testament to Vice President Pence’s long pro-life legacy,” said Clarke Forsythe, senior counsel at Americans United for Life, which advocates against abortion. “He was a leader in Congress on defunding Planned Parenthood going back to 2005, 2006. He raised the profile of the issue.”

Three months before Trump selected the then-governor as his running mate in 2016, Pence signed the bill, which pushes new legal issues to the forefront. Many of the prior court and political fights had centered on matters such as mandating waiting periods before an abortion, or instituting building codes so stringent that many abortion clinics would have to shut down.

Proponents of the ban say a fetus should not be aborted because of a disability or fetal abnormality. But the Indiana law, and a subsequent one passed in Ohio, have sparked a fierce and emotional debate about whether a woman should be forced to carry or deliver a child with a severe or life-threatening disability or condition.

As the legal battle over the Indiana law ascended through the court system, so did Trump’s candidacy. Pence’s anti-abortion bona fides convinced skeptics that Trump — a onetime defender of abortion rights —
would work to end abortion and put “pro-life” judges on the Supreme Court.

The Trump-Pence administration has already instituted more conservative policies on reproductive health and teen pregnancy. It has reshaped the federal judiciary by appointing conservatives at all levels, including a record number of judges at the courts of appeal. Trump elevated Neil Gorsuch to the Supreme Court, and if his second high court nominee, Brett Kavanaugh, is confirmed, he would swing the court’s political leaning to the right.

In the past, the Supreme Court justices appeared to be closely divided on abortion, and they accepted only a small fraction of the abortion-related cases they are asked to hear. Activists on both sides of the abortion debate believe Kavanaugh would change the court’s dynamic and that a challenge to Roe is all but inevitable.

“There is no question that at least one if not more [of the three cases] could be there next term,” said Helene Krasnoff, senior director of public policy, litigation and law at Planned Parenthood. “Any case that the court takes gives them an opportunity to opine on whether or not the Constitution protects” access to abortion.

It is not yet certain whether Indiana will appeal, whether the court would accept the case or how broadly the justices might rule. Rep. Jim Banks (R-Ind.), who sponsored the legislation in the Indiana Statehouse, certainly favors fighting for it. “I hope the attorney general will press it to the Supreme Court,” Banks said. “Obviously, Gov. Pence at the time signed it and championed it.”

All three of the key state cases, including Indiana’s, directly conflict with the Roe ruling, so any one of them would give the justices an avenue to reverse or significantly narrow the 1973 abortion rights decision. In addition, the lower courts are filled with reproductive health cases, some involving Planned Parenthood funding or the federal Teen Pregnancy Prevention Program, that could also shape abortion policy.

Pence and other White House officials say Kavanaugh was not asked his opinion on Roe as part of the selection process. But Kavanaugh’s name was on a list approved by the conservative Federalist Society — and Trump made a campaign pledge to appoint “pro-life” justices to the court.

A spokesman for Indiana Attorney General Curtis Hill, who in recent weeks has been accused of inappropriately groping women, said the office had no decision to announce yet on whether it would appeal lower court rulings that have blocked the statute. The office has until late September.

The two other major cases come from Alabama and Texas, which both passed bans on a common second-trimester abortion procedure called dilation and evacuation. If upheld, the ban would make abortion after 14 weeks of gestation almost impossible. Some legal experts say those cases might be more enticing for the Supreme Court to review. There are parallels to how the anti-abortion movement, after court fights, successfully enacted federal legislation against another
second-trimester abortion procedure in the early 2000s.

When he blocked the Indiana law, 7th U.S. Circuit Court of Appeals Judge Daniel Manion made clear that he wants the Supreme Court to weigh in. He noted that in the 1992 Planned Parenthood v. Casey ruling, which defined how far states could go in limiting abortion, “the purported right to have a pre-viability abortion is more ironclad even than the rights enumerated in the Bill of Rights.

“But only a majority of the Supreme Court or a constitutional amendment can permit the States to place some limits on abortion,” Manion added.

Legal experts on the anti-abortion side are more skeptical that even if given the chance, the court would quickly move to undo the Roe decision, at least not unless even more conservatives are named to the court.

“I question whether the court is interested in revisiting Roe even by five [votes]. I think there’s going to need six or more,” said Forsythe, the AUL lawyer.

For Pence, the prospect of an Indiana law delivering an abortion debate to the Supreme Court could bring his anti-abortion résumé full circle.

As a House member, he introduced the first bill to defund Planned Parenthood in 2009. As governor, he signed half a dozen anti-abortion bills. In a CNN interview this month, he reiterated unequivocally that he wants to see the Roe decision overturned.

“I do, but I haven’t been nominated to the Supreme Court,” he said, adding that he and Trump “will continue to be a pro-life administration.”
“What happens if Roe v. Wade gets overturned?”

The Washington Examiner

Kimberly Leonard

July 17, 2018

Hundreds of abortion defenders rallied outside the Supreme Court on the night President Trump unveiled his choice to replace Justice Anthony Kennedy.

They knew they would oppose Trump’s nominee even before he proclaimed Judge Brett Kavanaugh’s name. They heard Trump during the campaign when he pledged he would be “putting pro-life justices on the court,” and they believed him.

Though they realized that national abortion policy had hit a bend in the road, the tone of the rally among those who think abortion should remain legal across the U.S. was pointedly optimistic. Since the announcement of the retirement of Kennedy, who had in the past been the tie-breaking vote to uphold Roe v. Wade, they have clung to a refrain: When it comes to abortion, the public is on their side. During the last year they have been bolstered by victories even with Republicans enjoying unified control of Congress, including stopping lawmakers from cutting off federal funds from Planned Parenthood and from rolling back Obamacare.

“We are taking this very seriously because the stakes are real, but we also know that we can and will win,” said Kelley Robinson, national organizing director for Planned Parenthood Federation of America. “And if there is anything the last year has shown us it’s that this experiment of democracy is working.”

Should they fail to stop Kavanaugh’s confirmation and should he decide to overturn Roe, their optimism will be put to the test, as the issue of abortion would move back to the states, and political trench warfare would ensue.

To organizations such as the Susan B. Anthony List, which supports politicians that block abortion access, this nomination is a rare opportunity.

Roe and another Supreme Court decision, Planned Parenthood v. Casey, allowed abortion until fetal viability, which is generally understood as up to 24 weeks, and prohibited states from placing an “undue burden” on women who seek an abortion. More recently, Whole Women’s Health v. Hellerstedt took specific restrictions off the table that limit how abortion clinics must operate.

“We see that we have got a battle ahead of us, and this is the one that the pro-life movement has been looking to for decades,” Marjorie
Dannenfelser, president of SBA List, told reporters on the night of the nomination.

There is, to be sure, a long and winding road to overturning Roe. To start, it’s no guarantee that the Senate will confirm Kavanaugh. Though his credentials and experience have been widely acknowledged, the reality is that Republicans have a fragile majority of 51 seats and can only afford to lose a single vote if Democratic opposition holds. Centrist GOP Sens. Lisa Murkowski of Alaska and Susan Collins of Maine are avowed supporters of abortion rights and the health status of Sen. John McCain, R-Ariz., makes it uncertain whether he’d be able to vote.

Even if Kavanaugh is confirmed, it is far from a guarantee that a newly constituted Supreme Court would overturn Roe.

Justice Clarence Thomas is the only member of the Supreme Court who has voted to overturn Roe. In 1992’s Casey case, Thomas sided with the conservative minority that stated Roe was “wrongly decided” and “can and should be overruled consistently.” The dissent rejected the idea that stare decisis, a legal principle of being deferential to prior precedents, compelled them to uphold it.

If all other conservative justices are on board with overturning the ruling, it’s still not a lock that Kavanaugh would cast the deciding vote to strike it down. On the one hand, he told Congress in 2006, as part of his nomination for the D.C. Circuit, that he would follow Roe “faithfully and fully” and considered it “binding precedent of the court.” On the other hand, while praising the legacy of the late Justice William Rehnquist in a 2017 speech to the conservative American Enterprise Institute, he highlighted how Rehnquist fought for limits on the expansion of unenumerated rights, meaning those not explicitly recognized by the Constitution. As examples, Kavanaugh mentioned how Rehnquist had joined the dissent in Roe and later voted to overturn it in Casey.

Neither example reveals with certainty how Kavanaugh would vote. When he called Roe “binding precedent,” he was speaking as a lower court candidate who would be bound by prior Supreme Court rulings, something that would not be the case if he joins the high court. His AEI speech could be viewed as a look at the influence that Rehnquist had on the court rather than a suggestion that he would have ruled the same way in every case. Furthermore, even if he agreed with Rehnquist’s decision to oppose Roe in the past and expressed weariness of expanding unenumerated rights, that doesn’t mean he wouldn't vote to preserve a right that has been on the books for decades.

Kavanaugh has ruled in favor of abortion limits in at least one case. He dissented in a ruling from the D.C. Circuit last year that allowed an immigrant teen who was in the country illegally, and under government custody, to get an abortion. He wrote in his opinion that the majority’s position was “based on a constitutional principle as novel as it is wrong: a new right for unlawful immigrant minors in U.S. government detention to obtain immediate abortion on demand.”
Clarke Forsythe, senior counsel at Americans United for Life, cautioned that Roe might never be overruled, but said that people who oppose abortion still had reason to be hopeful because he believes in the short term the courts will uphold state or federal limits on abortion.

“The 5-4 pro-abortion majority that has been on the court ... is changing,” he said. “Justice Kennedy was intensively invested in Roe, in its future and its perpetuation, staking his historic legacy on reaffirming Roe.”

For the Supreme Court, there are a multitude of potential outcomes in between outright upholding or fully overturning Roe that would allow for more restrictions on abortion.

Justices have significant leeway not only in which cases they choose to hear but in how they address the issues they are presented with. Dozens of abortion restrictions have been challenged in court, ranging from who is allowed to provide an abortion to how it can be performed and when.

Appellate courts are considering the legality of bans on an abortion procedure known as dilation and evacuation, in Texas, Alabama, and Arkansas. The procedure, in which fetal tissue is removed from the womb with suction and surgery tools, is used in the second trimester. Judges have blocked bans from going into effect, but it’s possible they could reach the Supreme Court.

“They are pretty serious challenges to Roe because they ban a method to abortion that is the primary method to abortion after 12 weeks,” said Elizabeth Nash, senior state issues manager for the Guttmacher Institute, which tracks abortion and other reproductive policies. “When you ban this method you are eliminating access for much of the second trimester.”

Bans on how late into a pregnancy abortions are allowed could also move up through the courts. Mississippi is facing a court challenge over its 15-week ban, which has been blocked by a judge because it doesn’t meet Roe’s standards.

“The Supreme Court has been clear that those bans are unconstitutional,” said Hillary Schneller, staff attorney at the Center for Reproductive Rights. “They have been blocked everywhere challenged.”

Other cases touch on abortion without outright disputing its legality. A debate over whether states should be allowed to cut off Medicaid funding from Planned Parenthood, for instance, could be heard as early as this fall if four justices decide to take it up.

Cases such as this, Schneller said, are “about abortion but don’t as directly relate to Roe or Casey or the standards in Whole Women’s Health about the constitutional right to abortion.”

A law in Indiana obligating abortion clinics to bury fetal remains is another example that could be taken up, said Forsythe.

How abortion cases are challenged, whether in federal or state court, will also be at play in terms of how far-reaching a policy could become. The Supreme Court could narrowly uphold state laws without touching on Roe, or they could rule in a way that opens
the door to states chipping away at abortion rights.

If \textit{Roe} is overturned, the decision to legalize abortion would fall to states and popular opinion, and voting patterns would play a much larger role in determining abortion policy.

Current polling on abortion is nuanced, providing opportunities for both sides to claim public sympathy with their position. For instance, roughly two-thirds of the public does not want to see the Supreme Court overturn \textit{Roe}. A Pew Research Center poll found that 57 percent of the public said abortion should be legal in most or all cases, compared to 40 percent who said it should be illegal in all or most cases.

But additional questioning shows that support for abortion breaks down depending on the time in the pregnancy and on the circumstances. Though 60 percent of Americans believe abortion should be legal in the first trimester, according to Gallup polling, just 28 percent say it should be legal in the second trimester, and support drops to 13 percent in the third trimester. Though 83 percent favor legalized abortion if a pregnant woman’s life is in danger and 77 percent in the cases of rape or incest, just 45 percent say abortion should be legal if “the woman does not want the child for any reason.” These findings suggest that outlawing abortion in all cases has limited popular support, but so too does the idea of allowing abortion at any time and for any reason.

These national numbers can vary widely from state to state, and that’s where those opposed to abortion see an opportunity ahead. In a post-\textit{Roe} world, the states, they say, are poised to be divided into three buckets: One that will leave abortion laws in place without barriers, another ready to further restrict abortion, and a final category that would leave open the debate.

“In the remaining third there is likely to be a vigorous debate — previously impeded by \textit{Roe} — to find consensus about how to protect unborn children and advance women,” said Mallory Quigley, spokeswoman for SBA List. “Reaching democratic consensus is what this nation is all about, and it’s what distinguishes us from abortion activists who pretend to have broad support but depend on unelected judges to impose radical policy on the entire nation.”

Abortion rights groups counter that women’s access to abortion should not be dictated by where they happen to live. They say the Supreme Court is needed to decide on abortion because it should be shielded by the Constitution rather than decided by politicians, who would have more power to make changes if \textit{Roe} is overturned.

Should that happen, 22 states could outlaw abortion, according to the Center for Reproductive Rights.

Certain states are expected to see no impact. California, Connecticut, Delaware, Hawaii, Maine, Maryland, Oregon, Nevada, and Washington state have laws that explicitly legalize abortion. State lawmakers seeking to maintain abortion access in the wake of the
Supreme Court vacancy are looking to do the same.

But a handful of states would ban abortion, some of which have exceptions to protect a pregnant woman’s life, or in cases of prosecuted rape. Louisiana, Mississippi, North Dakota, and South Dakota all have “trigger laws” that would ban abortions if Roe is overturned. Ten additional states still have pre-Roe bans on the books.

Depending on the political makeup of the presidency and Congress, overturning Roe would also open the door to passing federal restrictions that previously didn’t meet the case’s standards.

Dr. Hal Lawrence, president of the American College of Obstetricians and Gynecologists, warned that making abortion illegal would not stop it from happening. Estimates show that 5,000 women a year were killed by illegal abortions before Roe.

“When abortion access is restricted or criminalized, women do not cease to need abortion care,” he said. “They are simply forced to look for alternate methods to receive care, where there is often little to no formal medical expertise or regulation to ensure the method is either safe or effective.”

In many states, abortion is already heavily regulated, even with the parameters in Roe and Casey. Restrictions in Kentucky, Mississippi, North Dakota, South Dakota, West Virginia, and Wyoming have winnowed down the number of abortion clinics to one.

Abortion foes say restrictions are needed to protect women, but those in favor of few restrictions on abortion say they are medically unnecessary.

In larger states where abortion is more regulated, women tend to need the financial resources and the ability to take time off work to drive hundreds of miles to a clinic. Some states have mandatory waiting periods, which could necessitate a hotel stay if a clinic is outside town, and some clinics will only provide abortions once a week.

“All of those restrictions can pile up and make it so women can’t access abortion safely and legally,” Schneller said.

The restrictions on abortion can have the unintended consequence of delaying them from happening earlier in a pregnancy, at a time that has more public support. One in four women will have an abortion by age 45, studies suggest, but late-term abortions are rare, at roughly 1 percent a year.

Research suggests that women who have had an abortion during the second trimester would have preferred to have one earlier, but were unable to because of the restrictions in their state. Others may have initially wanted to have a baby but learn of fetal abnormalities or threats to their health or lives.

“One seek abortions later in pregnancy for the same reasons as they seek it earlier in a pregnancy,” Schneller said. “They are often delayed because of all the restrictions states have passed.”

Organizations such as SBA List point to the passage of laws to limit abortion as evidence
that public sentiment on the issue is facing unrest.

“How we treat unborn children isn’t settled in the hearts and minds of the American people, otherwise states would not have passed hundreds of pro-life laws designed to protect the unborn, especially in recent years,” Quigley said.

States with already limited access to abortion could make the practice even more limited.

“If Roe is undercut or overturned it really exacerbates the disparity we already see,” Nash said. “It just makes a difficult situation more burdensome and allows states to adopt restrictions that may have been struck down years ago.”

This understanding is driving protests across the country. On the night Trump announced his nominee, outside the Supreme Court, the emotional debate was in the spotlight. Alternating cries of “Protect Roe!” from hundreds of organized protesters and “Overturn Roe!” among a smaller group of gatherers drowned each other out.

Were Roe to be overturned, the passion of both sides would be transferred to battles at the legislative level. The late Justice Antonin Scalia’s take on such an outcome, as he described in arguing for striking down Roe, was that the abortion issue would be, “resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting.”
President Donald Trump’s pick for the Supreme Court won’t have to wait long to make a potentially historic decision on abortion rights.

A slew of abortion-related cases are working their way through lower courts, dealing with questions about when abortions should be allowed, or which procedures doctors can perform to terminate a pregnancy. Any of these could become opportunities for the justices to address fundamental questions about the legal right to abortion in the United States, putting Roe v. Wade in the Supreme Court’s sights.

“This court is going to have a ton of opportunities” to address reproductive health, said Amy Hagstrom Miller, the founder of Whole Woman’s Health abortion clinic, which has six lawsuits pending against state abortion restrictions across the country. “When you have a … case on the table, the administration can use that as an opportunity to ask the court to do” more to restrict abortion.

Legal experts agree that any abortion-related case, even a relatively narrow one, that the justices accept could turn into a broader debate over the 1973 Roe v. Wade ruling that recognized abortion rights. For instance, the George H.W. Bush administration in 1992 asked the court to rule broadly on Roe when it took a case on whether Pennsylvania anti-abortion laws were valid. That time, the administration lost in what became the landmark Casey case — with retiring Justice Anthony Kennedy co-authoring the majority opinion that largely affirmed Roe.

The Supreme Court will look much different than it did in 1992, and the next threat to Roe could arrive at the Supreme Court in a more discrete manner. The justices control which cases they accept, so it is impossible to know whether they’ll take up an abortion case in the next term, which begins in October. But they could get at least one petition as soon as this fall.

The pending cases in federal courts, some just one level below the Supreme Court, fall into two categories, either of which could
turn into a broader debate about *Roe*. Some of the lawsuits challenge the reasons to allow a woman to get an abortion; others debate the method a physician could use.

Each of these cases forces the justices to weigh the state’s right to protect a fetus against a woman’s right to end a pregnancy, potentially leading them to reconsider *Roe*. Indiana officials, for instance, need to decide this summer whether to ask the justices to overturn a 7th Circuit decision that the state cannot ban abortion when Down syndrome or another fetal abnormality has been diagnosed. It was a bill signed into law by then-Gov. Mike Pence in 2016. Similar litigation against an Ohio ban on abortions after a Down syndrome diagnosis is working its way through the 6th Circuit.

There are several method-ban-related cases, too. The 5th Circuit will consider whether Texas can prohibit the common second-trimester abortion procedure. Two other circuits are weighing similar bans in Alabama and Arkansas. A related Kentucky ban was just challenged in court by the American Civil Liberties Union.

“There certainly is a real likelihood that one of those will be petitioned” to the justices, said Diana Kasdan, a senior staff attorney at the Center for Reproductive Rights, which has brought several lawsuits against abortion restrictions. “It’s a real risk. Trump has said that he will appoint justices that are certainly not favorable, to say the least. The question is if one of those went up, what might happen.”

Opponents of abortion, of course, have clamored for an opportunity to go after the *Roe* decision. Ohio lawmakers, for instance, introduced a bill this year that would ban abortion completely — an aggressive measure that would have sparked an immediate court challenge had it passed.

"That could ultimately be a bill that revisits *Roe v. Wade,*" Ohio state Rep. Ron Hood told POLITICO earlier this year. “One flip of a Supreme Court justice, and revisiting *Roe v. Wade* looks very, very promising.”

If the Supreme Court wants to wade head-on into the *Roe* decision, it is likely to get a case in a few years. Mississippi’s only surviving abortion clinic, Jackson Women’s Health, is suing over the state Legislature’s recent bill that would ban abortion after 15 weeks of pregnancy, significantly earlier than Supreme Court precedent that says states cannot ban it before a fetus is viable outside of the womb, about 24 weeks. That case is unlikely to progress to the Supreme Court level for several years, if it ever does.

Abortion rights advocates warn that even if the court doesn’t reverse the *Roe* ruling, it can dramatically expand states’ abilities to enact laws that create hurdles to abortion.

“Look at Texas,” said Helene Krasnoff, senior director of public policy, litigation and law at the Planned Parenthood Action Fund, referring to state laws that effectively shuttered half the abortion clinics in Texas before it was overturned in 2016. “States can just as effectively deny access to abortion short of an all-out ban.”
The Supreme Court accepts very few of the cases that come before it; abortion is not an exception. But when it does take an abortion case, it generally becomes one of the most significant cases of the term. That was the case when the court, after turning away dozens of abortion-related cases for years, took up the Texas case. The justices, including Kennedy, struck the laws.

That ruling, in *Whole Woman’s Health v. Hellerstedt*, had inspired Whole Woman’s Health to participate in a new series of lawsuits filed last month against state abortion laws in Texas, Virginia and Indiana. The idea was to use the 2016 Supreme Court ruling to strike other restrictive state laws.

“With Kennedy on the bench, I was excited to leverage the Whole Woman’s Health decision,” Hagstrom Miller said. Kennedy’s retirement changes the calculus; there is significantly more risk for the clinics, though Hagstrom Miller said she hasn’t had second thoughts. “It doesn’t change my resolve to bring lawsuits and … to take a stand for what’s right and to try to move the needle forward.”

The court will have other opportunities to shape reproductive health law. The justices this summer will decide whether to take one or both of the pending cases that would allow states to defund Planned Parenthood. If four justices agree, the court would likely hear a case this fall or next winter.

Around the country, the courts are also hearing cases involving several Trump administration changes to reproductive health policy, particularly on contraception. Several lawsuits challenge the administration’s decision to allow employers to not cover birth control in employee health plans, a requirement of Obamacare. The administration has also cut funding for the Teen Pregnancy Prevention Program and made dramatic changes in favor of abstinence-oriented programs under the Title X program, which has traditionally helped cover contraceptive services for low-income women. Several lawsuits have been filed against both policies.
“How a Supreme Court Shaped by Trump Could Restrict Access to Abortion”

New York Times

Adam Liptak, Anjali Singhvi, Natalie Reneau, Robin Stein, Aaron Byrd, and Jonah M. Kessel

August 14, 2018

President Trump has pledged to appoint Supreme Court justices who will vote to overturn Roe v. Wade, the 1973 decision that established a constitutional right to abortion. Justice Anthony M. Kennedy was a cautious supporter of abortion rights. With his departure and the addition of a second Trump appointee, the Supreme Court would have a conservative majority that would most likely sustain sharp restrictions on access to abortion in the United States.

But if the court does hear a case that brings up the issue, it is hardly clear that it would take the drastic step of overruling Roe. The court could instead opt for a more incremental strategy, upholding increasingly severe restrictions in much of the country but stopping short of saying that the Constitution has nothing to say about a right to abortion.

Assuming that there are five justices ready to limit abortion rights, how could that happen? Here are some of the possible scenarios, each of which entails a different degree of legal upheaval.
LIBERAL WING

Ginsburg  Sotomayor  Kagan  Breyer

CONSERVATIVE WING

Roberts  Kavanaugh  Gorsuch  Alito  Thomas

Trump appointees*

Very Unlikely

Nuclear Options
These are the most extreme, and therefore least likely, scenarios.

The court could rule that fetuses are persons protected by the Constitution.

Abortion = Murder

Abortion is banned nationwide.

Less Likely

Overturn Roe v. Wade
The Supreme Court could reverse the precedent, but it is not likely to take such a significant step in the short term.

The court could abolish the right to privacy by reversing the 1965 case Griswold v. Connecticut.

If Roe v. Wade were overturned, the right to privacy would remain but would no longer include the right to an abortion.

States could restrict or ban abortion because it would no longer be a constitutional right.

This would eliminate the legal foundation of the right to an abortion.

It would also endanger other privacy-based rights, like birth control and same-sex marriage.

Most Likely

Chip Away At Roe v. Wade
The court is much more likely to allow states to impose new restrictions on abortion.

Under the 1992 case Planned Parenthood v. Casey, states may not impose a substantial obstacle — or an “undue burden” — on a woman’s ability to get an abortion.

The court could interpret that standard more narrowly to allow states to impose increasingly severe limits.

States would have more leeway to restrict abortion.

Abortion rights stand, but access would most likely be restricted for many women in conservative states.
We can’t be sure what the substitution of Judge Brett Kavanaugh for Justice Anthony M. Kennedy means for the Supreme Court’s abortion jurisprudence. But we can take a page from history to make an educated guess.

Two pages, actually. Let’s set two judicial opinions on the subject of abortion side by side to see what they tell us. One, less than a year old, is by the current Supreme Court nominee. The other was written by another appeals court judge, Samuel A. Alito Jr., 15 years before he became a Supreme Court justice. The Kavanaugh opinion may suggest what lies ahead if he is confirmed. Justice Alito’s opinion told us in no uncertain words.

I’ll begin there, because no one should have been surprised by what happened after Justice Alito replaced Justice Sandra Day O’Connor in 2006. Justice O’Connor had voted with the 5-to-4 majority in 2000 to declare unconstitutional Nebraska’s criminal prohibition on so-called “partial-birth abortion,” a second-trimester abortion procedure that, while rarely used in practice, proved an invaluable gift to anti-abortion politicians.

Seven years later, the court flipped, voting 5 to 4 to uphold a nearly identical law, this one passed by Congress, with Justice Alito in the majority. What happened? The court, Justice Ruth Bader Ginsburg observed in her acerbic dissent in the new case, Gonzales v. Carhart, was now “differently composed.” Then, two years ago, Justice Alito dissented from the court’s decision in Whole Woman’s Health v. Hellerstedt, which declared unconstitutional a Texas law that would have imposed needless requirements on abortion clinics and would have caused many clinics in the state to close. Justice Alito objected that predictions of the devastating effect the law would have on the availability of abortion in Texas were based on “crude inferences.” The vote in that case was 5 to 3, with Justice Kennedy in the majority.

Back in 1991, as a judge on the Philadelphia-based United States Court of Appeals for the Third Circuit, Sam Alito had proven his anti-abortion bona fides with a separate opinion in a case that reviewed Pennsylvania’s sweeping Abortion Control Act. The three-judge panel on which he sat upheld all the law’s many provisions, including a waiting period and mandatory counseling, with a single exception: the requirement that a married woman notify her husband of her intention to terminate her pregnancy. Doctors could lose their licenses for performing an abortion on a married woman without first obtaining her signature attesting that she had complied with the notice requirement.
Judge Walter Stapleton’s majority opinion, taking account of what he called “the real-world consequences of forced notification,” declared that provision unconstitutional. Most married women do discuss an abortion decision with their husbands, Judge Stapleton observed; for them, “a notification requirement is unnecessary and serves no state interest.” But he added that “the number of different situations in which women may reasonably fear dire consequences from notifying their husbands is potentially limitless.” The “relevant burdens to be assessed,” he concluded, were not the burdens on married women in general, but specifically “on women who would choose not to notify their husbands in the absence of state compulsion to do so.” Because the burden on this group of women outweighed any interest that the state had in requiring notification, the provision was unconstitutional.

It was from this common-sense and compassionate analysis that Judge Alito dissented. To wave away the majority’s concerns about women’s welfare, he used arithmetic. Noting that most abortions are sought by unmarried women, and that according to expert testimony 95 percent of married women do notify their husbands, he said it was “immediately apparent” that the law “cannot affect more than about 5 percent of married women seeking abortions or an even smaller percentage of all women desiring abortions.”

He went on: “It seems safe to assume that some percentage, despite an initial inclination not to tell their husbands, would notify their husbands without suffering substantial ill effects.” (Which “ill effects” might be so “insubstantial” that they could just be ignored, he didn’t say.) Judge Alito’s conclusion was that there were simply not enough women for the court to worry about, and that in any event, the Pennsylvania Legislature could have “reasonably concluded” that conversation between husband and wife could “properly further a husband’s interests in the fetus in a sufficient percentage of the affected cases to justify enactment of this measure.”

When the Third Circuit decision, Planned Parenthood v. Casey, reached the Supreme Court in the spring of 1992, the justices agreed with Judge Stapleton. The waiting period and mandatory counseling were constitutional. The spousal notice requirement was not. The controlling opinion, written jointly by Justices O’Connor, Kennedy, and David H. Souter, had this to say about that requirement: “The analysis does not end with the 1 percent of women upon whom the statute operates; it begins there. Legislation is measured for consistency with the Constitution by its impact on those whose conduct it affects.”

The justices went on: “For the great many women who are victims of abuse inflicted by their husbands, or whose children are the victims of such abuse, a spousal notice requirement enables the husband to wield an effective veto over the wife’s decision,” adding that: “Women do not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where that power is employed
for the supposed benefit of a member of the individual’s family.”

(In an odd twist of history, Judge Kavanaugh was a law clerk for Judge Stapleton while Planned Parenthood v. Casey was under consideration by the Third Circuit. Did the young clerk agree with his judge on the spousal notice question, or with Judge Alito? Someone on the Senate Judiciary Committee should ask him.)

Justice Alito’s arid analysis as expressed in his own words, his refusal to yield to persuasion by his colleagues in the majority and the eventual rejection of his position by three Republican-appointed Supreme Court justices all speak volumes. Beyond his personal attitude about abortion, which should be irrelevant to a judge and about which we shouldn’t have to care, his opinion revealed his view of the judicial role when it comes to enforcing — or, in this case, even making a good-faith effort to understand — individual rights.

This brings me to Judge Kavanaugh and last fall’s case of the pregnant immigrant teenager whom the Trump administration tried to block from exercising her right to an abortion. The young woman, J.D., detained as an undocumented “unaccompanied minor” in the custody of an overtly anti-abortion bureaucrat in the Department of Health and Human Services, had jumped through every available hoop, including persuading a Texas judge that she was sufficiently mature to make the abortion decision. Volunteers had arranged and would pay for the procedure. The contract shelter in South Texas where she was being held would handle the logistics as it would for any other medical procedure, with no cost to the federal government. But in the Trump administration’s view, to permit the private actors to carry out their plan would be to force the government to “facilitate” abortion. By the time J.D. went to federal court, she was well into her second trimester and approaching the point when abortion would be unavailable in Texas.

Last Oct. 18, a federal district judge in Washington, D.C., Tanya Chutkan, issued an order to prohibit the administration from blocking J.D.’s access to an abortion. The judge found that further delay would cause the teenager to “suffer irreparable injury in the form of, at a minimum, increased risk to her health, and perhaps the permanent inability to obtain a desired abortion to which she is legally entitled.”

The administration appealed, and two days later, a panel of the United States Court of Appeals for the District of Columbia Circuit voted 2 to 1 to vacate Judge Chutkan’s order and to give the administration an additional 11 days to find a sponsor who would assume custody of J.D. Presumably, if the government no longer had custody, it would not be “facilitating” an abortion that might then take place. The problem, left unacknowledged in the court’s order, was that the Department of Health and Human Services, which necessarily vets would-be sponsors carefully, had been looking for one for J.D. for six weeks without success.

Judge Kavanaugh was presumably the author of the unsigned order, given that the other judge in the majority, Karen LeCraft Henderson, wrote separately, and the third
member of the panel, Patricia Millett, wrote a stinging dissent. “The government says it does not want to ‘facilitate’ the abortion,” Judge Millett wrote. “But there is nothing for it to facilitate” because everything would be handled by others. She added: “So what the government really claims here is not a right to avoid subsidizing the abortion decision; it claims a right to use immigration custody to nullify J.D.’s constitutional right to reproductive autonomy prior to viability.” It was, Judge Millett continued, “an astonishing power grab, and it flies in the teeth of decades of Supreme Court precedent preserving and protecting the fundamental right of a woman to make an informed choice whether to continue a pregnancy at this early stage.”

The teenager’s lawyers appealed to the full appeals court. By a vote of 6 to 3, the court vacated the panel’s order. The abortion could proceed (which it did, the next day.) Judge Kavanaugh wrote for the dissenters. His language was strong. He accused the majority of having created “a new right for unlawful immigrant minors in U.S. government detention to obtain immediate abortion on demand,” which he called “a radical extension of the Supreme Court’s abortion jurisprudence.”

Three times in his nine-page opinion, Judge Kavanaugh used the phrase “abortion on demand,” a famous dog whistle for those opposed to abortion, as odd as it is brutal-sounding. What does this phrase actually mean? We don’t say “rhinoplasty on demand” or even, for a medical emergency, “appendectomy on demand.” Here was Judge Millett’s response in her own separate opinion:

“Abortion on demand? Hardly. Here is what this case holds: a pregnant minor who (i) has an unquestioned constitutional right to choose a pre-viability abortion, and (ii) has satisfied every requirement of state law to obtain an abortion, need not wait additional weeks just because she — in the government’s inimitably ironic phrasing — ‘refuses to leave’ its custody. That sure does not sound like ‘on demand’ to me. Unless Judge Kavanaugh’s dissenting opinion means the demands of the Constitution and Texas law. With that I would agree.”

In his opinion, Judge Kavanaugh argued that the government was behaving reasonably. “She is 17 years old. She is pregnant and has to make a major life decision. Is it really absurd for the United States to think that the minor should be transferred to her immigration sponsor — ordinarily a family member, relative, or friend — before she makes that decision? And keep in mind that the government is not forcing the minor to talk to the sponsor about the decision, or to obtain consent. It is merely seeking to place the minor in a better place when deciding whether to have an abortion.”

In the abstract, that does sound reasonable. But in fact, J.D. had already decided that at age 17, alone and without resources, she did not want to become a mother. She had already received the permission of a state judge and counseling from a clinic physician. And every day, she was a day more pregnant.

The case, Azar v. Garza, ultimately made no law. In June, the Supreme Court issued a unanimous order vacating the appeals court’s ruling as moot. But the issue has not gone
away. A class-action lawsuit is proceeding on behalf of all immigrant teenagers in federal custody who may seek abortions.

And there will be other abortion cases, lots of them, propelled to the court in the belief that a long-awaited moment — the dismantling of Roe v. Wade — is finally at hand. We have no crystal ball to tell us for sure what a new Supreme Court justice will do. But we have words, and we can read.
Last fall, an undocumented 17-year-old was arrested while crossing the U.S.-Mexico border. The girl, referred to in court documents as Jane Doe, was sent to a private Texas detention center under contract with the Office of Refugee Resettlement. Shortly after her arrival, she learned she was eight weeks pregnant and decided to terminate. The teen had money to pay for her procedure, transportation and the approval of a Texas judge who deemed her “mature and sufficiently well informed to make the decision to have an abortion” (a requirement for minors seeking an abortion in Texas without parental consent).

The only thing standing in the girl’s way was the Trump administration, which refused to allow her to leave the detention center for the appointment. Government lawyers argued that letting her go would violate a decree issued a few months earlier that forbade shelters from taking “any action that facilitates” an abortion without the express permission of the ORR director – a Trump appointee who also happens to be a pro-life zealot.

ACLU lawyers sued the government on the girl’s behalf and the case, Garza v. Hargan, landed in front of a three-judge panel on the D.C. circuit court. One judge believed that because the girl was undocumented she didn’t have any Constitutional rights. Another said she did have rights and that the government was violating them by blocking her from obtaining the abortion. The third judge, Brett Kavanaugh, President Trump’s newest Supreme Court nominee, didn’t dispute the girl’s right to have an abortion. Instead, he proposed a solution that would have trapped her in legal limbo for a few more weeks, running out the clock as her pregnancy advanced and approached Texas’ 20-week cut-off for all legal abortions. The full circuit court ultimately ruled in the ACLU’s favor, and the teenager received her abortion when she was more than 15 weeks pregnant. But if it had been left up to Kavanaugh alone, she probably would have been forced to carry the baby to term against her wishes.

Trump’s nomination of Kavanaugh to the Supreme Court seat vacated by retiring Justice Anthony Kennedy could put the judge in a position to redefine reproductive rights in America for decades to come. That’s an alarming prospect for pro-choice Americans, because in both legal opinions and public speeches, Kavanaugh has left little doubt about the fact that he does not believe in a constitutional right to an abortion. That probably won’t stop him from trying to
convince skeptical senators during his confirmation hearings, though.

With a razor-thin Republican margin in the Senate, Kavanaugh’s confirmation will hinge on locking down support from Suan Collins (R-ME) and her colleague Lisa Murkowski (R-AK), who are both pro-choice. As they’ve done in the past, these senators will scrutinize Kavanaugh’s record, paying particular attention to one code-word: precedent. “I view Roe v. Wade as being settled law,” Collins told reporters shortly after Kennedy’s retirement. “It’s clearly precedent and I always look for judges who respect precedent.” (Approached for comment, Collins’ press secretary forwarded Rolling Stone the senator’s boilerplate statement on Kavanaugh’s nomination; it declares the judge has “impressive credentials and extensive experience,” but promises Collins will nonetheless “conduct a careful, thorough vetting” of his record.)

During last year’s confirmation hearings, Trump’s other Supreme Court pick, Justice Neil Gorsuch, repeatedly and ardently declared his deep respect for legal precedence. “I’m sworn as a sitting judge to give the full weight and respect to due precedent;” “I follow precedent;” “I will follow the law of judicial precedent in this and in every other area, senator, it’s my promise to you;” Gorsuch said at that time.

Gorsuch’s personal assurances about precedent were crucial to securing Collins’ vote. “I had a very long discussion with Justice Gorsuch in my office,” Collins recently told CNN’s Jake Tapper. “And he pointed out to me that he is a co-author of a whole book on precedent.”

Among Gorsuch’s co-authors in that same book? Brett Kavanaugh.

But, as Brianne Gorod, former clerk to Justice Stephen Breyer, has pointed out, all those promises weren’t worth much. In his first year on the court, Gorsuch voted to overrule past Supreme Court decisions in Janus v. AFSCME, Abbott v. Perez and South Dakota v. Wayfair – a decision in which he expressed a willingness to overturn even more precedents in the future.

Taking Kavanaugh at his word that he respects precedent would be a similarly grave error, because the judge has an unusual and radical interpretation of what abortion precedent actually is, as evidenced by his dissent in Garza v. Hargan in which he employed the word “precedent” 19 times in just 10 pages.

In his dissent, Kavanaugh tried to make the case that the Supreme Court has typically taken a conservative perspective on abortion, citing “many precedents holding that the Government has permissible interests in favoring fetal life, protecting the best interests of a minor, and refraining from facilitating abortion.” He failed to point out that the Supreme Court has consistently ruled that any restriction constituting “a unilateral veto” – like the government unilaterally deciding that a teenage girl cannot have an abortion after she
met the state’s legal requirements – is unconstitutional.

He went on to contrast his view with the majority’s “radical” interpretation of the law, which he said would only have been supported by history’s most extreme justices. He called three of them out by name – William J. Brennan, Thurgood Marshall and Harry Blackmun – casting those justices as extremists whose abortion views were far outside the mainstream and decidedly “not with the many majority opinions of the Supreme Court that have repeatedly upheld reasonable regulations that do not impose an undue burden on the abortion right recognized by the Supreme Court in Roe v. Wade.”

He returned to those three justices later in his dissent, in a passage that should be extremely concerning for anyone holding out hope that if confirmed, Kavanaugh would leave Roe untouched. “From one perspective, some disagree with cases that allow the Government to refuse to fund abortions and that allow the Government to impose regulations such as parental consent, informed consent, and waiting periods,” Kavanaugh wrote. “That was certainly the position of Justices Brennan, Marshall, and Blackmun. From the other perspective, some disagree with cases holding that the U.S. Constitution provides a right to an abortion.”

Kavanaugh presented this as a binary choice. If there is room for more than two opinions on the matter of abortion, Kavanaugh did not account for it. The fact that he already cast Brennan, Marshall and Blackmun as the radical fringe effectively places Kavanaugh squarely in the other camp – the camp that disagrees that the Constitution provides a right to an abortion.

The opinion that Roe should be overturned is a radical one, and it should be treated as such. It’s not only a departure from 45 years of Supreme Court precedent, it’s also wildly outside the mainstream public opinion: 67 percent of Americans do not want to see Roe overturned, according to a recent poll taken by the Kaiser Family Foundation.

Judges with Supreme Court dreams usually take great pains to keep their true feelings about issues like abortion private out of fear that these statements could come back to haunt them in confirmation hearings. It’s probably not a coincidence that Kavanaugh became more bold in airing his views after Trump – who promised to appoint justices that would overturn Roe v. Wade – was elected.

In a speech he gave last year, Kavanaugh praised the late Chief Justice William Rehnquist – one of the two dissenting justices to vote against Roe – as his “first judicial hero.” Kavanaugh bemoaned the fact that Rehnquist was “not successful in convincing a majority of the justices in the context of abortion either in Roe itself or in the later cases such as Casey... But he was successful in stemming the general tide of freewheeling judicial creation of unenumerated rights that were not rooted in the nation’s history and tradition.” Here, with his choice of words – “freewheeling judicial creation of unenumerated rights” – Kavanaugh again
indicated his belief that abortion is not a constitutional right guaranteed by the 14th amendment. After his speech, an audience member, while posing a question, said Kavanaugh agreed with Rehnquist’s *Roe* dissent. Kavanaugh did not correct him, and in answering, affirmed his belief that Rehnquist was right.

Back in 2006, when Kavanaugh was nominated for his current position, Sen. Chuck Schumer (D-NY) asked him point blank: “Do you consider *Roe v. Wade* to be an abomination?” The judge, a Catholic, didn’t answer the question directly. He replied, “If confirmed to the D.C. Circuit, I would follow *Roe v. Wade* faithfully and fully. That would be binding precedent of the Court. It’s been decided by the Supreme Court.”

That’s true. But it’s important to keep in mind that, unlike lower court judges who only get to interpret precedent, Supreme Court justices get to decide what qualifies and what doesn’t. As Sen. Chuck Grassley (R-IA) put it when explaining why he wouldn’t vote to confirm Justice Sonia Sotomayor to the Supreme Court in 2009, even though he supported her nomination to a lower court: “Supreme Court Justices have the last say with respect to the law and have the ability to make precedent, they do not have the same kinds of restraints lower court judges have. So we need to be convinced these nominees have judicial restraint – in other words, the self-restraint to resist interpreting the Constitution to satisfy their personal beliefs and preferences.”

Collins and Murkowski, both of whom previously voted to confirm Kavanaugh to the D.C. Circuit, would do well to keep that in mind during his Supreme Court confirmation hearings.
“Supreme Court wipes out appeals court ruling in immigrant abortion case”

Politico

Josh Gerstein and Renuka Rayasam

June 4, 2018

The Supreme Court has granted the Trump administration’s request to wipe out a federal appeals court’s ruling upholding the right of teens in immigration custody to seek abortions.

The high court said the dispute was moot because the 17-year-old at the center of the legal fight had an abortion before the case reached the justices. The Supreme Court, acting in an unsigned order and without recorded dissent, didn’t signal a view on the underlying legal issue.

The action means the question is all but certain to arise again, particularly given the Trump administration’s policy of resisting actions it views as facilitating abortions for minors.

The high-profile case, which dates back to last fall, was the first in a series of court battles over abortion policy in the relatively obscure Health and Human Services’ Office of Refugee Resettlement (ORR), which is responsible for the care of unaccompanied minors who enter the country illegally. Monday’s court order, one of the first of abortion cases with Supreme Court Justice Neil Gorsuch on the bench, comes after weeks of delay suggesting that there might have been conflicting opinions behind the scenes of the court, but no dissenting opinion was issued.

The Trump administration had asked the Supreme Court in November to reverse the D.C. Circuit Court’s decision that allowed the teenage girl in an immigration shelter to obtain an abortion. It also asked the high court to dismiss a class-action suit challenging the administration’s policy of blocking abortions for minors in the care of HHS.

The high court indicated it would not act on the Justice Department’s request to impose sanctions on American Civil Liberties Union attorneys over their actions in the case. The federal government's lawyers argued that the ACLU, which is leading the class-action suit against the administration, and the girl’s lawyers deceived HHS officials about when her abortion would take place, rushing the procedure before the Trump administration appealed to the Supreme Court.

The teen, known as Jane Doe in court documents, had requested an abortion in September after she was detained by immigration authorities for illegally crossing the border into Texas. The ACLU and the Texas attorneys representing her said the HHS refugee office intervened to block the procedure even though she had private funds and, in accordance with state law, obtained a judge's permission without parental consent.

The full bench of the U.S. Circuit Court of Appeals for the District of Columbia ruled that ORR would have to immediately release
Doe, who was about 16 weeks pregnant at the time, to obtain an abortion. The next morning, the girl’s lawyers arranged for the procedure to take place. The ACLU told the Supreme Court that the girl’s lawyers acted in her best interests.

The administration argued it wanted more time to find a sponsor for Doe so she could seek an abortion outside of federal custody. The Justice Department has not yet taken a position on whether undocumented minors have a constitutional right to an abortion.

U.S. District Court Judge Tanya Chutkan in March told the Trump administration it can't interfere with the ability of undocumented teens in federal custody to obtain abortions. She also allowed the ACLU case to move forward as a class-action suit.

Martin Lederman, an associate professor at Georgetown Law, said the Trump administration’s request for the Supreme Court to consider the class-action suit before it fully progresses through lower courts, as well as its call to discipline opposing attorneys, was "extraordinarily unusual." He said the Supreme Court’s action on the Doe case was unlikely to affect the proceedings of a class-action suit.
A coalition of attorneys general on Tuesday urged the D.C. Circuit to uphold a District of Columbia federal court's ruling that temporarily paused a federal agency's policy of blocking detained immigrant girls from accessing abortion services, saying such a policy violates the rights of both the states and women.

New York Attorney General Barbara D. Underwood, leading a group of 19 attorneys general, asked the appellate court to keep intact a lower court's decision granting a preliminary injunction against the Office of Refugee Resettlement's policy of barring the facilitation of abortions. Although states differ as to how minors can get an abortion, the agency cannot simply override state procedures and judgments, the attorneys general said.

"Permitting a federal agency to unilaterally substitute its policy judgment for the determinations of state legislatures and courts — as well as for the independent decision-making of the minors living in those states — tramples on both the federalism interests of amici states and individual constitutional rights," the brief says.

In March 2017, the agency adopted a policy that gave agency Director Scott Lloyd the authority to personally decide on all requests for abortion by detained immigrant minors, according to the filing.

In addition to refusing to allow the girls to secure judicial bypass in lieu of parental consent, the director also instructed shelters to notify a minor's parents about her pregnancy without her consent, even in cases where such policy violated state law, the coalition said.

By attempting to be the "final voice" on how a minor can obtain an abortion — either by rejecting her request, even with parental consent, or by rejecting her request when she seeks to use the state's bypass process — the agency ignores the fact that states in which the minors are located already have laws and policies in place, according to the brief.

"Contrary to [the Office of Refugee Resettlement]'s assertions, its statutory responsibility for the health and welfare of children in its custody does not justify the challenged policy," the attorneys general said. "]The Office of Refugee Resettlement]'s custodial role does not authorize limitless control; rather, the agency's authority is 'subject, of course, to the restrictions governing natural parents."

August 7, 2018
Citing a U.S. Supreme Court decision called Planned Parenthood of Se. Pa. v. Casey, which found unconstitutional statutes that created a "substantial obstacle" for women seeking abortions, the attorneys general said the Office of Refugee Resettlement's policy similarly imposes an "unconstitutional undue burden."

"All women have a constitutionally protected right to access safe and effective abortion services — including unaccompanied minors," Underwood said in a statement on Tuesday. "The Trump administration simply does not have the authority to force their personal views on these young women by requiring them to carry pregnancies against their will. The federal policy is unconstitutional and inhumane, and we will continue to fight it."

The brief was also signed by the attorneys general of California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Vermont, Virginia, Washington and the District of Columbia.

A representative for the Office of Refugee Resettlement did not immediately respond to a request for comment on Tuesday.

In April, U.S. District Judge Tanya S. Chutkan determined that the federal government had not required any policy or legal justifications from Lloyd for his personal determination that abortion would not be in any pregnant immigrant girl’s best interests.

The policy steps on the girls' Fifth Amendment rights, among others, in part because the decision to implement the policy was based on Lloyd’s ideological opposition to abortion, without regard to the girls' circumstances or right to choose, the judge found.

Garza is represented by Brigitte Amiri and Arthur B. Spitzer of the American Civil Liberties Union.

Azar is represented by August Edward Flentje and Michael Christopher Heyse of the U.S. Department of Justice.

The case is Rochelle Garza et al. v. Alex Azar II et al., case number 18-5093, in the U.S. Court of Appeals for the District of Columbia Circuit.
The Democratic governors of New York, Oregon and Washington said Monday that they would have no choice but to take legal action if the Trump administration moves forward with proposed changes to the Title X family-planning program that would pull funding for Planned Parenthood.

New York Gov. Andrew Cuomo, Oregon Gov. Kate Brown and Washington Gov. Jay Inslee spoke out in advance of the Tuesday cutoff for public comments regarding the proposal, urging the administration to reverse course on policy changes that would yank federal funding for health care providers that perform abortions, along with other reforms the leaders say will have dangerous consequences for women.

Otherwise, Cuomo and Inslee said, they will have no choice but to pursue all possible options, including legal action, to block the policy from depriving the women of their respective states with critical health care options.

"I believe the rule as written will not withstand legal challenge, and I'll do all I can to prevent it," Inslee said in a Monday statement issued after a visit to the new Planned Parenthood clinic in Spokane, Washington.

Inslee and Brown pledged to withdraw their participation from Title X if the proposal is adopted, with the latter governor saying doing so would be in the best interests of Oregon’s citizens and state law.

While Cuomo stopped short of explicitly saying his state wouldn't be involved in the revamped program, he did note in a Monday letter to U.S. Department of Health and Human Services Secretary Alex Azar that "it will be impossible for New York to continue its comprehensive Title X program" if the rules are enacted as proposed.

In May, HHS revealed its proposed updates to the Title X program, which provides family-planning services to low-income Americans, serving roughly four million people every year.

The agency explained that the new proposal would make a number of changes to Title X's governing regulations, which were last revised 18 years ago, including cutting funding for programs and facilities that perform abortions and barring participating health providers from giving abortion referrals.
Before the proposal was even published in the Federal Register, which ultimately occurred on June 1, the Democratic Governors Association blasted the policy, telling Azar that they were "deeply concerned."

The May 31 letter said Title X has enjoyed bipartisan support for more than 40 years, serving as an important partnership between the federal government and states that ensures women receive quality health care and comprehensive, medically accurate information.

"We strongly urge you to reconsider this plan, which is nothing more than a domestic 'gag rule' that poses serious risks to women's health," the governors said.

But with the public comment period closing, Cuomo, Brown and Inslee — who had all signed onto the Democratic Governors Association letter — reiterated their concerns Monday.

Cuomo, for instance, said in his letter to Azar that the proposal would decrease the quality of care provided to those who rely on Title X, particularly low-income and uninsured individuals, and deny women the information they need to make crucial decisions about their health.

However, if the policy moves forward and legal challenges prove unsuccessful, the governors said they will do everything in their power to ensure the continued well-being of their citizens, including, if necessary, withdrawing their involvement in Title X.

The National Family Planning and Reproductive Health Association, along with several branches of Planned Parenthood, had launched early May litigation challenging the policy before it was officially unveiled, but a D.C. federal court axed the action earlier this month.

U.S. District Judge Trevor N. McFadden granted the government's bid for a quick win on July 16, saying the challenge came too soon because nothing of legal effect had yet occurred.

However, the judge said that even if he reached the merits, the government's challenged priorities were in line with Title X's mission to aid with projects offering a "broad range of acceptable and effective family planning methods and services."

That decision is currently being appealed to the D.C. Circuit.
Affirmative Action
With the first day of college only weeks away, many institutions of higher education must now make a significant decision: Comply with the current U.S. Department of Justice position on race-neutral admissions, or face being targeted as the first in a likely series of test cases by the U.S. attorney general’s newly constituted admissions litigation force. The administration’s latest act of disruption has hit colleges and universities. How will our institutions respond? What does this mean for students with acceptance letters?

Attorney General Jeff Sessions recently announced that 24 Justice Department guidance documents are now deemed “unnecessary, outdated, inconsistent with existing law, or otherwise improper.” That includes all of President Barack Obama’s guidance on voluntary affirmative action admission plans.

During the George W. Bush administration, schools had been encouraged to only use “race-neutral methods for assigning students to elementary and secondary schools” largely based on the U.S. Supreme Court Grutter v. Bollinger ruling in 2003. That case held that it was “patently unconstitutional” for a school to use affirmative action plans to achieve racial balance. In a significant shift, the Obama administration’s Education and Justice departments issued guidance to support colleges and universities in establishing voluntary affirmative action admission policies that fit within the Supreme Court parameters.

Specifically, admission policies became more narrowly tailored by only taking the race of an applicant into account based on the compelling interest of avoiding racial isolation and to achieve diversity in schools. In 2016, the U.S. Supreme Court in Fisher v. University of Texas at Austin recognized that colleges and universities had a compelling interest to ensure student body diversity; that case decided that an admissions program was constitutional if it remained narrowly tailored to achieve this compelling interest.

Justice Anthony Kennedy authored the 4-3 decision in Fisher, noting that “considerable deference is owed to a university in defining those intangible characteristics, like student body diversity, that are central to its identity and educational mission. But still, it remains an enduring challenge to our Nation’s education system to reconcile the pursuit of
diversity with the constitutional premise of equal treatment and dignity.”

Now, the Trump administration is targeting affirmative action programs in higher education, in a move that had been expected since at least last fall when the Justice Department officially sought to hire attorneys for a new project regarding “intentional race-based discrimination in college and university admissions.” It appears the attorneys hired last fall for the “new project” were hired and, we expect, are ready to roll.

Following the attorney general’s announcement, the U.S. Department of Education tweeted that “ED & DOJ are rescinding documents that advocate specific policies and procedures beyond what the Constitution, Title IV, or Title VI require. The protections from discrimination on the basis of race guaranteed by the Constitution, Title IV, and Title VI remain in place. OCR is firmly committed to vigorously enforcing these protections on behalf of all students.”

Even though the affirmative action admission programs at issue are voluntary, the government is still positioned to step in and stop higher education institutions from making determinations regarding individual student admissions based on race and to review decisions that have been made. The details of what lies ahead are difficult to predict. But, with the rollback by AG Sessions, the Bush administration’s position that schools should use race-neutral methods and can only consider race where essential to educational mission within constitutional parameters is revived and it will certainly roil higher education.

Assuming colleges utilized the Obama administration guidance, it is likely their voluntary affirmative action admission programs would pass constitutional muster. That said, it is one thing to believe they would. Being entangled in a lawsuit defending that position is an entirely different matter, particularly when the Justice Department has identified it has a priority of addressing these cases and prepared its resources accordingly. The anticipated aggressive pursuit of these cases by the Justice Department without any apparent consideration of providing higher education the considerable deference to which it is entitled according to our Supreme Court should not be easily dismissed.

The fact is, our colleges are in for a fight. And it is one that is worthwhile to defend, because the educational mission of our institutions of higher education is at stake. The colleges need to be prepared for a long battle (and much legal expense), starting immediately with conducting thorough analysis of current admissions programs to ensure institutions continue their obligation to analyze the constitutionality of these programs on an annual basis. This is critical, as the constitutionality of these programs is not just based upon a snapshot at the date of creation, but upon the state of the program today and whether the institution has a compelling interest now.

For any college with a voluntary affirmative action program in place, the most important thing to do right now is for counsel to conduct
a review of the program since its inception, with attention paid to preserving all data supporting the institution’s decision to institute and maintain the program. Particular attention should be paid to tracking the effect of the implementation on effectuating the objective of student diversity, and how that has quantifiably enriched the institution.

Next, the current program should be evaluated in light of the action by Attorney General Sessions on July 3, 2018. A review done close in time should be memorialized, with the administration’s shift in perspective, to ensure there is a record of due diligence. To the extent the current program deviates in any manner under the new standard, it will be necessary to identify whether to modify the program accordingly, or if it is more prudent to place the program in abeyance until further clarification is provided by Congress or the courts.
“Brett Kavanaugh once predicted ‘one race’ in the eyes of government. Would he end affirmative action?”

The Washington Post

Ann E. Marimow and Robert Barnes

August 7, 2018

In the spring of 2015, Brett M. Kavanaugh returned to his alma mater in New Haven, Conn., to address the Black Law Students Association. The student who introduced him said Kavanaugh was concerned that African Americans and other minorities were being shut out of coveted clerkships with federal judges like him.

Kavanaugh concluded the session by handing out his email address and phone number and encouraging the Yale students to apply. Indeed, two of Kavanaugh’s four law clerks this year were African American students he met during annual visits to Yale, and Kavanaugh and his supporters have touted his record of hiring young lawyers from diverse backgrounds to work with him at the U.S. Court of Appeals for the District of Columbia Circuit.

“It was important to him that everyone have access,” recalled Rakim Brooks, who introduced the judge that day and completed a year-long clerkship with him this summer just as President Trump announced Kavanaugh’s nomination to the Supreme Court.

Yet even as Kavanaugh has taken steps to open up an elite, historically white and male network, civil rights advocates cite legal opinions, interviews and writings that suggest he would weaken broad legal protections for minorities. Interest groups on both sides say Kavanaugh could be the vote conservatives have been looking for to speed the demise of affirmative action in college admissions.

Civil rights advocates and Democratic lawmakers point in particular to an opinion he wrote in 2012 delaying but ultimately allowing voter identification requirements in South Carolina that were opposed by the Justice Department, and to his description in 1999, when he was a lawyer in private practice, of a government program for Native Hawaiians as a “naked racial-spoils system.” In that case, embracing the language of Justice Antonin Scalia, Kavanaugh wrote in a newspaper column that the Supreme Court would eventually, inevitably find that “in the eyes of government, we are just one race.”

Vanita Gupta, president of the Leadership Conference on Civil and Human Rights, said, “That kind of statement really signals that he
will bring an anti-civil-rights agenda to the Supreme Court and fails to recognize the current reality of being a person of color in this country and the history of discrimination.”

“Kavanaugh’s worldview is not demonstrated by the fact that he’s appeared before black law students and hired diverse clerks,” she said, noting that he has also appeared nearly 50 times before chapters of the Federalist Society, the conservative legal group that has helped shape Trump’s list of potential Supreme Court nominees, including Kavanaugh.

The stakes are high because the man Kavanaugh would replace, Justice Anthony M. Kennedy, cast the deciding vote on a key affirmative action case two years ago. He joined the court’s liberal justices to uphold the University of Texas’s limited use of race as a factor in admissions. In an earlier case involving the racial makeup of public school districts, Kennedy declined to join conservatives in saying race could not be considered. These issues seem certain to return to the Supreme Court because admissions practices at Harvard University and the University of North Carolina are already facing legal challenges.

During his 12 years on the bench, few cases have required Kavanaugh to take positions on matters directly involving race. Speculation about how he would approach these types of cases is based in part on his work as a lawyer at Kirkland & Ellis. There, Kavanaugh teamed with conservative lawyer Robert H. Bork and the Center for Equal Opportunity, a conservative think tank, in arguing that it was unconstitutional to bar people who were not Native Hawaiians from voting for trustees of the Office of Hawaiian Affairs.

While working on that case, Kavanaugh in a 1999 Wall Street Journal column urged the court to adhere to the constitutional principle that, he wrote, was most clearly articulated by Scalia in an earlier case involving racial preferences in hiring: “Under our Constitution there can be no such thing as either a creditor or a debtor race. . . . In the eyes of government, we are just one race here.”

The Supreme Court struck down the race-based voting qualification in a 7-to-2 decision written by Kennedy.

Roger Clegg of the Center for Equal Opportunity, who joined with Kavanaugh and Bork to submit an amicus brief in that case, said he suspects that Kavanaugh as a justice would “be hospitable to the kinds of arguments he was making.”

“Our hope is that he is correct in his prediction that the government will get out of the business of playing favorites on the basis of race and ethnicity, and that the court will recognize that it’s plainly prohibited.”

Clegg stressed that the way to end discrimination is for the government to stop categorizing Americans by race, a practice that he said is untenable in a multiethnic, multiracial society.

Still, Clegg said his expectations for Kavanaugh are tempered somewhat because he was acting then as a private attorney, not as a judge.
Civil rights advocates, however, say that Kavanaugh’s rhetoric about a “racial-spoils system” and his embrace of Scalia’s “one race” prediction leave little room for surprise when it comes to affirmative action.

“He’s not someone for whom you have to guess about,” said Thomas Saenz, president and general counsel of the Mexican American Legal Defense and Educational Fund. Saenz said he views Kavanaugh’s statements as particularly troubling at a time when white-supremacist groups and anti-immigrant sentiment are on the rise.

Justin Driver, a University of Chicago law professor, cautioned that affirmative action has been administered “last rites many times,” only to be saved by an improbable list of conservative justices. But he said that Kavanaugh’s language “signals great hostility to racial classifications.”

In a 2003 decision upholding the University of Michigan Law School admissions policy, Justice Sandra Day O’Connor wrote, “We expect that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today.”

“We’re 10 years away from 2028,” said Driver, who clerked for O’Connor. If Kavanaugh joins the court, “it may well not last another 10 years.”

Through his hiring and in his public statements, Kavanaugh has made clear that the topic of racial discrimination is often on his mind. When he was introduced as Trump’s nominee at the White House in June, one of the first things he mentioned was his mother’s work as a public high school teacher in Washington in predominantly African American schools.

“Her example taught me the importance of equality for all Americans,” Kavanaugh said.

In response to questions from the Senate Judiciary Committee, Kavanaugh listed what he considered his 10 most important decisions. He identified nine that went to the high court and a 10th involving a Fannie Mae employee who was fired shortly after complaining about an executive’s use of a racial slur to refer to him. Kavanaugh sided with the employee and wrote a separate opinion to which he called attention in his questionnaire.

“In a 2012 case reviewing a South Carolina voter identification law, Kavanaugh acknowledged concerns from the Justice Department and civil rights groups about the disproportionate impact on black voters, who were less likely to have an acceptable photo ID, according to court filings.

“In the 2012 case reviewing a South Carolina voter identification law, Kavanaugh acknowledged concerns from the Justice Department and civil rights groups about the disproportionate impact on black voters, who were less likely to have an acceptable photo ID, according to court filings.

“The long march for equality for African-Americans is not finished.”

Kavanaugh joined with two other judges to delay for one year implementation of the
voter-ID requirement. But their unanimous decision cleared the law to take effect after the 2012 election.

“The rhetoric is a lot less significant than the ruling itself,” said Todd A. Cox, director of policy at the NAACP Legal Defense Fund. “That is the thing that has the impact on real people’s lives.”

Civil rights advocates say it is telling that Kavanaugh did not join the other judges — Colleen Kollar-Kotelly, a Clinton nominee, and John D. Bates, a George W. Bush nominee — in a separate opinion in which they noted the “vital function” of the Voting Rights Act provision that required federal oversight of election laws in states with a history of discriminatory practices.

The following year, the Supreme Court invalidated that provision, known as Section 5.

Throughout his tenure on the bench in Washington, Kavanaugh has returned six times to Yale to speak to the black law students’ group. Of the 48 clerks he has hired, 13 are minorities. Nine of the 13 have gone on to Supreme Court clerkships, according to statistics compiled by his former clerks and first reported by the National Law Journal.

Rakim Brooks credits Kavanaugh for his efforts to diversify the elite clerkship track. He signed a letter submitted this month to the Senate from the judge’s former clerks that praises Kavanaugh as a mentor, friend, intellect and highly qualified nominee.

But Brooks, who grew up in public housing in East Harlem and was the first in his family to attend college, is concerned about the future of civil rights. His feelings about the nomination fight are complicated.

He said his respect and admiration for the judge don’t “mean people shouldn’t fight and challenge Judge Kavanaugh’s nomination if they disagree. I think they should.”

“There was no one that President Trump was going to appoint who was likely to advance the civil rights agenda beyond where Justice Kennedy is leaving it,” Brooks said.
A group that is suing Harvard University is demanding that it publicly release admissions data on hundreds of thousands of applicants, saying the records show a pattern of discrimination against Asian-Americans going back decades.

The group was able to view the documents through its lawsuit, which was filed in 2014 and challenges Harvard’s admissions policies. The plaintiffs said in a letter to the court last week that the documents were so compelling that there was no need for a trial, and that they would ask the judge to rule summarily in their favor based on the documents alone.

The plaintiffs also say that the public — which provides more than half a billion dollars a year in federal funding to Harvard — has a right to see the evidence that the judge will consider in her decision.

Harvard counters that the documents are tantamount to trade secrets, and that even in the unlikely event that the judge agrees to decide the case without a trial, she is likely to use only a fraction of the evidence in her decision. Only that portion, the university says, should be released.

“This is an important and closely watched civil rights case,” William S. Consovoy, the lawyer for the group, Students for Fair Admissions, said in his letter to the court. “The public has a right to know exactly what is going on at Harvard. Even if this were a commercial issue — as Harvard would like to portray it — the public would have a right to know if the product is defective or if a fraud is being perpetrated.”

At stake in the dispute is the secrecy of the university admissions process, especially at elite institutions like Harvard that are competing for a small pool of highly qualified students, and whether and how race and ethnicity play a role.

Students for Fair Admissions includes more than a dozen Asian-American students who applied to Harvard and were rejected. They contend in their lawsuit that Harvard systematically and unconstitutionally discriminates against Asian-American applicants by penalizing their high achievement as a group, while giving preferences to other racial and ethnic minorities. They say that Harvard’s admission process amounts to an illegal quota system.
A spokeswoman for Harvard, Rachael Dane, while declining to comment on the specifics of the litigation, said: “Harvard College does not discriminate against applicants from any group in its admissions processes. We will continue to vigorously defend the right of Harvard, and other universities, to seek the educational benefits that come from a class that is diverse on multiple dimensions.”

Harvard gave the court the documents in question, which include six years of admissions data on hundreds of thousands of high school students, as part of the pretrial discovery process. About 40,000 students apply to Harvard each year.

The judge in the case, Allison D. Burroughs of the Federal District Court in Boston, has scheduled a hearing on April 10 for both sides to present oral arguments on whether the documents should be made public.

The two sides provided lengthy letters to Judge Burroughs, giving a preview of their arguments. The judge has set a trial date for next January, though Harvard in its letter said it was prepared to go to trial as soon as October.

The contents of the documents have been only roughly sketched out in court papers. But Harvard said in its letter that the parties have exchanged more than 90,000 pages, including “deeply personal and highly sensitive information about applicants to and students at Harvard and the inner workings of Harvard’s admissions process.”

“Harvard understands that there is a public interest in this case and that the public has certain — though not unfettered — interests in access to judicial materials,” the university said. “Those interests, however, must be balanced against the need to protect individual privacy and confidential and proprietary information about the admissions process.”

The leader of Students for Fair Admissions and the architect of the case against Harvard is Edward Blum, a longtime crusader against affirmative action who has recruited plaintiffs, hired sympathetic lawyers and raised millions of dollars from conservative groups to challenge voting rights laws and affirmative action policies, often successfully.

One of Mr. Blum’s landmark cases was a lawsuit by Abigail Fisher, a white applicant who said she was denied admission to the University of Texas at Austin because of her race. The United States Supreme Court ruled 4-3 in favor of the university in 2016, saying that it is constitutional to use race as one of many factors in admissions decisions.

Critics have seen the lawsuit against Harvard, which seems intended to go to the Supreme Court, as an attempt to reignite that battle.

The Trump administration has taken an interest in the issue, opening a parallel investigation based on a separate 2015 complaint to the Justice Department by a coalition of Asian-American organizations.

In its letter to the judge, Harvard said that it had an obligation to protect the identities of applicants, who take it on faith that their applications will remain private. While names and other information that could directly identify applicants have been
redacted from the documents, the university said that hometowns, awards and other elements could reveal applicants’ identities through simple internet searches.

The documents also include deposition testimony concerning the procedures Harvard used to evaluate applications; internal correspondence among admissions officers about applicants’ qualities; and statements by admissions officers about why they liked some applicants better than others.

“That information is highly proprietary to Harvard and of great interest to college admissions consultants and others who seek any advantage they can muster in the highly competitive admissions process,” Harvard said in its letter. Releasing it “would put Harvard at a severe competitive disadvantage,” the university said, and would prompt applicants to try to game the system.

Students for Fair Admissions scoffed at the notion that the admissions procedure was akin to a trade secret. “This case does not involve anything like ‘national security, the formula for Coca-Cola or embarrassing details of private life,’ ” the group said, citing case law.

The group noted that Harvard officials have repeatedly said that there is no formula for being admitted, and that books and articles have been written about how the Harvard admissions process works.

The plaintiffs cited a landmark affirmative action case, Gratz v. Bollinger, in which the Supreme Court ruled in 2003 that the University of Michigan was using an unconstitutional scoring system for undergraduate admissions. The system automatically awarded 20 out of 150 points toward admission to members of underrepresented minorities.

“There is no way the public could have understood the dispute,” the group said, “if the facts had been hidden.”
“Harvard Rated Asian-American Applicants Lower on Personality Traits, Suit Says”

New York Times
Anemona Hartocollis
June 15, 2018

Harvard consistently rated Asian-American applicants lower than others on traits like “positive personality,” likability, courage, kindness and being “widely respected,” according to an analysis of more than 160,000 student records filed Friday by a group representing Asian-American students in a lawsuit against the university.

Asian-Americans scored higher than applicants of any other racial or ethnic group on admissions measures like test scores, grades and extracurricular activities, according to the analysis commissioned by a group that opposes all race-based admissions criteria. But the students’ personal ratings significantly dragged down their chances of being admitted, the analysis found.

That has led to intense interest in the university’s closely guarded admissions process. Harvard had fought furiously over the last few months to keep secret the documents that were unsealed Friday.

The documents came out as part of a lawsuit charging Harvard with systematically discriminating against Asian-Americans, in violation of civil rights law. The suit says that Harvard imposes what is in effect a soft quota of “racial balancing.” This keeps the numbers of Asian-Americans artificially low, while advancing less qualified white, black and Hispanic applicants, the plaintiffs contend.

The findings come at a time when issues of race, ethnicity, admission, testing and equal access to education are confronting schools across the country, from selective public high schools like Stuyvesant High School in New York to elite private colleges. Many Ivy League schools, not just Harvard, have had similar ratios of Asian-American, black, white and Hispanic students for years, despite fluctuations in application rates and qualifications, raising questions about how those numbers are arrived at and whether they represent unspoken quotas.
Harvard and the group suing it have presented sharply divergent views of what constitutes a fair admissions process.

“It turns out that the suspicions of Asian-American alumni, students and applicants were right all along,” the group, Students for Fair Admissions, said in a court document laying out the analysis. “Harvard today engages in the same kind of discrimination and stereotyping that it used to justify quotas on Jewish applicants in the 1920s and 1930s.”

Harvard vigorously disagreed on Friday, saying that its own expert analysis showed no discrimination and that seeking diversity is a valuable part of student selection. The university lashed out at the founder of Students for Fair Admissions, Edward Blum, accusing him of using Harvard to replay a previous challenge to affirmative action in college admissions, Fisher v. the University of Texas at Austin. In its 2016 decision in that case, the Supreme Court ruled that race could be used as one of many factors in admissions.

“Thorough and comprehensive analysis of the data and evidence makes clear that Harvard College does not discriminate against applicants from any group, including Asian-Americans, whose rate of admission has grown 29 percent over the last decade,” Harvard said in a statement. “Mr. Blum and his organization’s incomplete and misleading data analysis paint a dangerously inaccurate picture of Harvard College’s whole-person admissions process by omitting critical data and information factors.”

In court papers, Harvard said that a statistical analysis could not capture the many intangible factors that go into Harvard admissions. Harvard said that the plaintiffs’ expert, Peter Arcidiacono, a Duke University economist, had mined the data to his advantage by taking out applicants who were favored because they were legacies, athletes, the children of staff and the like, including Asian-Americans. In response, the plaintiffs said their expert had factored out these applicants because he wanted to look at the pure effect of race on admissions, unclouded by other factors.

Both sides filed papers Friday asking for summary judgment, an immediate ruling in their favor. If the judge denies those requests, as is likely, a trial has been scheduled for October. If it goes on to the Supreme Court, it could upend decades of affirmative action policies at colleges and universities across the country.

Harvard is not the only Ivy League school facing pressure to admit more Asian-American students. Princeton and Cornell and others also have high numbers of Asian-American applicants. Yet their share of Asian-Americans students is comparable with Harvard’s.

In Friday’s court papers, the plaintiffs describe a shaping process that begins before students even apply, when Harvard buys data about PSAT scores and G.P.A.s, according to the plaintiffs’ motion. It is well documented that these scores vary by race.

The plaintiffs’ analysis was based on data extracted from the records of more than
160,000 applicants who applied for admission over six cycles from 2000 to 2015.
Battle lines were drawn this week as Asian-American groups took sides in an ongoing lawsuit that accuses Harvard of discriminating against Asian-American applicants.

Current Harvard students, alumni and applicants who defend the school’s consideration of race in admissions — and organizations like the Asian American Coalition for Education, which accuses Harvard of “unfairly rejecting many top performing Asian American students” — were among those who filed friend-of-the-court briefs in Boston federal court on Monday and Tuesday, as a judge weighs whether the case should go to trial.

In the wake of the lawsuit brought by Students for Fair Admissions in 2014, Asian Americans, often stereotyped as model minorities, have found themselves in the center of the debate on affirmative action.

One group of students, represented by Asian Americans Advancing Justice-L.A. and two other civil rights groups, contends in their brief that Harvard’s race-conscious, holistic admissions policy is constitutional. They also maintain that the school needs to do more to ensure even greater diversity, which the brief says enhances learning for all students.

But the Asian American Coalition for Education and the Asian American Legal Foundation, both nonprofit advocacy groups, argue in their brief that Harvard, in order to maintain racial quotas, makes Asian-American applicants surmount a higher bar than others.

They allege that Asian Americans today encounter the same “formal and hidden quotas” faced by Jewish applicants to Harvard and other Ivy Leagues during the first half of the 20th century.

While Asian-Americans appear divided on affirmative action, backing for the policy among the group has actually held steady, except for Chinese Americans, according to Karthick Ramakrishnan, founder and director of AAPI Data and a public policy professor at the University of California, Riverside.

National survey figures analyzed by AAPI Data showed that from 2012 to 2016, Asian-American support for affirmative action hovered around 70 percent, though for Chinese it dropped from 78 percent to 41 percent.
“This has been a major issue within the Chinese-American community and predominantly driven by the concerns and anxieties of Chinese immigrants,” Ramakrishnan said.

The group suing Harvard, Students for Fair Admissions, which is led by conservative activist Edward Blum, includes Asian Americans who have been denied admission to Harvard. It alleges that the college intentionally discriminates against Asian-American applicants by limiting their admissions numbers each year.

Harvard denies the claims. It says it believes the evidence shows that it does not use quotas or racial balancing and that race is just one of many factors it considers in admissions decisions.

The Supreme Court has ruled that colleges cannot use racial quotas because they violate the Constitution’s Equal Protection Clause, but may take race into account when deciding whom to admit.

In Harvard’s class of 2021, 22 percent of students were Asian, 15 percent African American, 12 percent Hispanic or Latino, and 3 percent Native American or Pacific Islander.

Nicole Gon Ochi, an attorney with Asian Americans Advancing Justice-L.A., said she believes everyone benefits from diversity. She said their brief stands out from the others in that it captures the full range of student voices, including prospective and current ones, as well as alumni.

“We have a Chinese-American and Vietnamese-American student who actually believe that they got into Harvard because of affirmative action,” Ochi said.

Nicole Gon Ochi, an attorney with Asian Americans Advancing Justice-L.A., said she believes everyone benefits from diversity. She said their brief stands out from the others in that it captures the full range of student voices, including prospective and current ones, as well as alumni.

“We have a Chinese-American and Vietnamese-American student who actually believe that they got into Harvard because of affirmative action,” Ochi said.

“There’s others for whom race may not have played a role, but once they got to Harvard, it really greatly enhanced their educational experience, kind of transformed them as people into caring a lot about social justice ... helped them to see their own prejudices,” she added.

Ochi said the students in the amicus brief were also troubled by the prospect of not having their race — which they believe to be a core part of their identity — taken into account for admissions when every other aspect of who they are is considered.

“For many of our Asian-American students, they actually have been told don’t talk about your race, don’t disclose that you’re Asian, it’s going to hurt you in the admissions process,” she said. “And all of them considered that advice and rejected it, because they said we can’t represent ourselves authentically without that.”
But Yukong Zhao, president of the Asian American Coalition for Education, said race should play no role in who’s admitted to Harvard.

“We want to really point out that the Harvard admission model ... actually is illegal,” Zhao said. He added that the school’s admissions’ practice is “totally immoral” and “creates so much harm to Asian-American communities and also undermines the American merit-based college admissions system.”

Zhao’s coalition said it represents 156 Asian-American organizations across the country, among them the Asian American GOP Coalition, Asian Americans Against Affirmative Action and the Michigan Chinese Conservatives Alliance, according to their friend-of-the-court brief.

The brief, which contends Harvard sets the admissions bar higher for Asian Americans, argued that by doing so Asian-American applicants must study and excel more than other candidates to have the same shot at getting in.

“This vicious cycle forces Asian-American students into behavior closer to the negative stereotype that they are nothing but personality-less ‘nerds,’ making it easier for admissions officers to apply unfair stereotypes and deny them admission,” the brief argued.

In addition to Harvard, Students for Fair Admissions has also sued the University of North Carolina at Chapel Hill and the University of Texas at Austin in separate cases, alleging they use discriminatory admissions policies.

Blum, the group’s president, recruited Abigail Fisher, the lead plaintiff in Fisher v. University of Texas.

Fisher, who is white, first sued the University of Texas at Austin in 2008, arguing that its holistic-review process, which considers race along with other factors, put her at a disadvantage to other applicants.

The U.S. Supreme Court in June 2016 ruled 4-3 in that case to uphold the school’s affirmative action policy.
“U.S. says it might enter Harvard affirmative action court battle”

*Reuters*

Nate Raymond

April 6, 2018

The U.S. Justice Department said on Friday it might formally enter a lawsuit accusing Harvard University of discriminating against Asian-American applicants as the agency probes its admissions policies for potential civil rights violations.

The department disclosed its plan in a brief urging a federal judge in Boston to not allow the Ivy League school to file pre-trial court papers and documents provisionally under seal.

Harvard had cited the need to protect the privacy of applicants and students as well as the inner workings of its admissions process, arguing that various documents should be initially filed under seal pending the judge’s review.

The Justice Department said it opposed Harvard’s request, joining Students for Fair Admissions (SFFA), the group behind the case, which has urged the disclosure of “powerful” evidence showing Cambridge, Massachusetts-based Harvard is violating Title VI of the Civil Rights Act.

“Harvard College is responsible for protecting the confidential and highly sensitive personal information that prospective students - none of whom asked to be involved in this dispute - entrust to us every year in their applications,” Harvard spokeswoman Rachael Dane said in a statement.

“We are committed to safeguarding their privacy while also ensuring that the public has the access that it is entitled to under the law,” Dane said.

William Consovoy, a lawyer for SFFA, declined to comment.

The U.S. Supreme Court has ruled universities may use affirmative action to help minority applicants get into college. Conservatives have said such programs can hurt white people and Asian-Americans.

The Justice Department under Republican President Donald Trump has been investigating a complaint by more than 60 Asian-American organizations which say Harvard’s policies are discriminatory because they limit the acceptance of Asian-Americans.
“The public funds Harvard at a cost of millions of dollars each year, and thus has a paramount interest in any proof of these allegations, Harvard’s responses to them, and the Court’s resolution of this dispute,” Justice Department lawyers wrote in Friday’s filing. The department said that while it had obtained much of the case’s evidence through its own separate probe, it wanted to review the court records as it considers whether to file a “statement of interest” arguing a position in the case.

A hearing before U.S. District Judge Allison Burroughs is scheduled for Tuesday.

Harvard says its admissions policies comply with U.S. laws and that it has worked to increase the financial aid it offers to ensure economic, as well as racial, diversity in its classes.
“Trump Officials Reverse Obama’s Policy on Affirmative Action in Schools”

New York Times

Erica L. Green, Matt Apuzzo, and Katie Benner

July 3, 2018

The Trump administration said Tuesday that it was abandoning Obama administration policies that called on universities to consider race as a factor in diversifying their campuses, signaling that the administration will champion race-blind admissions standards.

In a joint letter, the Education and Justice Departments announced that they had rescinded seven Obama-era policy guidelines on affirmative action, which, the departments said, “advocate policy preferences and positions beyond the requirements of the Constitution.”

“The executive branch cannot circumvent Congress or the courts by creating guidance that goes beyond the law and — in some instances — stays on the books for decades,” said Devin M. O’Malley, a Justice Department spokesman.

Striking a softer tone, Education Secretary Betsy DeVos wrote in a separate statement: “The Supreme Court has determined what affirmative action policies are constitutional, and the court’s written decisions are the best guide for navigating this complex issue. Schools should continue to offer equal opportunities for all students while abiding by the law.”

The Trump administration’s moves come with affirmative action at a crossroads. Hard-liners in the Justice and Education Departments are moving against any use of race as a measurement of diversity in education. And the retirement of Justice Anthony M. Kennedy at the end of this month will leave the Supreme Court without its swing vote on affirmative action while allowing President Trump to nominate a justice opposed to policies that for decades have tried to integrate elite educational institutions.

A highly anticipated case is pitting Harvard against Asian-American students who say one of the nation’s most prestigious institutions has systematically excluded some Asian-American applicants to maintain slots for students of other races. That case is clearly aimed at the Supreme Court.

“The whole issue of using race in education is being looked at with a new eye in light of the fact that it’s not just white students being discriminated against, but Asians and others as well,” said Roger Clegg, the president and general counsel of the conservative Center.
for Equal Opportunity. “As the demographics of the country change, it becomes more and more problematic.”

Democrats and civil rights organizations denounced the administration’s decisions. Representative Nancy Pelosi of California, the House Democratic leader, said the “rollback of vital affirmative action guidance offends our nation’s values” and called it “yet another clear Trump administration attack on communities of color.”

Guidance documents like those rescinded on Tuesday do not have the force of law, but they amount to the official view of the federal government. School officials who keep their race-conscious admissions policies intact would do so knowing that they could face a Justice Department investigation or lawsuit, or lose funding from the Education Department.

The Obama administration believed that students benefited from being surrounded by diverse classmates, so in 2011, the administration offered schools a potential road map to establishing affirmative action policies and race-based considerations that could withstand legal scrutiny from an increasingly skeptical Supreme Court.

In a pair of policy guidance documents issued in 2011, the Obama Education and Justice Departments informed elementary and secondary schools and college campuses of “the compelling interests” established by the Supreme Court to achieve diversity. They concluded that the court “has made clear such steps can include taking account of the race of individual students in a narrowly tailored manner.”

But Trump Justice Department officials identified those documents as particularly problematic and full of “hypotheticals” intended to allow schools to skirt the law.

The Trump administration’s decision returned the government’s policies to the George W. Bush era. The administration did not formally reissue the Bush-era guidance but in recent days did repost a Bush administration affirmative action policy document online. That document states, “The Department of Education strongly encourages the use of race-neutral methods for assigning students to elementary and secondary schools.” For several years, that document had been replaced by a note declaring that the policy had been withdrawn.

The Education Department had last reaffirmed its position on affirmative action in schools in 2016 after a Supreme Court ruling said schools could consider race as one factor among many. In that case, Fisher v. University of Texas at Austin, a white woman claimed she was denied admission because of her race.

“It remains an enduring challenge to our nation’s education system to reconcile the pursuit of diversity with the constitutional promise of equal treatment and dignity,” Justice Kennedy wrote for the 4-to-3 majority.

Some colleges, such as Duke and Bucknell universities, said they would wait to see how the Education Department proceeds in issuing new guidance. Other colleges said
they would proceed with diversifying their campuses as the Supreme Court intended.

Melodie Jackson, a Harvard spokeswoman, said the university would “continue to vigorously defend its right, and that of all colleges and universities, to consider race as one factor among many in college admissions, which has been upheld by the Supreme Court for more than 40 years.”

A spokeswoman for the University of Michigan, which won a major Supreme Court case in 2003, suggested that the flagship university would like more freedom to consider race, not less. But it is already constrained by state law. After the case, Michigan voters enacted a constitutional ban on race-conscious college admissions policies.

“We believe the U.S. Supreme Court got it right in 2003 when it affirmed our law school’s approach at the time, which allowed consideration of race as one of many factors in the admissions process,” said Kim Broekhuizen, the Michigan spokeswoman. “We still believe that.”

Attorney General Jeff Sessions has indicated that he will take a tough line against such views. Federal prosecutors will investigate and sue universities over discriminatory admissions policies, he said.

But a senior Justice Department official denied that these decisions were rolling back protections for minorities. He said they were instead hewing the department closer to the letter of the law. In the departments’ letter, officials wrote that “the protections from discrimination on the basis of race remain in place.”

“The departments are firmly committed to vigorously enforcing these protections on behalf of all students,” the letter said.

Anurima Bhargava, who headed civil rights enforcement in schools for the Justice Department under President Barack Obama and helped write that administration’s guidance, said the withdrawal of the guidelines was timed for brief filings in the Harvard litigation, due at the end of the month.

“This is a wholly political attack,” Ms. Bhargava said. “And our schools are the place where our communities come together, so our schools have to continue to promote diversity and address segregation, as the U.S. Constitution demands.”

Catherine Lhamon, who served as the Education Department’s head of civil rights under Mr. Obama, called the departments’ move confusing.

“There’s no reason to rethink or reconsider this, as the Supreme Court is the highest court in the land and has spoken on this issue,” Ms. Lhamon said.

On Friday, the Education Department began laying the groundwork for the shift, when it restored on its civil rights website the Bush-era guidance. Conservative advocacy groups saw that as promising. Mr. Clegg, of the Center for Equal Opportunity, said that preserving the Obama-era guidance would be akin to “the F.B.I. issuing a document on how
you can engage in racial profiling in a way where you won’t get caught.”

Ms. DeVos has seemed hesitant to wade in on the fate of affirmative action policies, which date back to a 57-year-old executive order by President John F. Kennedy, who recognized systemic and discriminatory disadvantages for women and minorities. The Education Department did not partake in the Justice Department’s formal interest in Harvard’s litigation.

“I think this has been a question before the courts and the courts have opined,” Ms. DeVos told The Associated Press.

But Ms. DeVos’s new head of civil rights, Kenneth L. Marcus, may disagree. A vocal opponent of affirmative action, Mr. Marcus was confirmed last month on a party-line Senate vote, and it was Mr. Marcus who signed Tuesday’s letter.

Under Mr. Marcus’s leadership, the Louis D. Brandeis Center, a human rights organization that champions Jewish causes, filed an amicus brief in 2012, the first time the Supreme Court heard Fisher v. University of Texas at Austin. In the brief, the organization argued that “race conscious admission standards are unfair to individuals, and unhealthy for society at large.”

The organization argued that Asian-American students were particularly victimized by race “quotas” that were once used to exclude Jewish people.

As the implications for affirmative action for college admissions play out in court, it is unclear what the decision holds for elementary and secondary schools. New York City is embroiled in a debate about whether to change its entrance standard — currently a single test — for its most prestigious high schools to allow for more black and Latino students.