

ORIGINAL

Nos. 17-1618 and 17-1623

---

---

**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.*

---

ON WRITS OF CERTIORARI TO THE  
UNITED STATES COURTS OF APPEALS  
FOR THE ELEVENTH AND SECOND CIRCUITS

---

---

---

JOINT MOTION FOR DIVIDED ARGUMENT BY PETITIONER BOSTOCK  
AND RESPONDENTS ZARDA AND MOORE

---

---

Pursuant to Rules 21 and 28.4 of this Court, petitioner in No. 17-1618, Gerald Lynn Bostock, and respondents in No. 17-1623, Melissa Zarda and William Moore, Jr., Co-Independent Executors of the Estate of Donald Zarda (the “Zarda respondents”), jointly file this motion for divided oral argument in these consolidated cases. They propose that argument time be divided as follows: ten minutes to counsel for Bostock (Brian J. Sutherland), and twenty minutes to counsel for the Zarda respondents (Pamela S. Karlan). Any rebuttal time will be reserved by the Zarda respondents. This division of argument time will ensure that both Petitioner Bostock and the Zarda respondents have their interests fully represented and their arguments fully conveyed by counsel, and it will ensure that the Court receive a full understanding of the interests and perspectives of each. In support of this motion, they state:

1. The two cases come before this Court with different procedural histories and in different postures. Petitioner Bostock was employed by a local government. He alleged that his employer initiated a pretextual audit involving the program funds he managed in order to fire him based on his sexual orientation. J.A. 11 (No. 17-1618). His complaint was dismissed for failure to state a claim on the ground that precedent binding in the Eleventh Circuit forecloses a Title VII sex

discrimination claim based on an individual's sexual orientation. The Eleventh Circuit affirmed the dismissal of the complaint. Pet. App. 3 (No. 17-1618).

By contrast, Donald Zarda was employed by a private-sector employer. He alleged that he was fired because, as a gay man, he “did not conform [his] appearance and behavior to sex stereotypes.” Pet. App. 178 (No. 17-1623). A panel of the Second Circuit, reviewing the evidence presented at trial, declared it “entirely possible that a jury thought that Zarda’s sexual orientation was ‘one of the employer’s motives’” in firing him. *Id.* at 149. The Second Circuit sitting en banc then held that Title VII prohibits employment actions taken on the basis of sexual orientation as a form of sex discrimination.

2. Petitioner Bostock and the Zarda respondents emphasize complementary but distinct arguments in this Court. They share the position in these consolidated cases that the prohibition of discrimination “because of sex” set forth in Title VII encompasses discrimination on the basis of sexual orientation. However, in their briefs, they focus on different arguments in support of their position.

The Zarda respondents rely on the text and structure of Title VII to argue that discriminating against individuals for being attracted to persons of their own sex, rather than a different sex, discriminates “because of sex”; is a form of

impermissible sex stereotyping; and constitutes a form of prohibited associational discrimination. They point to this Court's recognition in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), that Title VII's protections extend to forms of sex discrimination beyond those specifically contemplated by Congress in 1964.

Petitioner Bostock agrees with the Zarda respondents' contentions, but offers the unique argument, based upon specific amendments to the statutory language, that Congress intended the ban on discrimination "because of sex" to be interpreted broadly to encompass forms of sex discrimination not enumerated in the statute. Br. for Pet'r 32-44 (No. 17-1618). Specifically, he argues that the 1978 and 1991 amendments to Title VII ratified and incorporated decisions of this Court that the scope of Title VII goes beyond any original understanding of the statutory language.

In recent terms, this Court has frequently granted divided argument in consolidated cases where the parties emphasized different arguments. *See, e.g.*, *Rucho v. Common Cause*, 139 S. Ct. 1316 (2019); *Am. Legion. v. Am. Humanist Ass'n*, 139 S. Ct. 951 (2019); *Ala. Democratic Conference v. Alabama*, 135 S. Ct. 434 (2014); *McDonald v. City of Chicago*, 559 U.S. 902 (2010); *Granite Rock Co.*

*v. Int'l Bhd. of Teamsters*, 558 U.S. 1010 (2009). Time splitting is likewise appropriate here.

3. This case presents a question of extraordinary public importance. As explained by 206 large American businesses as *amici curiae*, there are 28 states that offer no express legal protection from workplace discrimination on the basis of sexual orientation. Br. of 206 Businesses as *Amici Curiae* in Support of Employees 19-20. Almost half, or approximately 44%, of all lesbian, gay, or bisexual people in America live in these states where workplace discrimination on the basis of sexual orientation is not expressly prohibited. The Court has often granted divided argument in cases of such monumental public importance. *See, e.g., Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 466 (2017); *United States v. Texas*, 136 S. Ct. 1539 (2016); *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 565 U.S. 1193 (2012).

4. Throughout the litigation, petitioner Bostock and the Zarda respondents have been represented by separate counsel. They have filed separate briefs in this Court. They believe that dividing oral argument would assist the Court in deciding this case of exceptional public importance. They therefore jointly request that the Court divide oral argument between counsel for petitioner Bostock, who will have ten minutes of argument time, and counsel for the Zarda

respondents, who will have twenty minutes of argument time. Respondent Clayton County, Georgia does not oppose this request and Petitioners Altitude Express, Inc. and Ray Maynard state that they take no position.

Respectfully submitted,

BRIAN J. SUTHERLAND  
*Counsel of Record*  
THOMAS J. MEW IV  
BUCKLEY BEAL, LLP  
The Promenade, Suite 900  
1230 Peachtree Street, N.E.  
Atlanta, GA 30309  
Telephone: (404) 781-1100  
Email: bsutherland@buckleybeal.com  
tmew@buckleybeal.com

*Counsel for Petitioner*  
*Gerald Lynn Bostock*

Jeffrey L. Fisher  
Brian H. Fletcher  
Pamela S. Karlan  
STANFORD LAW SCHOOL  
SUPREME COURT LITIGATION  
CLINIC  
559 Nathan Abbott Way  
Stanford, CA 94305

Ria Tabacco Mar  
James D. Esseks  
AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
125 Broad Street  
New York, NY 10004

Gregory Antollino  
*Counsel of Record*  
ANTOLLINO PLLC  
275 Seventh Avenue  
Suite 705  
New York, NY 10001  
(212) 334-7397  
Gregory10011@icloud.com

Stephen Bergstein  
BERGSTEIN & ULLRICH, LLP  
5 Paradies Lane  
New Paltz, NY 12561

David D. Cole  
AMERICAN CIVIL LIBERTIES  
UNION FOUNDATION  
915 15th Street, NW  
Washington, DC 20005

Christopher Dunn  
Erin Harrist  
Robert Hodgson  
NEW YORK CIVIL LIBERTIES  
UNION FOUNDATION  
125 Broad Street  
New York, NY 10004

*Counsel for the Zarda respondents*