The New York Times

Prominent Republicans File Brief to Support L.G.B.T. Rights in Legal Case

By Jeremy W. Peters

July 2, 2019

WASHINGTON — A group of three dozen current and former Republicans is urging the Supreme Court to declare that the Civil Rights Act of 1964 explicitly prohibits discrimination against gay men, lesbians and transgender people in the workplace. And they have tailored their arguments to resonate with a seemingly unlikely bloc on the court: its five conservatives.

In an amicus brief that will be filed with the court this week, the Republicans make the case that their view about how the law should be interpreted represents "a common sense, textualist approach" — nodding to the school of legal thought on the right that disapproves of judges who go beyond a law's text when deciding how to apply it.

The arguments, though novel, are unlikely to satisfy some conservatives who believe that federal nondiscrimination laws do not cover sexual orientation and gender identity because Congress never provided for it in the original statute. The high court has agreed to hear three cases when it returns from its summer recess that concern whether the Civil Rights Act, which bans workplace discrimination based on sex, also guarantees gay and transgender people the same protection.

The cases are expected to provide the first indication of how the court's new conservative majority will approach L.G.B.T. rights.

The signers of the brief include a host of prominent former elected officials, party leaders and strategists like Alan Simpson, the former senator from Wyoming; Mark McKinnon, the media adviser for George W. Bush; Meg Whitman, the former chief executive of Hewlett-Packard; and Ken Mehlman, the former chairman of the Republican National Committee who helped lead a similar effort to recruit Republicans for an amicus brief in support of same-sex marriage.

Mr. Mehlman also wrote an op-ed about the topic for The New York Times.

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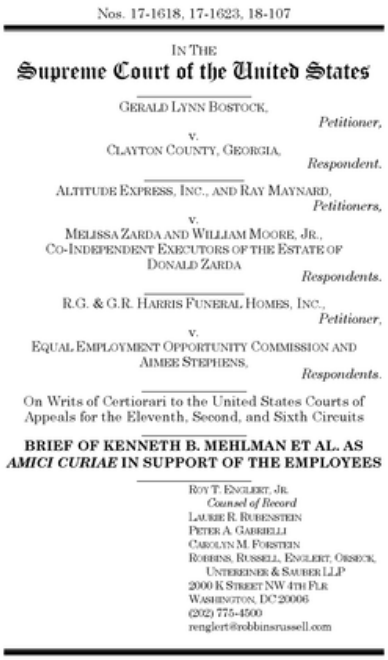
The Republicans acknowledge the obvious: that Congress and the American public may not have anticipated that the landmark 1964 civil rights law would apply to gay men, lesbians and people with gender identities different from their sex at birth. But that is besides the point, they argue, because the text of the law is clear when it explicitly forbids treating people differently because of their sex.

The group advances its argument in a rather unexpected way, citing an opinion from Antonin Scalia, the former associate justice and icon of the conservative legal movement who has argued that laws routinely apply to situations that their drafters never could have envisioned.

Amicus Brief Calling for Civil Rights Protection for Gays, Lesbians and Transgender People

An amicus brief filed by a group of three dozen current and former Republicans urges the Supreme Court to declare that the Civil Rights Act of 1964 explicitly prohibits discrimination against gays, lesbians and transgender people in the workplace. (PDF, 34 pages, 0.21 MB)



Nos. 17-1618, 17-1623, 18-107

IN THE
Supreme Court of the United States

GERALD LYNN BOSTOCK,
Petitioner,
v.
CLAYTON COUNTY, GEORGIA,
Respondent.

ALTITUDE EXPRESS, INC., AND RAY MAYNARD,
Petitioners,
v.
MELISSA ZARDA AND WILLIAM MOORE, JR.,
CO-INDEPENDENT EXECUTORS OF THE ESTATE OF
DONALD ZARDA
Respondents.

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,
Petitioner,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND
AIMEE STEPHENS,
Respondents.

On Writs of Certiorari to the United States Courts of Appeals for the Eleventh, Second, and Sixth Circuits

BRIEF OF KENNETH B. MEHLMAN ET AL. AS *AMICI CURIAE* IN SUPPORT OF THE EMPLOYEES

ROY T. ENGLERT, JR.
Counsel of Record
LAURIE R. RUBENSTEIN
PETER A. GABRIELLI
CAROLYN M. FORSTEIN
ROBBINS, RUSSELL, ENGLERT, ORSECK, UNTEREINER & SAUBER LLP
2000 K STREET NW 4TH FLR
WASHINGTON, DC 20006
(202) 775-4500
renglert@robbinsrussell.com

34 pages, 0.21 MB

A law's purpose "must be derived from the text, not from extrinsic sources such as legislative history or an assumption about the legal drafter's desires," the brief says, quoting Justice Scalia.

The court has already ruled, in effect, "We don't care what the legislators thought in 1964, the text of the law is clear," said Roy T. Englert, a Washington appellate lawyer who is the lead author of the brief. The issue of nondiscrimination protections for gay and transgender individuals may stir up cultural and political disagreement, but as a matter of law they should be straightforward, Mr. Englert added. "It's encrusted with a lot of baggage, but it's actually really simple."

The brief argues that discrimination on the basis of sexual orientation or gender identity is, at its core, discrimination against someone because of his or her sex and violates Title VII of the Civil Rights Act.

People who are fired because they are gay or lesbian are being treated differently for engaging in behavior that would be tolerated from them if they were members of the opposite sex — in these cases, a man who is attracted to a man or a woman who is attracted to a woman.

It applies the same logic to discrimination against transgender individuals.

Most federal appeals courts have interpreted Title VII to exclude sexual orientation discrimination. But recently courts have split over the question. The cases the Supreme Court agreed to hear include one from New York in which a gay skydiving instructor said he was fired after a female customer complained about being tightly strapped to him during a tandem dive. The instructor, hoping to reassure her, told her that he was “100 percent gay.” Judges from the United States Court of Appeals for the Second Circuit concluded “sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination.”

In a second case from Georgia, judges from the 11th Circuit reached the opposite conclusion, that sexual orientation-based discrimination and sex discrimination are not the same thing. The third case the Supreme Court will hear involves a woman who was fired from a Michigan funeral home after she announced in 2013 that she was transgender and would start wearing women’s clothing to work. Judges in the Sixth Circuit sided with her, ruling that sex and gender identity cannot be disentangled.

Some conservatives have balked at the suggestion that it would be fundamentally conservative or textualist to see the law as covering sexual orientation and gender identity. The purpose of outlawing sex discrimination, they have pointed out, was to produce gender equality — not to tackle other forms of discrimination.

Mr. Mehlman, who came out as gay in 2010 and has worked to build greater acceptance among Republicans for gay- and transgender-friendly policies, said that he hopes skeptical conservatives will understand that few principles are more in line with their beliefs than judging someone solely on merit.

“This case simply says that individuals ought to be judged based on the work they perform — not based on their status, not based on their sexual orientation or gender identity,” he said.